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CALIFORNIA REPORTER

IN VOLUME

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SECOND SERIES

11 Cal.2d 488

MOREL v. RAILROAD COMMISSION OF CALIFORNIA.

L. A. 16232.

Supreme Court of California.

June 30, 1938.

1. Carriers 🔑2

Under constitutional grant of authority of Legislature to confer additional powers on railroad commission, the additional powers conferred must be cognate and germane to the regulation of public utilities, and, when the power conferred relates to the regulation of transportation companies, it must be cognate and germane to the regulation of railroads or other transportation companies that are in fact common carriers. Const. art. 12, § 23.

2. Automobiles 🔑60

The Legislature had power to confer jurisdiction upon railroad commission to regulate business of private carriers operating motor vehicles upon streets of cities for transportation of property for hire in competition with common carriers engaged in like transportation, the regulation of such private carriers being cognate and germane to regulations of common carriers engaged in like transportation. St.1935, p. 1057, as amended by St.1937, p. 629; Const. art. 12, §§ 22, 23.

3. Carriers 🔑4

A private carrier may not be converted into a "common carrier" by mere legislative fiat.

[Ed. Note.—For other definitions of "Common Carrier," see Words & Phrases.]

4. Automobiles 🔑60, 73

The City Carriers' Act requiring private carriers operating motor vehicles upon streets of cities to obtain permits for which fee of $3 each was charged, requiring the railroad commission to require the private carriers to furnish adequate protection against liability for injuries to person or property, and authorizing the railroad commission to establish or approve reasonable, nondiscriminatory, maximum and minimum rates to be charged by the private carriers, was not unconstitutional as converting the private carriers into "common carriers" against their wishes. St.1935, p. 1057, as amended by St.1937, p. 629; Const. art. 12, §§ 22, 23.

5. Highways 🔑165

The state has the authority to regulate the use of public highways for business purposes.

6. Automobiles 🔑60, 73

The City Carriers' Act requiring private carriers operating motor vehicles upon streets of cities to obtain permits for which a fee of $3 each was charged, requiring the railroad commission to require the private carriers to furnish adequate protection against liability for injuries to person or property, and empowering the railroad commission to establish or approve reasonable, nondiscriminatory, maximum and minimum rates to be charged by such private carriers, was lawful and reasonable. St.1935, p. 1057, as amended by St.1937, p. 629; Const. art. 12, §§ 22, 23.

7. Automobiles 🔑62

Whenever the state sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways, the entire control over whatever phases of the subject are covered by the state legislation ceases in so far as municipal or local regulation is concerned.

8. Automobiles 🔑60, 73

The City Carriers' Act requiring private carriers operating motor vehicles upon streets of cities to obtain from railroad commission permits for which a fee of $3 each was charged, requiring the railroad commission to require the carriers to furnish adequate protection against liability for injuries to person or property, and empowering the railroad commission to establish or approve reasonable, nondiscriminatory, maximum and minimum rates to be charged by the carriers, was not invalid on ground that the matter of regulating use of streets of cities for commercial purposes is a municipal matter and not subject to control of Legislature, since transacting of business on streets imposes burdens on the streets and is matter of public concern, subject to regulation by the state. St.1935, p. 1057, as amended by St.1937, p. 629; Const. art. 12, §§ 22, 23.

◆

In Bank.

Proceeding by Victor Morel against the Railroad Commission of the State of California to annul an order of the respondent requiring the petitioner to cease and desist from conducting operations for the transportation of property for compensation or hire as a business over the public highways of the City of Los Angeles by means of any motor vehicle, unless he first secures from the Railroad Commission a proper permit.

Order of the Railroad Commission affirmed.

Dario H. Nelson, of Los Angeles, for petitioner.

P. N. McCloskey, of Los Angeles, amicus curiæ.

Ray L. Chesebro, City Atty., Frederick von Schrader and Newton J. Kendall, Asst. City Attys., and John L. Bland, Deputy City Atty., all of Los Angeles, amici curiæ for Los Angeles.

Ira H. Rowell and Frank B. Austin, both of San Francisco, and Herbert Cameron, of Los Angeles, for respondent.

CURTIS, Justice.

By this proceeding the petitioner seeks to annul an order of the respondent, the Railroad Commission of the State of California, requiring the petitioner, Victor Morel, to cease and desist from conducting any and all operations for the transportation of property for compensation or hire, as a business, over the public highways in the city of Los Angeles by means of any motor vehicle, unless and until he shall first have secured from the railroad commission a proper permit authorizing him to operate the same.

The order which petitioner seeks to have annulled was made, and the proceedings leading up to the making of said order were held, in pursuance of the authority which it is claimed was conferred upon the respondent Railroad Commission by the City Carriers' Act (Stats.1935, chap. 312, p. 1057, as amended in 1937, Stats.1937, chap. 286, p. 629).

In defining the terms used in the act, section 1 (f) provides: "The term, 'carrier' when used in this act means every corporation or person * * * engaged in the transportation of property for compensation or hire as a business over any public highway in any city or city and county in this State by means of a motor vehicle or vehicles."

Section 2 reads as follows: "No carrier shall engage in the business of the transportation of property for compensation by motor vehicle over any public highway in any city of this State, except in accordance with the provisions of this act which the Legislature hereby declares to be enacted under the power of the State to regulate the use of the public highways."

Section 3 of the act, as amended, provides for the issuance by the Railroad Commission of a permit authorizing such operations. Section 4 provides for adequate protection against liability imposed by law upon such carrier for the payment of damages for personal bodily injuries, including death resulting therefrom. Section 5 makes further provision as to the manner in which this protection may be secured. Section 7 makes it obligatory for each carrier to display upon the vehicle in use a distinctive license plate approved by the Railroad Commission. Section 8 provides for the payment of a fee of $3.00 upon the filing of an application for a permit and an annual registration fee of $1.00. By section 9, the Railroad Commission is authorized to establish or approve "just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any carrier subject to this act." The remaining provisions of the act relate to matters not involved in the proceeding before us. It will be noted that the provisions of this act apply equally to all carriers whether common carriers or private carriers transporting property for compensation upon the streets of a city.

Petitioner first contends that it is beyond the power of the legislature to confer jurisdiction upon the Railroad Commission to regulate, or in any wise to control, the business of a private carrier.

[1] The Railroad Commission was created and derives in part its power in pursuance of the provisions of section 22 and section 23 of Article 12 of the Constitution. The powers therein enumerated are further augmented by the authority granted to the legislature by section 23 to confer such additional power of the same kind or different from those conferred upon the Railroad Commission in the Constitution, and the authority of the legislature to confer such additional powers is expressly declared "to be plenary and unlimited by any provision of this Constitution." These sections of the Constitution have been the subject of numerous decisions by this and the appellate courts of this state, in which the courts have attempted to define not only the powers which are directly conferred upon the commission by these sections of the Constitution, but the additional powers which by virtue of the authority given it by the Con-

stitution, the legislature may empower the commission to exercise. One of the limitations placed upon the grant of authority to confer additional powers upon the commission, it has been held, is that such additional powers must be cognate and germane to the regulation of public utilities, and when the power thus conferred relates to the regulation of transportation companies, it must be cognate and germane to the regulation of railroads or other transportation companies that are in fact common carriers. Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822; City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A.L.R. 1425; San Bernardino v. Railroad Commission, 190 Cal. 562, 213 P. 980; Frost v. Railroad Commission, 197 Cal. 230, 241, 240 P. 26. The question then arises whether the regulation of private carriers is cognate and germane to the regulation of common carriers. This question received a direct answer by this court in its opinion in Frost v. Railroad Commission, supra. In that case, we held, referring to the question just stated (page 31): "The question thus presented is whether the regulation of the business of a private carrier engaged in the business of transporting property for hire upon the public highways between fixed termini or over a regular route is cognate and germane to the regulation of the business of a common carrier who is engaged in like transportation. We think this question must be answered in the affirmative. It is at once apparent that the private carrier is or at least may be in direct competition with the public carrier, who is operating over the same route, and whose business it is the duty of the commission to supervise and regulate. The primary purpose of such regulation is to secure the adequacy, regularity, and reliability of service and the reasonableness of rates and charges therefor. Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 235 P. 1000. To accomplish this end there must of necessity be some restriction upon competition. As was said by the Supreme Court of Washington: 'The purpose of the Transportation Act * * * is to permit the establishment of regular and dependable service whenever public necessity and convenience requires. No adequate service can be given without proper equipment. * * * An income must be earned which will cover operating costs and depreciation and give some return on the investment or the service cannot be long continued. In the case of Public Utilities Comm. v. Garviloch, 54 Utah, 406, 181 P. 272, the Supreme Court of Utah said: "The granting of a certificate of convenience and necessity by the commission to Chandler, therefore, was in the nature of a limited franchise, which authorized him to operate his automobile stage line over the route designated in the certificate for the time and under the conditions therein specified. The certificate, therefore, not only confers authority to operate a stage line, but it necessarily also affords him protection against any one who unlawfully interferes with the right thereby conferred. If such is not the legal effect of the certificate, then the operation of utilities may easily become detrimental rather than beneficial to the public and thus result in a farce."' Davis v. Nickell, 126 Wash. 421, 218 P. 198."

[2] As far as our research has gone, this pronouncement is the last direct expression of this court upon the question of the power of the Railroad Commission to regulate the business of private carriers when their business is carried on in competition with that of common carriers. It may be questioned whether our decision in the Frost Case in its discussion of the cognate and germane theory was not limited to private carriers operating between fixed termini or over a regular route, whose business brings them in competition with common carriers. It so happens that the private carrier whose rights were involved in the Frost Case, was such a private carrier, and therefore the decision in that case must be limited accordingly. But the principle announced in that case was that legislation, the purpose of which was to regulate private carriers whose business was in competition with that of common carriers, was cognate and germane to that pertaining to the regulation of common carriers. While the court was dealing only with private carriers carrying on their business in a particular manner, it does not appear that the manner or mode in which their business was carried on was the determining factor of the decision so long as such business was in competition with that of common carriers. We can see but slight, if any, difference from a practical standpoint between competition brought about by private carriers operating between fixed termini or over a regular route and those who place no such limitations upon their

operations, except that the competition of the latter class would probably be more ruinous than that of the former. If necessary, therefore, for us to extend the language in the Frost Case so as to include all classes of private carriers whose business is in competition with common carriers, and hold that the regulation of all private carriers using the streets of a city for the transportation of property for hire in competition with common carriers is cognate and germane to regulations of common carriers engaged in like transportation, we have no hesitancy in so holding. We think the principle announced in the Frost Case as stated above is applicable to the business of all private carriers in competition with public carriers.

While our decision in the Frost Case was reversed by the Supreme Court of the United States (Frost & Frost Trucking Company v. Railroad Comm., 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457), the reversal was not placed upon the ground that the regulation of private carriers was not cognate and germane to the regulation of common carriers, but upon the ground that the Act (the Auto Stage and Truck Transportation Act, as amended in 1919) as construed by the Supreme Court of this state, compelled private carriers not merely to submit themselves to regulation by the commission appropriate to private carriers, but forced them, in order to enjoy the use of the highways, to submit to the condition of becoming common carriers and to be regulated by the Railroad Commission as such common carriers. Accordingly the act was held to violate the due process clause of the fourteenth amendment to the Constitution of the United States. U.S.C.A.Const.Amend. 14. That portion of our opinion and decision in which we held that the regulation of the business of a private carrier engaged in business of transporting property for hire upon the public highways was cognate and germane to the regulation of the business of a common carrier who is engaged in like transportation was in no way disturbed or affected by the decision rendered by the Supreme Court of the United States upon the appeal to the last named court. In the face of the ruling in that case, we are unable to agree with the contention of petitioner that it is beyond the power of the legislature to confer jurisdiction upon the Railroad Commission to regulate in the manner set forth in the City Carriers' Act the business of private carriers using the streets of the city for the transportation of property for hire when such business is in competition with that of common carriers engaged in like transportation.

Petitioner relies upon certain language used by this court in the cases of People v. Duntley, 217 Cal. 150, 162, 17 P.2d 715, and Lang v. Railroad Commission, 2 Cal. 2d 550, 556, 42 P.2d 639. The language in People v. Duntley, supra, upon which petitioner relies is found on page 162, on page 719 of 17 P.2d, of the opinion and reads as follows: "If one [certificate of public convenience and necessity] be denied, the common carrier as such must go out of business entirely. If it be granted, the rates and charges and services are subject to regulation by the Railroad Commission. *If it had been the intention of the people of the state to subject all carriers, whether public or private, to regulation by the Railroad Commission,* the Constitution could have so provided, as was done by general statute in the state of Kansas. Not having done so, the refusal of a carrier in good faith to dedicate his property to public use, and his insistence upon his right to operate as a contract carrier under the exactions imposed by law upon him in that capacity, would seem to be entitled to respect." The emphasized portion of the above quotation is particularly relied upon by petitioner. The only question involved in the case of People v. Duntley, supra, was one of taxation, the right to subject the defendant's property to a tax in pursuance of article 13, section 15, of the Constitution, and section 3664a of the Political Code, then in force. It was held that only property of a common carrier was subject to such a tax and that as the defendant was a private or contract carrier he was not liable for the payment of any tax under said sections of the Constitution and the Political Code. The Railroad Commission has no jurisdiction nor any duty to perform over matters of taxation, and it is difficult to perceive how the language quoted above from the opinion of People v. Duntley, supra, can have any authoritative force in the decision of any issue involved in the present proceeding. We, therefore, do not regard said statement, taken from said decision, as a pronouncement of the law upon the power of the legislature to confer authority upon the Railroad Commission to regulate private carriers when their business is in direct competition with that of common carriers. This conclusion finds support in the following statement found on page 159, on page 718 of 17 P.2d, of the opinion in that case: "Unregulated truck transportation over the highways has developed a difficult and perplexing problem. The state of California has approached the problem of such regulation in a much more restricted fashion. Common carriers are required under the Auto Stage and Truck Transportation Act (St.1917, p. 330 as amended) to obtain from the Railroad Commission a certificate of public convenience and necessity. Contract carriers are claimed to be without adequate regulation both as to rates of service, use of the highways, and interference with regulated common carriers. This is undoubtedly true, but the problem suggested is a legislative and not a judicial one. We are here dealing not with a regulatory measure in its proper sense, but with a tax question arising under our Constitution and statutes."

In the case of Lang v. Railroad Commission, supra, it is stated that (page 641): "They [private carriers] have never dedicated their property to public use. The Railroad Commission has no jurisdiction over them, either in the matter of fixing the rates that they will charge, or for any other purpose." That this statement was made in view of the law as it then existed when there was no statute in force which purported to give the commission any regulatory authority over private carriers is, we think, made apparent by the following language found on page 565, on page 645 of 42 P.2d, of the opinion: "Until truck carriers are brought within the jurisdiction of the commission and the latter is given power to fix rates to be charged by them, we see no way that the commission can stabilize this business between them and the rail carriers." We find nothing, therefore, in either of these two cited cases at variance with our conclusion that it is within the power of the legislature to confer authority upon the Railroad Commission under proper limitations and within legal bounds, to regulate the business of private carriers when they are in competition with common carriers. On the other hand, it must be apparent that such regulation is necessary in order to stabilize the transportation business to the end that both private and common carriers may be protected from unrestrained and ruinous competition.

No question is raised as to the fact that private carriers may be in competition with common carriers in business carried on wholly within the limits of a single municipality. It is not necessary, therefore, for us to dwell to any extent upon this phase of the case. The competition may not be as acute or as destructive as when the business is carried on outside of a city, but it is of sufficient extent and bears such a relation to the whole question of transportation as to disrupt, unless restrained, the entire plan of regulating transportation between the several types of carriers now using the public highways.

[3, 4] It is further contended that the City Carriers' Act is unconstitutional and therefore void for the reason that it imposes upon a private carrier the status of a common carrier. It is well settled that a private carrier may not be converted into a common carrier by mere legislative fiat. This principle of law was approved in the Frost Case, 197 Cal. 230, 236, 240 P. 26, and numerous other cases which might be cited to the same effect. But the City Carriers' Act makes no such change in the character or status of private carriers. Under the act they are still private carriers; they may choose their own patrons, and refuse or accept business as suits their convenience, but are subject to regulation in a limited extent by the Railroad Commission. In order to use the streets of the city for the purpose of carrying on their business under said act, they must, in the first instance, secure a permit from the commission authorizing them to carry on such business. Before granting a permit, the commission must require of the carrier adequate protection by indemnity insurance, or otherwise, against liability for injuries to person or property. A small fee of $3.00 is charged for the permit and the commission is empowered to establish or approve reasonable, nondiscriminatory, maximum and minimum rates to be charged by such carriers. A statute embodying such requirements of a private carrier does not convert the carrier into a common carrier. Stephenson v. Binford, 287 U.S. 251, 265, 53 S.Ct. 181, 184, 77 L.Ed. 288, 87 A.L.R. 721.

The cited case involved a statute of the state of Texas, Vernon's Ann.Civ.St. art. 911b, imposing regulations upon private carriers almost identical with those contained in the City Carriers' Act. The same claim was made in that case as is made in the present proceeding that the statute imposed upon a private carrier the status of a common carrier. This contention was disposed of by the following statement found on pages 267 and 268, on page 185 of 53 S.Ct., of the opinion: "The question decided in Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457, differs entirely from that here presented. There (page 592 of 271 U.S., 46 S.Ct. 605) the California Supreme Court (Frost v. Railroad Comm., 197 Cal. 230, 240 P. 26) had construed a provision of the state statute which required the private contract carrier to obtain, not a permit, as here, but a certificate of public convenience and necessity before doing business over the state highways, as a condition obliging him to dedicate his property to the business of public transportation and to subject himself to all the duties and burdens imposed by the act upon common carriers. This court, in accordance with the settled rule, accepted that construction as binding and, in that view, said (page 592 of 271 U.S., 46 S.Ct. 605, 606): '* * * the case presented is not that of a private carrier, who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier, but it is that of a private carrier, who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission. The certificate of public convenience, required by section 5, is exacted of a common carrier, and is purely incidental to that status. The requirement does not apply to a private carrier qua private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist.'

"On the contrary, the Texas statute in respect of permits deals exclusively with the private contract carrier, and requires the issue of the permit not to him in the imposed character of a common carrier, but in his actual character as a private contract carrier. If the California statute requiring a certificate had been thus interpreted by the highest court of the state, the foregoing quotation clearly suggests that our decision might have been otherwise."

This language is applicable to the City Carriers' Act, the terms of which, as we have seen, are substantially like those of the Texas statute under review by the Supreme Court of the United States. The contention of petitioner therefore, that the act imposes upon private carriers the status of common carriers cannot be sustained.

The court in Stephenson v. Binford, supra, reviews the provisions of the Texas statute, in which are the requirements respecting a permit to be issued to private carriers before they are permitted to use the public highways, the authority conferred upon the Railroad Commission to fix maximum and minimum rates, and the procuring of indemnity insurance, and holds that they are all reasonable regulations to be imposed upon a person using the highways for the transportation of property for compensation. Upon this question the court held as follows (page 272, 53 S.Ct. page 187): "The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the Legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end."

[5, 6] By reference to the preamble of the City Carriers' Act, it will be noted that one of the purposes of the act is to "preserve for the public the full benefit and use of public highways". We quote from the preamble as follows: "The use of the public highways for the transportation of property for compensation is a business affected with a public interest and it is hereby declared that the purpose of this act is to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways." It is apparent therefore that one of the express purposes of the City Carriers' Act is the preservation of the highways and to that end it is declared necessary to regulate the use of the highways by those transporting property thereon for commercial purposes. The case of Stephenson v. Binford, supra, is direct authority not only that the state has the power and authority to regulate the use of public highways for business purposes but that the regulation, like that imposed upon private carriers by the City Carriers' Act, is lawful and reasonable. The same conclusion was reached by the supreme

court of Washington as appears from the following statement from the case of Hadfield v. Lundin, 98 Wash. 657, 663, 168 P. 516, 518, L.R.A.1918B, 909, Ann.Cas.1918 C, 942: "If any proposition may be said to be established by authority, the right of the state in the exercise of its police power to prohibit the use of the streets as a place of private business, or as the chief instrumentality in conducting such business, must be held so established. Nor can it be questioned that the power to prohibit includes the power to regulate even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power to prohibit exists, the reasonableness of any regulation is palpably a legislative question, pure and simple."

The foregoing authorities not only establish the power of the legislature to regulate the use of highways for commercial purposes and that the regulation imposed by the City Carriers' Act is reasonable and within the power of the legislature to enact, but we think they meet all other objections to the validity of said act made by petitioner and by the various amici curiae, except that raised by the petitioner and the city of Los Angeles, as an amicus curiae, in which it is contended that the matter of regulating the use of the streets of a city for commercial purposes is a municipal matter and is not subject to the control of the legislature.

[7] Upon this question after reviewing the case of Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172, and In re Murphy, 190 Cal. 286, 212 P. 30, this court held: "The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned." Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334, 336.

[8] It is true that these cases involve regulation of the use of city streets and the instant case relates to the regulation of a business transacted upon such streets, and it is contended for this reason that these cases are not authority in support of the right of the state to regulate business carried on on the streets of a city. But the transacting of business upon a street necessarily requires the use of the street for that purpose, and the use of the street for the purpose of transacting business thereon is as a rule a much more onerous and burdensome use than the mere traveling over said streets by an ordinary private conveyance. If the latter use is a matter of public concern, we think the former which imposes far greater burdens upon the streets is also a matter of public concern and therefore subject to regulation imposed by the state.

For the reasons herein stated, we are of the opinion that the order of the respondent Railroad Commission should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

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11 Cal.2d 449

UNION TRUST CO. OF SAN DIEGO v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

L. A. 16626.

Supreme Court of California.

June 29, 1938.

1. Discovery 🔑1

Equity rules appertain to relief ordinarily available to a party by procedure known as a bill of discovery. Code Civ.Proc. § 1000.

2. Discovery 🔑89, 99

As foundation for legality of order of inspection indispensable requirements are that document, sought to be inspected, contains evidence that is material to issue which is involved in action or proceeding with relation to which order is supposed to be made, and that order by which such inspection may be authorized be so specific in its terms with reference to its designation or description of document that it may be readily identified. Code Civ.Proc. § 1000.

3. Discovery 🔑89

Where, in trustee's action against trustor, trustor filed a cross-complaint and counterclaim alleging negligence and fraud on part of trustee in administration of trust, and demurrer to such pleading was overruled, it would be assumed that order requiring inspection of trustee's books was not subject to criticism as far as element of materiality of books was concerned, particularly where supporting affidavits contained cogent allegations with respect to alleged negligence and fraud of trustee. Code Civ.Proc. § 1000.

4. Discovery ⚷97(6)

In determining question of materiality of records sought to be inspected, trial court was not limited to consideration of affidavit but could consider also contents of pleadings filed in the case which showed or might show materiality of evidence sought to be obtained. Code Civ.Proc. § 1000.

5. Discovery ⚷39

Order requiring trustee to permit inspection of its documents by trustor, who when sued by trustee filed a cross-complaint and counterclaim alleging negligence and fraud on part of trustee in administration of trust, sufficiently identified documents sought to be inspected, especially where, on hearing of application, trustee's counsel was fully apprised of contents of supporting affidavit in behalf of proposed order and of contents of pleadings. Code Civ.Proc. § 1000.

6. Discovery ⚷99

An order requiring trustee to permit inspection of its documents by trustor who charged trustee with negligence and fraud in administration of trust was not erroneous on ground that documents were not sufficiently identified, since, if in administering trust trustee pursued even ordinary course of business, it would have kept a set of books of some description and presumably it preserved at least the originals or copies of all important documents which were directly related to administration of trust. Code Civ.Proc. § 1000.

7. Discovery ⚷84

The matter of obtaining inspection of documents in a case where it is obvious that rights of a party may depend upon its proper exercise should not be regarded as a game, having fixed rules, that must be literally and punctiliously observed. Code Civ. Proc. § 1000.

8. Discovery ⚷97(1)

A party litigant seeking inspection of records which are pertinent to his cause must describe them with such certainty only as will reasonably apprise his opponent or custodian of such records of that which may be desired, and fact that description of records may appear to be deficient, to persons other than those directly concerned in compliance with order by which inspection may be directed, is immaterial. Code Civ.Proc. § 1000.

9. Discovery ⚷97(1)

Whether description of records sought to be inspected is sufficient to inform their custodian of that which is desired presents question merely of whether under circumstances, considered in light of reason and common sense, he ought to recognize and be able to distinguish or identify particular thing that is required. Code Civ.Proc. § 1000.

10. Discovery ⚷99

That, in affidavit or in court's order requiring trustee to permit inspection of its documents, documents were not described in accordance with trustee's appellation of them, did not affect right to inspect them nor was technical objection available that order was too broad. Code Civ.Proc. § 1000.

11. Discovery ⚷102

A trustee had duty to comply with order requiring it to permit inspection of its documents by trustor, as far as trustee was able in reason and good faith to ascertain intent and meaning of order. Code Civ.Proc. § 1000.

12. Discovery ⚷80

The purpose of a "discovery" is to assist in administration of justice, and statutory right of inspection is based upon and relates back to ancient principles of equity. Code Civ.Proc. § 1000.

[Ed. Note.—For other definitions of "Discovery," see Words & Phrases.]

13. Trusts ⚷370

When parties to litigation stand in relation of trustor and trustee, ordinary strictness of rule relating to right of inspection is greatly relaxed, and in such case trustor or beneficiary has right to full and complete inspection of all books and records with relation to trust. Code Civ.Proc. § 1000.

14. Trusts ⚷370

Where parties to litigation stand in relation of trustor and trustee, court will on application of either party order production of books and records for inspection at any stage of suit to enable party to prepare case, and a trustee is bound to render every reasonable assistance and, when he is called to account, he will be compelled to produce all his documents which are in any way con-

nected with trust and which are in his possession or under his power. Code Civ.Proc. § 1000.

15. Discovery ⚿86(1)

An order requiring trustee to permit inspection of its books and records by trustor who charged negligence and fraud in administration of trust was not erroneous on ground that order permitted trustor to indulge in a "fishing expedition" and thus deprive trustee of its constitutional right to be secure against "unreasonable search and seizure," since such right is limited by determination of whether proposed search and seizure would be unreasonable. Code Civ. Proc. § 1000.

16. Searches and seizures ⚿7(25)

By enactment of constitutional guaranty securing against "unreasonable search and seizure," it was not intended that inherent power of courts to elicit evidence in trial of an action should be either unreasonably impaired or abrogated, but in exercise of such authority judicial tribunals should be limited only by that which might constitute in each instance an "unreasonable" search or seizure. Code Civ.Proc. § 1000.

17. Discovery ⚿85

In determining right to inspect books and records, much must be left in first instance to sound discretion of trial judge. Code Civ.Proc. § 1000.

In Bank.

Proceeding by the Union Trust Company of San Diego for a writ of mandate directed to the Superior Court in and for the County of San Diego and judge thereof to compel the respondents to vacate an order which related to the time when trial might be had and to set the cause for trial. The Court of Appeal, 73 P.2d 634, granted a peremptory writ, and C. J. Novotny petitioned the Supreme Court for hearing of the matter.

Alternative writ discharged and peremptory writ denied.

Stearns, Luce, Forward & Swing, of San Diego, for petitioner.

C. J. Novotny, of San Diego, for respondents.

HOUSER, Justice.

From the record herein, it appears that on August 14, 1931, as the outcome of a foreclosure suit that was brought by Union Trust Company against C. J. Novotny, the plaintiff therein became entitled to a deficiency judgment in the sum of $1,744.27. Some years thereafter Union Trust Company instituted another and separate action against the same defendant for the purpose of recovering from him a separate judgment for the amount of the said deficiency. At the same time when the defendant answered to the complaint in the latter action, he also filed a cross-complaint and a counterclaim against Union Trust Company, wherein the said defendant sought to recover damages from Union Trust Company, alleged to have resulted to him by reason of the asserted negligence and the fraud committed and perpetrated respectively by it with respect to a specified trust which theretofore had been administered by Union Trust Company in behalf of the said defendant, as the owner of all the stock of Prudential Bond & Mortgage Company, a corporation. At a time shortly before the date that had been fixed for the trial of the latter action, at the instance of the defendant therein, the trial court made its order, in effect that the said defendant be permitted by the said plaintiff to inspect its several books of account and its various records that had been prepared, made, kept or maintained by it in connection with its administration of the said trust. On the ground that such order was violative of its constitutional rights, particularly in regard to what popularly is known as "search and seizure", the plaintiff refused to comply with the said order. Thereupon, of its own motion, and in the absence of the pursuit of an available if not more drastic proceeding, the trial court vacated its former order by which the cause had been set for trial and contemporaneously therewith, in substance, ordered that no trial of the action be had until at least thirty days had elapsed after the defendant in said action had been permitted by the plaintiff to inspect the said books and records. In such circumstances, at the solicitation of the plaintiff, the District Court of Appeal directed the issuance of its peremptory writ of mandate, by which, in effect, the trial court was required to vacate its former order which related to the time when trial might be had, and thereupon to set the cause for trial. On the petition of the defendant in the action, a hearing of the matter, after the decision therein by the District Court of Appeal, has been granted by this court.

It is obvious that a decision regarding the legality of the order of inspection that was made by the trial court will be decisive of the main question that is presented for consideration herein.

[1, 2] Aside from the rules obtaining in equity which appertain to the relief ordinarily available to a party by the procedure known as a bill of discovery, both parties to this proceeding concede that in proper circumstances the general privilege accorded to either party to an action to inspect material and pertinent entries of accounts or documents in the possession or under the control of the other party is largely influenced by the statutory provisions that are contained in section 1000 of the Code of Civil Procedure. Broadly speaking, the objection that is here presented with regard to such inspection, relates to the sufficiency of the means that was adopted or practiced by the defendant in his endeavor to comply with the procedural method that either is demanded by the terms of the statute, or that which is impliedly required by judicial construction thereof. Ordinarily, when clear and specific, naturally it might be anticipated that the former source of enlightenment would be controlling; but at least in the absence of such clarifying conditions, the latter becomes paramount. In that regard it may be noted that in each of several adjudications which heretofore have been made by the appellate tribunals of this state it has been declared that as a foundation for the legality of the making of an order of inspection, two separate, indispensable requirements must be made to appear: (1) that the books, or the paper, or the document that is sought to be inspected contains evidence that is material to an issue which is involved in the action or the proceeding with relation to which the order is proposed to be made; and (2) that the order by which such inspection may be authorized be so specific in its terms with reference to its designation or description of such book, paper, or document that it may be readily identified. Kullman, Salz & Co. v. Superior Court, 15 Cal.App. 276, 114 P. 589; Shell Oil Company v. Superior Court, 109 Cal. App. 75, 292 P. 531.

[3, 4] With respect to the first requirement, it is to be noted that the sufficiency of the defendant's pleading, by the terms of which the allegations of both the negligence and the fraud of Union Trust Company in the administration of the trust was tested by a demurrer that was interposed by the latter to such pleading, and that the ruling that was made by the trial court thereon was unfavorable to the said plaintiff. Therefore, in that regard, with reference to the foundation for the making of the order of inspection (as far as the element of materiality is concerned), it may be assumed that such order is not subject to legal criticism, particularly when the allegations of the supporting affidavit are examined. It appears that the affidavit, by reference thereto, incorporated all the allegations that were contained in the cross-complaint and the counterclaim which were filed by the defendant, among which allegations were the following:

"* * * with the consent and approval of plaintiff's officers and directors (the plaintiff) fraudulently used such escrow funds in buying and dealing in the stocks of plaintiff corporation and its said associated and subsidiary corporation, as plaintiff is informed and believes;

"That in the furtherance of such purposes plaintiff misappropriated to itself and paid to itself under the fraudulent guise of fees large sums out of the funds of said trust belonging to defendant and said Prudential Bond & Mortgage Co., his assignor; that such payments and misappropriations were made to itself fraudulently and without right notwithstanding that defendant paid plaintiff the full sum agreed upon in full payment of all services rendered and to be rendered by plaintiff, but plaintiff nevertheless took further large sums in excess of the sum of $1,000 in alleged payment of services already paid for by defendant;

"That *plaintiff* (defendant) is informed and believes that since the maturity of said bonds plaintiff has fraudulently and unlawfully paid to itself and converted to itself further sums belonging to said trust and defendant in excess of the sum of $5,000 in addition to the full and reasonable value of all services rendered since such maturity;"

In addition thereto the cross-complaint and the counterclaim, as well as the affidavit, contained many other equally cogent allegations with respect both to the alleged negligence and the fraud of the plaintiff in the administration of said trust, from which the materiality of evidence that properly should appear in the books, records and documents which presumably were kept by the plaintiff and which were in its possession or under its control becomes readily apparent. In determining the question of materiality of the records sought to be inspected, the trial court was not limited to a consideration of the affidavit, but also was entitled to consider the contents of the pleadings filed in the case which showed, or might show, the materiality of the evidence sought to be obtained. Maclay Rancho Co. v. Superior Court, 81 Cal.App. 471, 254 P. 287.

With regard to the scope permitted a trial court in the exercise of its discretion in the matter of determination of the question of the asserted "materiality" of books and records sought to be inspected by a party litigant, the following cases are pertinent: In the case of Main v. Ring, 219 Iowa 1270, 260 N.W. 859, 862, 863, which also was an action involving the issue of fraud, the court said, "* * * The action, as previously noted, is for damages for deceit. One of the questions made by the pleadings is whether the defendant is guilty of fraud. * * * Obviously, anything which would throw light on these questions would be material. No nice discrimination on the question of materiality should be attempted in a situation of this kind. * * * The trial court determined the papers were material. * * * The presumption should be that the court acted within its proper jurisdiction. * * * The statute is clearly designed to help a party to a suit to discover material facts even though the documents evidencing such facts are in the possession of the adverse party, and it is a wholesome aid to the proper administration of justice." And in the case of Dalton v. Calhoun County Dist. Court, 164 Iowa 187, 145 N.W. 498, Ann.Cas.1916D, 695, where it was claimed that the application for the order (for inspection) failed to show affirmatively the materiality of the evidence sought to be adduced, the court said (page 500) "* * The application * * * did not in terms state that the books were material, but it did state in detail what was expected to be proved from them, * * * and if material such was sufficiently shown by the pleadings in the main case, and by the application for the production of the books, even though such fact was not expressly averred."

[5, 6] Nor, with respect to the second requisite, considering the facts here presented, may it properly be declared that the books and records as specified were not sufficiently identified in the order that was made for their inspection. As hereinbefore has been indicated, it should be noted that the order in question was made pursuant to notice that was given to the plaintiff that application for such an order would be made. Moreover, on the hearing of such application, the plaintiff, represented by counsel, was present and then and there was fully apprised not only of the contents of the supporting affidavit in behalf of such proposed order, but also with the contents of the pleadings, which by reference had been incorporated within such affidavit. The pertinent terms of the order were: "It is hereby ordered that the plaintiff give to the defendants forthwith an inspection and copy or permission to take a copy of the entries of account and of the documents and papers mentioned in the affidavit of C. J. Novotny sworn to on May 19th, 1937, excepting those certain documents and records mentioned in said affidavit. * * *" In the foundational affidavit thus referred to, the books, records and documents which assumedly had been kept by or which were under the control of the plaintiff were described as:

"All entries in all of plaintiff's cash books, day books, journals, trust records and other books and records relating to trust No. 5771 and the trust agreement made and entered into by and between said plaintiff and the Prudential Bond & Mortgage Co. on or about July 15, 1919, the assets of said trust and all properties, mortgages and securities transferred and assigned to plaintiff or received or held by it under or in connection with said trust and agreement;

* * *

"All appraisements of all properties mentioned in and covered by the mortgages and securities conveyed and assigned or caused to be conveyed, transferred and assigned to plaintiff by said Prudential Bond & Mortgage Co. or in its behalf;

"All entries in said books relating to fees taken, received or claimed by or paid to plaintiff in connection with said trust and agreement and the mortgages and other securities received by plaintiff under said trust or in connection therewith;

"All entries in all of said books relating to the receipt of, deposit of and disbursement or payment of escrow and other funds received by plaintiff from said Prudential Bond & Mortgage Co.; * * *

"Documents, papers, instruments and instructions signed by said Prudential Bond & Mortgage Co. or said C. J. Novotny relating to the affairs, assets and securities of said trust and said Prudential Bond & Mortgage Co. and the management thereof."

Furthermore, with reference to the assertion that such books, records and documents which were sought to be inspected by the defendant were not sufficiently identified, it is clear that if in administering the trust to which the defendant referred in his cross-complaint and his counterclaim, the plaintiff pursued even the ordinary course of business, it would have kept a set of books of some description (Hotchkiss v. Levi, 140 App.Div. 525, 125 N.Y.S. 462); and presumably it preserved at least either the originals or copies of all important documents which were directly related to the administration of such trust.

[7-10] The matter of obtaining an inspection of documents in a case where it is obvious that the rights of a party may depend upon its proper exercise, manifestly should not be regarded "as a game", having fixed rules that must be literally and punctiliously observed. "Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document desired is enough." Burke v. Table Mountain Water Co., 12 Cal. 403. It is apparent that, in reason, all that should be required of a party litigant in his endeavor to obtain an inspection of records which are pertinent to his cause and which he is or should be entitled to examine, is that in his attempt to do so, he describe them with such certainty only as will or should reasonably apprise his legal opponent, or the custodian of such records, of that which may be desired. If that be done, the fact that such description or designation of such records may appear to be faulty, deficient, uncertain or unintelligible to persons other than those who may be directly concerned in the compliance with an order by which an inspection may be directed or permitted, is of no consequence in a proper case, and on that account cannot be available to defeat the right of inspection. Whether the description of records is sufficient to inform their custodian of that which is desired, presents a question merely of whether under the circumstances and situation generally, considered in the light of reason and common sense, he ought to recognize and be able to distinguish or identify the particular thing that is required. In the instant matter, whether in the defendant's affidavit or in the order that was made by the trial court with reference to the defendant's right of inspection, if the several books, records or documents were, or either of them was not described in accordance with the plaintiff's appellation of them or any or either of them, that fact should not be deemed either determinative or as in any wise affecting the right of the defendant to inspect them. Nor, under the circumstances of this case, may the technical objection be available that the order was too broad. The same objection was made in the case of Gables Racing Ass'n v. Persky, 116 Fla. 77, 156 So. 392, 395, and while under the facts of that case, the court held that the order should be modified, it made the following statement relative to the validity of such order: "While many more books, papers, and documents were required to be produced than the pleadings in the case seemed to require, and the order might have been with more propriety limited to such necessary papers and books as were likely to give some information to the court upon the question presented by the pleadings, we cannot say that the chancellor abused his discretion to the point of invalidating the order."

[11, 12] In the instant case, it was the plaintiff's duty in the premises to comply with the order of the court as far as it was able in reason and good faith to ascertain the intent and meaning of the order here made. With regard thereto, it may be said at this point that the arbitrary refusal on the part of the plaintiff to comply with the order in question, based as it was upon technical objections, does violence to the spirit and intent of the statute under which the right of an inspection is conferred. It should be remembered that the purpose of a "discovery" is to assist in the administration of justice, and that the statutory right of inspection is based upon, and relates back to, ancient principles of equity.

In Pomeroy's Equity Jurisprudence, 4th edition, volume I, sections 190–195, at pages 260, 262, 267 and 273, in tracing the early history of discovery the author makes the following observation:

"The rules of the ancient common law concerning the competency of witnesses were exceedingly arbitrary, and would often work great injustice, unless their defects had been supplied by the equitable jurisdiction. In the common-law courts, prior to the modern statutory legislation, a party could not be examined as a witness, nor forced to make admissions in his pleadings, in behalf of his adversary; nor was there any means in the common-law procedure of compelling a party to produce, or submit for inspection, or furnish copies of any documents or books which might be in his possession or under his control, however important they might be to the other party's cause of action or defense. It was to supply this grievous defect in the ancient common-law methods that equity established the first branch of its auxiliary jurisdiction, called discovery. * * * The suit for discovery, properly so called, is a bill filed for the sole purpose of compelling the defendant to answer its allegations and interrogatories, and thereby to disclose facts within his own knowledge, information, or belief, or to disclose and produce documents, books, and other things within his possession, custody, or control * * *. Modern legislation has greatly interfered with the practical exercise of the auxiliary jurisdiction for a discovery, by introducing simpler and more efficacious methods in its stead, and by thus rendering a resort to it unnecessary and even inexpedient * * * the principles and doctrines relating to discovery, which have been settled by courts of equity, and which determine what facts parties can be compelled to disclose, and what documents to produce, and under what circumstances the disclosure or production can be obtained, will still continue to be recognized by the courts, and to regulate their action in enforcing the examination of parties and the production of writings by means of the more summary statutory proceedings. * * * As this auxiliary jurisdiction was contrived to supply a great defect in the ancient common-law methods, which was a constant source of wrong to suitors at law, and as it was intended to promote right and justice, discovery was, from the outset, favored by courts of equity."

[13] But there is another and perhaps equally cogent reason why the issuance of the order in this case was not improper. As hereinbefore has been noted, the parties to this litigation stood in the relation of trustor and trustee respectively, one to the other. When such a situation appears, the ordinary strictness of the rule relating to the right of inspection is greatly relaxed. The courts have repeatedly declared that in such circumstances, almost "as a matter of course", the trustor or the beneficiary has a right to a full and complete inspection of all books and records with relation to the trust; and the defendant here asserts that because of the instant trust relationship, many of the documents (trust agreement, appraisements, accounts of receipts and disbursements, as well as records of the assets of the trust) are as much the property of the defendant as they are of the plaintiff.

With respect to the general rule which is applicable in such situations, in 18 C.J., page 1117, it is declared that:

"A production or inspection of books and papers will be granted where the applicant has a special interest or right in them. Thus in an action between partners production and inspection of the partnership books will be ordered almost as a matter of course when such production and inspection is sought by one of the partners. So production and inspection will be required of books kept by an executor, or trustee, where the inspection is sought by a person interested in the estate of the decedent or by a beneficiary of the trust. * * * In short, production and inspection will be granted of all books and documents in which the parties have a common interest."

Also, in the case of Hotchkiss v. Levi, 140 App.Div. 525, 125 N.Y.S. 462, where it was held that the request for an order of inspection should have been granted, the court said (page 464), "The allegations with respect to the keeping of books and records by the firm and the contents thereof are, it is true, made on information and belief. In the ordinary case this would be insufficient. * * * Here, however, the application is for a discovery and inspection of the books, records, and papers of agents and joint venturers, and it may fairly be presumed that a firm of stock brokers engaged in such an enterprise would keep books and records thereof, and it is not denied that they did keep them and that the plaintiff has them and has refused to permit the defendant to inspect them."

[14] In the instant case, it also may be noted that although the affidavit which was presented by the defendant in support of his motion for an inspection of the records was more than ordinarily replete with respect to a statement of facts, nevertheless the plaintiff made no denial of such facts. In that

connection, the rule is thus laid down in the case entitled Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114, 115, as follows:

"But, when both parties have an equal right to the examination and inspection of documents and books of account, as in cases of partners, and books kept by a trustee of the trust account, and of documents acquired in a trust relation, which have to do with a pending suit between such parties, the rule is different, and the court will on application of either party order their production for inspection at any stage of the suit to enable him to prepare his case. [Citing cases.] * * * It is not contended but that these books of account contain evidence material to complainant's case. * * So a trustee is bound to render every necessary information required of him, and when he is called to account he will be compelled to produce all the books, papers, writings, vouchers, and other documents which are in any way connected with the trust, and which are in his possession or under his power. 2 Bates on Fed. Eq. Prac., § 762." See, also, Stebbins v. Harmon, 17 Hun, N.Y., 445; Livingston v. Curtis, 12 Hun, N.Y., 121, and In re Smathers' Will, 152 Misc. 774, 274 N.Y.S. 109.

In effect, it is stated in Corpus Juris, volume 18, page 1116, that the enactment of statutes relative to the remedy of obtaining evidence by inspection was had with a view to provide a more speedy and less expensive remedy than by the proceedings in chancery; that they "are remedial in their nature and should be liberally construed".

That the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method, to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered, is reflected in many modern decisions, some of which are here noted.

In the case of Wheeling Steel Corporation v. American Rolling M. Co., 6 Cir., 82 F.2d 97, although holding that the necessity for resort to discovery must be established, and under the facts of that case denied the right thereto, the court stated that "* * equity favors discovery as an aid to simplifying the issues and expediting the trial of suits at law", and that "the trend of modern legislation in respect to the examination of documents and records prior to trial has had the same objective". And in the case of Iroquois Hotel & Apartment Co. v. Iroquois Realty Co., 126 App.Div. 814, 111 N.Y.S. 172, it was said, "A right of inspection of books and papers is * * * expressly given by the Code to a defendant where they affect the merits of the defense and this defense need not necessarily be an affirmative one. Such inspection may greatly facilitate the trial and relieve the court from much detail, as well as apprise the parties so they [may] meet the particular dispute involved, and should be granted where a proper case is disclosed." Also to the same effect is the language used by the court in the case of Main v. Ring, 219 Iowa 1270, 260 N.W. 859, where it was said (page 865) "* * * in the consideration of the question [of jurisdiction of the court to make the order] * * * a broad and liberal construction of the pleadings must be adopted and all the allegations of the petition must be considered". And in the case entitled Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 53 S.Ct. 736, 77 L.Ed. 1449, 88 A.L.R. 496, a bill for discovery in advance of trial (under the equity rules, however), to obtain the disclosure of general facts as to the defendant's use of an invention, in an action at law for damages for alleged breach of agreement, was held to be proper. There the United States Supreme Court, speaking through Mr. Justice Cardozo, made the following pertinent statement (page 737):

"Help for the solution of problems of this order is not to be looked for in restrictive formulas. Procedure must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs. Equity rule 58 [28 U.S.C.A. following section 723]. There were other reasons in times past, when parties were not permitted to be witnesses, and when there was no compulsory process for the production of books or documents. [Citing cases.] Today the remedy survives, chiefly, if not wholly, to give facility to proof."

[15, 16] Particularly with reference to the contention of the plaintiff that the order was too broad in scope, and in effect that it would permit the defendant to indulge in a so-called "fishing expedition" among the plaintiff's books and records, and therefore that such order was violative of its constitutional right to be secure against "unreasonable search and seizure", in the light of what has been said hereinbefore, it is clear that such claim is without merit. In substance, it has been declared by many judicial tribunals that the asserted right in this regard is limited by a determination of whether the proposed search and seizure would be unreasonable. It is manifest that by the enactment of the constitutional guaranty here under consideration, it was not intended that the inherent power of the courts to elicit evidence in the trial of an action should be either unreasonably impaired or abrogated, but that in the exercise of such authority, judicial tribunals should be limited only by that which might constitute in each instance an "unreasonable" search or seizure. State v. Anderson, 270 Mo. 533, 194 S.W. 268, L.R.A.1917E, 833. Furthermore, in the case of Dalton v. Calhoun Dist. Court, 164 Iowa 187, 145 N.W. 498, Ann.Cas.1916D, 695, where this protective provision was urged as a bar to the issuance of an order of inspection, it was stated (page 502) that as a rule the provision "has reference to criminal or quasi criminal proceeding, or to forfeiture and not the statutory methods for obtaining evidence". The court, in the latter case, went on to say that, "* * * we must presume that the trial court in exercising the discretion granted to it in such matters, and in the fairness which may be expected to control its acts in the matter, will permit no examination or discovery not necessary to the case, nor want in proper regard for the rights of both litigants".

[17] In every case, much must necessarily be left in the first instance to the sound discretion of the trial judge.

From that which hereinbefore has been said, it follows that the alternative writ hereinbefore issued should be discharged, and that a peremptory writ should be denied. It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

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27 Cal.App.2d 473

DULL v. ATCHISON, TOPEKA & S. F. RY. CO. et al.

Civ. 11447.

District Court of Appeal, Second District, Division 1, California.

July 8, 1938.

1. Trial 🔑178

On a motion for a directed verdict, the function of the trial court is analogous to and practically the same as that of a reviewing court in determining on appeal whether there is evidence in the record of sufficient substance to support a verdict.

2. Railroads 🔑350(32)

In action for deaths of plaintiff's wife and minor children who were killed when automobile which was being driven by wife was struck by train at grade crossing, evidence that rails protruded some two inches above ballast which was rough and broken up and that an automobile being driven in manner in which wife was driving at time of accident stopped when it struck rails was insufficient to make jury question on issue of railroad's liability in absence of evidence tending to prove that condition of the crossing had anything to do with the accident. Code Civ.Proc. §§ 1958, 1960.

3. Negligence 🔑136(25)

A submissible case is not made out in an action predicated on negligence by proving a defendant's negligence without in some way fastening that negligence to the injury.

4. Trial 🔑178

Although on a motion for a directed verdict all reasonable inferences are to be drawn from the evidence in favor of the plaintiff and conflicts are to be resolved in favor of the plaintiff, inferences cannot be based on imagination, speculation or supposition. Code Civ.Proc. §§ 1958, 1960.

5. Evidence 🔑586(3)

In action for deaths of plaintiff's wife and minor children who were killed when automobile being driven by wife was struck by train at grade crossing, negative testimony of witnesses that they did not hear or were not sure that they heard whistle while standing 300 feet from crossing engaged in conversation did not destroy the probative value of testimony of enginemen that whistle was blown and bell was rung as train approached crossing.

6. Death 🔑58(1)

The presumption of ordinary care and diligence on the part of a decedent from the circumstances of the case and the natural instinct of self-preservation arises only in the absence of direct proof of the facts.

7. Railroads 🔑346(5)

In action for deaths of plaintiff's wife and minor children who were killed when automobile being driven by wife was struck by train at grade crossing, the presumption of ordinary care and diligence on the part of the wife was rebutted by proof that wife approached open crossing with clear view of tracks in both directions from a point 60 feet from crossing and as she approached tracks slowed down to approximately 2 miles per hour and then drove up a short incline and onto tracks where she was struck by train.

8. Railroads 🔑324(1)

A motorist approaching a grade crossing which a train was approaching at speed of approximately 60 miles per hour had the duty to use the care and caution commensurate with the apparent danger surrounding her.

9. Railroads 🔑338

Where motorist, who was killed when train struck automobile at grade crossing, approached crossing with clear view of tracks in both directions from point 60 feet from crossing and slowed down to approximately 2 miles per hour, motorist's husband could not recover for her death on last clear chance doctrine, since negligence of motorist continued until practically the exact moment of the impact.

10. Railroads 🔑338

As respects recovery for death of motorist who was killed when struck by train at grade crossing, doctrine of last clear chance was inapplicable until negligence of motorist in approaching crossing had terminated.

11. Negligence 🔑83

The rule which permits a recovery notwithstanding some negligence on the part of the plaintiff or person injured is properly applied only where such negligence was the remote and not the proximate cause of the injury, and the negligent acts of the parties were independent of each other.

12. Death 🔑24

The contributory negligence of a mother is a defense to an action on behalf of the community to recover for the deaths of children, since in caring for the children the mother represents and acts for the community and for the father as head of the community, and her negligence, if any, in caring for the children is the negligence of the father.

13. Negligence 🔑89(2)

The negligence of the wife in approaching a grade crossing at which automobile which wife was driving was struck by train resulting in deaths of wife and minor children barred recovery by husband for deaths of minor children where children were in custody of wife by and with the consent of the husband at the time of the accident.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Delphin D. Dull against the Atchison, Topeka & Santa Fe Railway Company and others for the death of plaintiff's wife and two minor children who were killed when automobile which the plaintiff's wife was driving was struck by a train. Judgment for defendants, and plaintiff appeals.

Affirmed.

Paul J. Fritz, of Los Angeles, for appellant.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for respondents.

WHITE, Justice.

In this action by a husband and father for the death of his wife and two minor children, the court instructed the jury to return a verdict for the defendants. From the judgment entered thereon this appeal is prosecuted.

The facts necessary for a correct understanding of the questions involved on this appeal may be thus briefly stated: On the morning of June 18, 1936, shortly after 8:30 o'clock, Ruby Marie Dull, wife of appellant, accompanied by their minor children, aged 9½ and 3½ years respectively, were riding in an automobile driven by Mrs. Dull. They were proceeding in a southerly direction on a country road, and, while attempting to pass over an open grade crossing of respondent railway company, were struck by a passenger train approaching from their right at a rate of speed estimated to be in the neighborhood of sixty miles per hour.

[1] It is unnecessary here to consider in detail the power of the court to direct a verdict, because this question has received the attention of the courts of this state on numerous occasions, and the principles were reviewed in Estate of Lances, 216 Cal. 397, 14 P.2d 768, quoted with approval in Estate of Flood, 217 Cal. 763, 21 P.2d 579. Suffice it to say that the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict.

In support of his claim that the evidence was susceptible of reasonable inferences which should have required the court, without weighing that evidence, to deny the motion, we are directed by appellant to testimony that the deceased and her children were driving slowly on a clear day; that the rails of the single track were about two inches above the fill-in or ballast between the rails, and that the ballast was rough and broken; that this was an open crossing, so far as Mrs. Dull was concerned, for sixty feet away from the tract; that the driver of the automobile was in good health and a competent driver. Appellant further asserts that while the engine men of respondent railway company testified that the whistle was blown and the bell rung, several witnesses, claimed to be within hearing distance of the crossing at the time of the accident, did not hear the whistle or the bell; that the automobile approached the railroad crossing at a speed of approximately twenty miles per hour, slowing down to approximately one or two miles per hour, and finally, as the fireman testified, actually coming to a stop on the tracks. The fireman, who was situated on the side of the engine cab from which the automobile approached, testified that when he first saw the automobile come from behind some bushes and trees, the train was 150 yards away from the crossing and the automobile was about fifty or sixty feet from the tracks; that he immediately called out to the engineer to "hold her", which in railroad parlance means to apply the emergency air.

[2-4] Appellant first contends that the evidence shows that respondent railway company negligently maintained this crossing in violation of the bounden duty of every railroad company to construct and thereafter maintain crossings over public highways on the line of its road in such a manner that the same shall be reasonably safe for persons lawfully and properly using it. In support of this claim appellant urges that the evidence shows that the rails of the track in question protruded some two inches above the fill-in or ballast between the rails and that the ballast was rough and broken up near both rails; that the evidence showed, in an experiment made subsequent to the accident, that when an automobile of the same make and type, traveling between one and two miles per hour, struck the rail, it stopped and "seemed to come back". From this testimony, appellant argues that remembering the fireman's testimony that Mrs. Dull's automobile stopped on the track, the jury was entitled to draw an inference that the sole proximate cause of the accident was the dangerous and unsafe condition of the tracks as maintained by respondent railway company. No reasonable person, urges appellant, would drive upon the track and voluntarily stop thereon in front of a swiftly approaching train. A photograph introduced in evidence shows the physical facts with reference to the condition of the rails to be as contended by appellant. In answer to the foregoing, respondents claim that the photographs show a grade crossing in a "fairly good state of repair" and further contend that "there was no evidence in the case that tended to prove that the condition of the crossing had anything to do with the accident". We find ourselves in accord with this claim of respondents. The record is barren of any substantial evidence to show that the condition of the rails proximately contributed to the accident. It is the law that by proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. Union, etc., Co. v. San Francisco Gas, etc., Co., 168 Cal. 58, 141 P. 807. While on a motion for a directed verdict all reasonable inferences are to be drawn from the evidence in favor of the plaintiff and conflicts are also to be resolved in favor of the plaintiff, nevertheless, inferences cannot be based on imagination, speculation or supposition. Secs. 1958, 1960, Code Civ.Proc.

[5] Appellant next asserts that conceding the deceased drove the automobile upon the tracks in front of the approaching train, nevertheless, if she saw the train coming, then formed a judgment as to its distance

away and its speed and believed it was reasonably safe to make the crossing, but her judgment proved erroneous and she was struck, she is not guilty of negligence as a matter of law, but that the question of her negligence is one for the jury. In this connection, fireman Collins testified that he first saw the automobile when the train was about 150 yards from the crossing and the automobile was traveling about twenty miles per hour; that when the automobile was about fifty or sixty feet from the track it slowed down "almost to a stop" and then "proceeded to drive up on the track" and stopped, at which time the train was about sixty to eighty feet from the automobile. With reference to the conduct of the fireman after he saw the automobile, he testified: "Well, when I decided that she was going to drive up on the track—seen that she was—I hollered to the engineer to hold her," which, the witness testified, means "just what it says, to hold her to emergency—hold everything". The fireman was unable to state how far the train was from the crossing when he called this warning to the engineer. With reference to warning signals, both the engineer and the fireman testified that the whistle was blown, and the former testified he blew the whistle continuously from a point 1,300 or 1,400 feet from the crossing up to the time of the collision. The negative testimony of other witnesses, some 350 feet removed from the crossing and engaged in conversation, that they did not hear or were not sure that they heard the whistle, does not entirely destroy the probative value of the engine men's positive evidence.

[6-8] We come now to a consideration of respondents' claim that the deceased, in driving the automobile, was guilty of negligence that proximately contributed to the accident. We have already set forth a general statement of facts in the first part of this opinion. There are minor details not included in the foregoing general statement, but we do not think it will be necessary to set the evidence out more fully than has already been done. From the facts as they are contained in the record, it appears that the deceased approached an open railroad crossing with a clear view of the tracks in both directions from a point sixty feet away from the crossing; that as she approached the railroad tracks she slowed down to about two miles per hour, and then drove up a short incline and onto the tracks, where she was struck by the train. Driving an automobile which the appellant, who was the owner thereof, testified could be stopped within twelve or fourteen feet when going twenty miles per hour, and within about nine feet when going twelve or fifteen miles per hour, we find the deceased, according to the evidence, going twenty miles per hour when within five hundred feet of the crossing in question, and at a much slower speed for the last sixty feet, with an unobstructed view, still continuing to drive up to and upon the track in the face of the fast approaching train. With this picture, it would be idle to attempt to show ordinary care or prudence upon the part of the deceased. As a matter of fact, in order to justify the conduct of the unfortunate decedent, we would be first compelled to overrule every known California case involving accidents at railroad crossings. Appellant relies largely upon an indulgence of the presumption of ordinary care and diligence on the part of decedent from all the circumstances of the case and the natural instinct of self-preservation—and contends that because thereof the motion for a directed verdict should have been denied. However, this presumption arises only in the absence of direct proof of the facts. The circumstances of this case alone are sufficient to rebut the presumption claimed. In Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651, as to this issue, it was said: "But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined; and, if *any* element is wanting, the courts will hold, as matter of law, that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence." (Italics added.) It was incumbent upon the deceased to use the care and caution commensurate with the apparent danger surrounding her when she approached the railroad crossing. If the unfortunate woman had observed the rule of conduct which the law prescribed she would not, in all human probability, with her minor children, have met untimely death.

[9-11] Appellant next contends that under the doctrine of last clear chance

the cause should have been submitted to the jury. However, the facts of this case do not call for the application of this doctrine, for it is apparent from the evidence that the deceased was driving her automobile very slowly and could have stopped at any time within a few feet after she came into a position of peril. Therefore the negligence of the deceased continued until practically the exact moment of the impact, and plaintiff could not recover. Further, until this negligence of the deceased terminated, the doctrine of last clear chance has no application. In Holmes v. Southern Pac. C. Ry. Co., 97 Cal. 161, at page 169, 31 P. 834, it was said: "But the rule which permits a recovery notwithstanding some negligence on the part of the plaintiff or person injured is only properly applied in those cases where such negligence was the remote and not the proximate cause of the injury,—that is, where the negligent acts of the parties were independent of each other"; and when we apply this rule to the case here it is at once seen that even if it should be conceded that there was negligence upon the part of the railway company in its management of the train at the time of and just preceding the accident, still the plaintiff would not be entitled to recover, as such accident could not have occurred without the concurrent and active negligence of the deceased at the time. The defendant was not the only one who could have prevented the accident, but on the contrary, if the deceased had herself used ordinary care at the time, she could not possibly have been harmed by defendant's train, which was confined to the track upon which it ran. Practically up to the very moment her automobile was struck by the train, it was within her power to escape injury by simply stopping her slowly moving automobile. The deceased being actually and contemporaneously at fault until the moment of the collision, the appellant is barred from the right to recover through an application of the last clear chance doctrine. Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 41, 76 P. 719, 101 Am.St.Rep. 68; Giannini v. Southern Pacific Co., 98 Cal.App. 126, 132, 276 P. 618.

[12, 13] The final question presented is whether the negligence of the wife bars a recovery by the husband for the death of the minor children. It is the law that the contributory negligence of the mother is a defense to an action on behalf of the community to recover for death of the children, because in caring for the children she represents and acts for the community and for the husband as head of the community. And her negligence, if any, in caring for the children is the negligence of the husband. Keena v. United Railroads of San Francisco, 57 Cal.App. 124, 132, 207 P. 35; Cossi v. Southern Pacific Co., 110 Cal.App. 110, 113, 293 P. 663. In the case at bar there can be no question but that the children were in the custody of the deceased by and with the consent of appellant.

The judgment appealed from is therefore affirmed.

We concur: YORK, P. J.; DORAN, J.

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27 Cal.App.2d 484

PEOPLE v. REED.

Cr. 365.

District Court of Appeal, Fourth District, California.

July 9, 1938.

Hearing Denied by Supreme Court Aug. 8, 1938.

1. Larceny 🔑65

Evidence concerning intent sustained conviction of grand theft of an automobile.

2. Criminal law 🔑1036(1)

In prosecution for grand theft of an automobile, sustaining objection as irrelevant and immaterial to questions on defendant's cross-examination of a garage owner concerning handwriting on work sheet for repair of automobile and concerning whether insurer of automobile would have authorized repair if it had not been stolen was not prejudicial where questions were a "fishing excursion," no proffer of proof was made and expected proof as indicated by the questions was immaterial.

3. Witnesses 🔑270(2)

In prosecution for grand theft of an automobile, excluding testimony sought to be introduced by defendant in cross-examination of a garage owner concerning handwriting on work sheet for repair of automobile and concerning whether automobile insurer would have authorized repair if automobile had not been stolen was not error, since questions were a "fishing excursion."

4. Criminal law ⚿703

That a district attorney wrote his name on the blackboard several times during opening statement to illustrate his argument as to similarities and dissimilarities in signatures of the same person did not show error where court ruled in jury's presence that writings were merely illustrative and not evidence.

5. Criminal law ⚿1037(2), 1129(1)

Where no objection was made to a remark of a district attorney, remark was not assigned as prejudicial misconduct, and no instruction was asked thereon, any error in remark could not be urged for the first time on appeal.

6. Criminal law ⚿958(1)

In measuring the due exercise of discretion of trial court as to granting accused time in which to secure affidavits in support of statements of his counsel on motion for a new trial for newly discovered evidence, each case must be judged on its own factual background.

7. Criminal law ⚿633(1)

While officials connected with detection and prosecution of crime should be diligent in ferreting out and prosecuting the guilty, they should be fair to accused and evidence pointing to his innocence should not be suppressed.

8. Criminal law ⚿958(1)

In prosecution for grand theft of an automobile, refusal of further time to secure affidavits in support of motion for new trial for newly discovered evidence regarding whether defendant committed offense was an abuse of discretion requiring a retrial, where delay could not have injured people's cause, affidavit and statement of defendant's counsel showed that he was not lacking in diligence, and new evidence apparently would have had an important bearing on defendant's innocence.

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Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Wallace Reed was convicted of grand theft of an automobile, and he appeals.

Reversed, with instructions to retry the cause.

Richard A. Haley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was accused of the crime of grand theft, stealing an automobile belonging to C. C. Boucher. He was convicted and sentenced to confinement in the state penitentiary at San Quentin. His motion for new trial was denied. He has appealed from the judgment and from the order denying his motion for new trial.

He presents the following grounds for reversal of the judgment and order: That the evidence is not sufficient to sustain the verdict and judgment; errors of law occurring during the trial; misconduct of the district attorney; abuse of discretion on the part of the trial judge in refusing his request for further time to obtain further affidavits concerning newly discovered evidence; error in denying his motion for new trial.

The evidence discloses that C. C. Boucher owned and operated a second hand automobile sales lot in the city of San Bernardino. On the afternoon of May 25, 1936, Boucher was in his office concluding the sale of an automobile to a customer when defendant drove up in a 1930 Ford coupe which he parked at the curb. Defendant approached Boucher and asked if he would accept the Ford in trade for a 1933 Dodge sedan. Boucher told defendant that he would and asked him to wait until he had completed the transaction in which he was then engaged. As soon as Boucher was free he looked for defendant. The Ford was still parked at the curb but defendant and the Dodge car were gone.

Burdette D. Shidler operated a garage in San Bernardino. Shortly after 6 o'clock p. m. of that same day Shidler received a telephone call asking him to go to Fortieth and Electric streets in San Bernardino and bring in a broken down automobile. Shidler went to the designated place and found defendant and the Dodge sedan which he towed to his garage, defendant riding with him in the tow car. The Dodge had thrown a connecting rod through the crank case. Defendant signed an order for the repair of the car. He gave his name as W. G. Reed but signed the order "Wallace Reed", his residence as Alhambra and his telephone number as 2972—R. After the work order was signed defendant took his suitcase from the Dodge and departed. He was apprehended about January 1, 1938.

The foregoing summary of the evidence is taken from the testimony produced by the plaintiff. The defense was an alibi which was strongly supported.

Defendant urges that the foregoing evidence is insufficient to support the verdict and judgment principally because no intent to steal was proven and at most only an intent to "joy ride".

[1] When defendant had Shidler take the car to the garage and when he signed the work order for its repair he asserted the indicia of ownership of it from which the jury could reasonably infer an intent to appropriate it to his own use, or, in other words, to steal it. The evidence is positive that Boucher did not give defendant or any other person permission to drive the Dodge. The jury could have reasonably inferred an intent to steal from such facts.

[2, 3] During the cross-examination of Shidler the following occurred:

"Q. Now then have you at any time subjected any of Reed's handwriting and the handwriting you have on this work sheet to a handwriting expert?

"Mr. Thompson: Objected to as immaterial, and irrelevant.

"Mr. King: And not proper cross-examination. * * *

"The Court: I can't see that it is important or even material. Sustained.

"Q. You say later on you got an O. K. from the insurance company to repair the car and you repaired the car, it that true? A. That is right.

"Q. Do you know what company carried that insurance? A. No, I don't remember.

"Q. Do you know of your own knowledge, not what somebody told you, but do you know of your own knowledge whether or not the insurance company would have authorized the repair of that car if it had not been stolen?

"Mr. Thompson: Objected to as irrelevant and immaterial.

"The Court: Sustained."

We can find nothing prejudicial or erroneous in these rulings. Defendant's counsel was very evidently on a "fishing excursion". He made no proffer of proof and we can only guess at what he expected to prove. If the expected proof is indicated in the questions it was immaterial. Shidler had no admitted handwriting of defendant with which to have the signature on the work order compared. No duty rested on him to have such comparison made. It made no difference to Shidler who paid him for repairing the Dodge.

[4, 5] The deputy district attorney in making the opening argument to the jury wrote his name several times on a blackboard and used these signatures to illustrate his argument concerning similarities and dissimilarities in signatures of the same person. Counsel for defendant objected to the district attorney "giving evidence in this case". The trial court ruled in the presence and hearing of the jury that the writings were used merely to illustrate the argument being made. We find no error in this ruling. Further, the remarks were not assigned as error and no request was made for an instruction to the jury to disregard them. Defendant points out another remark of the deputy district attorney which he now claims was prejudicial. No objection was made in the trial court, the remark was not assigned as prejudicial misconduct and no instruction was asked upon it. The remark, if error, could not have been seriously prejudicial and the error, if any, cannot be urged here for the first time. See People v. Harris, 219 Cal. 727, 28 P.2d 906.

Defendant urges that the trial court abused its discretion in denying him further time in which to obtain and file affidavits in support of his contention that there was newly discovered evidence which would materially bear upon the question of his innocence if a new trial were granted.

The verdict was returned on March 23, 1938, and Friday, March 25, 1938, was fixed as the time for the pronouncement of judgment. On that day defendant moved for a new trial on all statutory grounds and in support of his motion presented an affidavit of his counsel which purported to disclose newly discovered evidence. The affidavit was clearly deficient and time was granted in which to file a second affidavit which was filed on that day. Upon request of defendant the hearing of the motion was continued until March 28, 1938, to permit the production of additional affidavits. At that time defendant requested further time in which to obtain and file further affidavits. His counsel made a statement in which he detailed the proof he hoped to obtain. The request for further time and the motion for new trial were denied and judgment was pronounced. Under this state of the record it is seriously urged that prejudicial error was committed that requires us to direct a new trial.

The first affidavit was so insufficient that it requires no further notice. The second affidavit contains the following:

"That he is now and has been at all times, attorney for Wallace Reed, the defendant in the above entitled case. That prior to the trial of said case on the 23d day of March, 1938, affiant had attempted to obtain information from the Sheriff's office and other persons, concerning the facts surrounding the stealing of the property, for which defendant stands charged.

"However, due to the fact that affiant was not familiar with any of the details of the crime which had been committed affiant was unable to obtain any information whatsoever relative to the taking of the automobile other than affiant was informed that the defendant, Wallace Reed, had been identified as the party in question. Affiant had no way of knowing that a second and subsequent car had been stolen from the immediate vicinity of the place where the first car was left after it had broken down.

"Thereafter, following the trial and after the jury had been instructed and retired to the jury room for deliberations, affiant ascertained from Deputy Sheriff George Pickett that the party who placed the stolen automobile in the garage, operated by Mr. Shidler, within five minutes took another automobile within a few feet of Mr. Shidler's garage, returned to Mr. Shidler's garage and obtained his suitcase and other property from the automobile that he had placed in Mr. Shidler's garage, transferred the property from the automobile left in Mr. Shidler's garage to the second automobile and proceeded on his way. That within a short time thereafter, the second automobile was recovered in the state of Texas, it having theretofore been reported a stolen automobile to the Sheriff's office and returned to its rightful owner in San Bernardino. Had affiant been in possession of this information, his cross-examination of the witness, Mr. Shidler, would have included questions relative to the above matter and affiant would have been able to place upon the witness stand, witnesses to corroborate in every detail the above statements; and if a new trial is granted, affiant will be able to place such evidence before the court and jury by the witness, Deputy Sheriff George Pickett, and will be able to unequivocally prove that the party took the automobile from Mr. Boucher's lot also drove the second, stolen automobile to the state of Texas and it being manifestly impossible for the defendant, Wallace Reed, to have accomplished said trip to Texas, he not having been absent from his place of employment. Justice will prevail and defendant, Wallace Reed, acquitted."

The record shows the following proceedings under date of March 28:

"The Court: People vs. Reed.

"Mr. Haley: If the Court please, last Friday afternoon the Court granted me a continuation for the purpose of obtaining further affidavits. I left here Friday, and Saturday morning I called Alhambra. The police officer, Colby, who is the investigating officer on the stealing of the car in Alhambra, I was informed didn't come to work until 4:00 o'clock. I went out to see him and he informed me at that time he was not able to get into the identification room, and asked me to come back Monday morning, which was this morning. I went back this morning and Mr. Colby was not there. I talked to the chief of police, who took me into the bureau of identification and showed me a picture of the Wallace Reed who had been positively identified as the man that took the car from the car lot in Alhambra, and four people who personally knew him positively identified him as W. C. Reed. I saw a picture of that party, and that picture, if the Court please, was not the picture of this defendant. I was not able to get affidavits by reason of the fact the Chief of Police had not made the investigation, although he knew that picture was the one positively identified, yet he could not personally make the affidavit. I am going to ask the Court at this time for two or three days more continuance to obtain these affidavits. It is very apparent from the feeling in Alhambra, almost a positive fact, that we have here tried and convicted the wrong person. After making my motion before Your Honor last week I went back to my office and looked over the transcript of the preliminary hearing which was the only source of information I had, and I found there was no reference at all to Alhambra or 315 North Second street or a car coming from Alhambra. The testimony at the preliminary hearing starts at the Used Car Lot in San Bernardino, and there is no mention made of a Ford coupe other than to say it was left at that lot. Therefore I do a little bit excuse myself for not having made the investigation I now speak of; and as I say, I had no information with reference to Alhambra, and thereafter while the jury was out while talking with one of the deputy sheriffs here I did receive the information but was denied the right to inspect the sheriff's file. The picture there, if the Court please, was of a man whose hair was beginning to leave him and he was partially bald upon the left temple. The hair was not kinky and wavy as this defendant's, it was straight, and while the facial expression in a little way represents the defendant yet no person could be mistaken as to the fact they are not the same person. I have made arrangement with deputy sheriff Gorman, who is now at this time procuring for me one of his pictures of this defendant here, which he is going to allow me to take back to Alhambra, and I am going to place it alongside the picture that has been identified by the witnesses in Alhambra and ask them again to make an identification as to which of the two pictures is W. G. Reed or Wallace Reed, and ask for identification whether they pick out the picture I take back or the picture there. On those grounds we ask a few more days continuance in which to prepare and file an affidavit.

"The Court: Well what would all that demonstrate if we had that proof?

"Mr. Haley: Simply this, if the Court please: There is no doubt but what the person who took the car in Alhambra is the person who took the car in San Bernardino for this reason: There was a Wallace Reed living at 315 North Second Street in Alhambra. That party was well known to the people he lived with and to the Used Car Dealer. That party took a Ford coupe, and I might state at this time the reason he was not prosecuted in Alhambra was because the Used Car Dealer there gave him permission to use the car to try out around the block, and he came to San Bernardino. There was a Wallace Reed there. He did take that Ford coupe and that Ford coupe was brought here. Apparently the person who brought it here talked to the Used Car dealer, and he left the Ford coupe at that lot and took from that lot the other car. Therefore that person is the person who stole the car in San Bernardino, and he is not this Wallace Reed. The Court will recall the testimony that the man came to Mr. Boucher and said to Mr. Boucher, 'How much will you give me for my Ford coupe?' Mr. Boucher said to him, 'I am busy now,' but he did step to the door and did look out and did see the Ford coupe. He said 'I am busy now, I will talk to you later.' And the next time he looked for the defendant he was gone and the Dodge automobile was gone, but the Ford coupe was there. That I believe was the testimony that was produced here at the trial. Therefore it would necessarily follow the person that took the Ford coupe in Alhambra was the same person who drove the car away. Consequently when we show there is another individual and show all those facts there will be no doubt in anybody's mind but what we have here the wrong man, regardless of what the witnesses who testified this was the man they say. There is no doubt but what those witnesses in their own heart and in their own mind are as honest as anyone could be, but of course we know a person can be mistaken, and I believe that is what happened here and I believe that the ends of justice will well be served if we are granted not over five days in which to prepare and to present to Your Honor those affidavits. I believe this beyond the question of a doubt, I say on my honor as an attorney of this court, I believe after those affidavits are presented here and if the District Attorney is so inclined that he makes an independent investigation in Alhambra, it will be the District Attorney and not myself that will make a motion for a new trial in this case. * * *

"Mr. Haley: I think we could at this time make application to the Court for probation. That would retain jurisdiction.

"The Court: Even if your affidavits were here, I don't see that this Court could then grant a new trial on the face of the testimony in this case.

"Mr. Haley: That may be true, but we wish to perfect our record.

"The Court: Those two witnesses, Shidler and Boucher, stated positively and without equivocation, and against them there is the suspicion somebody else did it. There is no positive testimony in the light of what you have said as to this new matter, there is nothing in that that would positively acquit the defendant of any connection with the crime.

"Your application for probation will be denied. The facts in this case are all before the Court. The probation officer could not add anything to the situation except possibly throw some light upon the defendant's past life.

"The application for a continuance will be denied."

We have here the serious question of a breach of discretion on the part of the trial judge in refusing to grant defendant time in which to secure affidavits supporting the statements of his counsel for it is of course admitted that the matter of granting a continuance was within the sound discretion of the trial court.

[6] In measuring the due exercise of such discretion each case should be judged from its own factual background. Here the people could not have been prejudiced in any way by a delay of five days which defendant asked to enable him to produce the affidavits. On the other hand, there is an indication that defendant might have been the victim of mistaken identity. If the evidence could be produced showing that another Wallace Reed stole the Alhambra Ford and which was driven by him to San Bernardino and left in front of the Boucher used car lot and later stole a second Ford in San Bernardino which he drove to Texas, defendant could hardly have been guilty of stealing the Dodge if he was at his place of employment six days during each week. The delay meant nothing to the people and might have meant much to defendant if the affidavits supported the statement of his counsel. The deputy district attorney did not seriously oppose the continuance.

Of course, the affidavit and statement of counsel did not demonstrate the innocence of defendant. There are several weaknesses in it. There is no showing or direct offer to show that the 1930 Ford coupe stolen in Alhambra was the same 1930 Ford coupe that was left in front of the Boucher sales lot in San Bernardino. There is only argument to that effect. That the man who rode in the tow car to the Shidler garage was the man who stole the automobile and drove it to Texas is not established unless Pickett's statement be supported. However, if that could have been established it would have been a strong argument in favor of defendant because there is strong evidence that defendant was at his place of employment in Hermosa Beach six days out of every week during the month of March, 1935.

[7] Counsel for defendant made a reasonable explanation why he was not in possession of any of these facts prior to the trial. If this client was innocent there was no reasonable source of information open to him except the officers of the law and while some of it at least was known to a deputy sheriff of San Bernardino county it was withheld until after the case had gone to the jury. While peace officers and officials connected with detection and prosecution of crime should be diligent in ferreting out and prosecuting the guilty they should be fair with an accused. Evidence pointing to his innocence should not be suppressed. For a guilty man to escape punishment is a miscarriage of justice, but for an innocent man to be convicted is unthinkable.

A quite similar factual situation on a motion for new trial was presented to the trial judge in the case of People v. Goodwin, 202 Cal. 527, 261 P. 1009. There counsel for defendant asked time in which to present affidavits of newly discovered evidence in support of the motion for new trial. The request was denied. It was there held that the trial judge should have granted defendant time in which to produce affidavits. The judgment was reversed with directions to grant the motion for new trial.

[8] As under the facts before us a delay of not to exceed five days in pronouncing judgment could not have injured the cause of the people in the slightest degree and as the affidavit and statement of counsel indicated there had been no lack of diligence on the part of defendant in seeking the new evidence and as it was strongly indicated that, if produced, such evidence would have had an important bearing on the question of the guilt or innocence of defendant, the trial judge should have granted the time requested to produce the affidavits. On the record before us and on the authority of the Goodwin Case we conclude that the refusal of the request for time in which to produce the affidavits and the consequent denial of the motion for new trial constituted prejudicial and reversible error.

The judgment and order appealed from are reversed with instructions to the trial court to retry the cause.

We concur: BARNARD, P. J., HAINES, Justice pro tem.

27 Cal.App.2d 447

Ex parte ALLEN

Cr. 2030.

District Court of Appeal, First District, Division 2, California.

July 6, 1938.

Hearing Denied by Supreme Court Aug. 4, 1938.

1. Pardon ⚿10

A resolution of the board of prison terms and paroles rescinding its resolution granting a parole to a prisoner before parole became effective was not void on ground that it deprived prisoner of a vested right although no cause for revocation existed or was stated and no notice or hearing was accorded prisoner since prisoner was not on "parole" until his release. Pen.Code, § 1168, subd. 4.

The word "parole" is defined as a conditional and revocable release, upon his own recognizance or subject to supervision provided by statute of a prisoner with indeterminate or unexpired sentence.

[Ed. Note.—For other definitions of "Parole," see Words & Phrases.]

2. Pardon ⚿10

Where the practice of granting paroles to prisoners to take effect in the future as a disciplinary measure was a matter of common knowledge, the Legislature could be assumed to have had such practice in mind and intended, by amending related statutes, to permit such grants of parole which were subject to rescission at the will of the board of prison terms and paroles. Pen.Code, § 1168, subd. 4.

Proceeding in the matter of the application of Harry Allen, who was confined in the state prison, for a writ of habeas corpus.

Writ discharged and the prisoner remanded to the custody of the warden.

Leo Friedman, of Long Beach, for petitioner.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

This is an original application for a writ of habeas corpus.

[1] The petitioner is confined in the state prison at San Quentin under a judgment of conviction of murder in the second degree. He entered the prison on April 23, 1923, and on September 6, 1935, the board of prison terms and paroles passed a resolution granting him a parole to become effective after he had served twelve and one-half years of his term of sentence. This resolution was rescinded on September 25, 1935. The order granting the parole was conditional upon his compliance "with all the requirements of law, rules and regulations governing parole".

On this application the petitioner contends that the order of September 25, 1935, is void because no cause then existed for a revocation of his parole; no cause was stated in the order of revocation; and no notice of the intended action was given the prisoner and no hearing thereon accorded him. The petitioner's case is based upon the theory that he was "on parole" from the time the original resolution was passed and that the order of rescission took from him an existing, or vested, right without notice or hearing, and without due process of law. His case is founded on the unsound theory that a prisoner is "on parole" from the date when the board determines that a parole should issue at some future date, and that this "right" cannot be suspended or canceled without according the prisoner a trial on some legal "cause".

A parole, as that term is used in section 1168 of the Penal Code, is a release from confinement within the prison. The power of the board is fixed in subsection 4 of this section as a power to provide rules and regulations whereby a prisoner who has served the period of time prescribed by this section "may be allowed to go upon parole outside the prison buildings and inclosures". In Webster's Unabridged Int. Dictionary, 2d ed., the word "parole" is defined in its legal sense as follows: "A conditional and revocable release, upon his own recognizance or subject to supervision provided by statute, of a prisoner with indeterminate or unexpired sentence." Thus a prisoner is not on parole until he is released from confinement in the prison, and, until this situation arises, there is no ground for the application of the rules relating to "revocation" of the parole, and no pertinency of the decisions covering "due process", notice, and hearing. The situation here is that the action of the board is nothing more than a determination that it will, at a future date, release the prisoner on parole unless intervening circumstances should prompt the board to retain him in further custody. To reach that result, the board may either rescind the resolution or suspend the granting of the parole either indefinitely or until another fixed date. The second paragraph of this subsection makes the legislative intention clear when it provides that in no case shall a prisoner be "paroled" until he has served one calendar year; but "in any case the matter of parole may be determined by the board at any time after the expiration of six months" of his actual imprisonment. Thus the board may determine the matter of parole, i. e., determine at what time and under what conditions the prisoner may be granted a parole and released "on parole" from confinement within the prison, and such determination may be made years in advance of the time fixed for release. But, until such release, the prisoner is not "on parole".

[2] The code section carries a clear distinction between suspension, rescission, and revocation in their application to paroles and to the proceedings of the board. The twelfth paragraph of subsection four gives the board: "Full power to make and enforce rules and regulations relating to the parole of prisoners, to grant paroles thereunder, to suspend, cancel and/or revoke paroles without notice, and to retake and imprison any prisoner so upon parole." The fifteenth paragraph of the same subsection reads: "No parole shall be revoked and no credits forfeited without cause, which cause must be stated in the order revoking the parole or forfeiting the credits." It will be noted that no such restriction is placed upon the suspension or cancellation of the determination to grant a parole. It is obvious that if the prisoner is still within the confines of the prison no order to "retake and imprison" him would be necessary. It is equally obvious that if the conduct of the prisoner while in the prison does not justify his release on parole, no statutory or constitutional right demands a notice and hearing before the board can set aside or rescind its action granting a parole. Such determinations as we have here are disciplinary in nature. They hold out to the prisoner the chance of parole unless his conduct in the meantime is such as to require further confinement. They are in harmony with the practice which has been followed by the prison authorities for a long period of years. Since this practice is a matter of common knowledge, it is fair to assume that the legislature has had it in mind during the frequent amendments to the code section, and that it was the legislative intent to permit the board to agree upon a parole to be effective at a future day, conditional upon the conduct of the prisoner in the interim, and subject to the conditions and circumstances existing at the expiration of that period. Such action by the board is, like any similar administrative determination, subject to rescission or modification at the will of the board and is not restricted by the rules of due process, notice, and hearing which apply to and limit the deprivation of a vested right arising out of the prior action of an administrative body.

The writ is discharged, and the prisoner is remanded to the custody of the warden.

We concur: STURTEVANT, J.; SPENCE, J.

In re ALLSHOUSE'S ESTATE.*

DAVIS et al. v. ALLSHOUSE.

Civ. 11872.

District Court of Appeal, Second District, Division 2, California.
July 6, 1938.

1. Husband and wife ⇨14(2)

Under law of Missouri, action of husband in causing title to realty purchased by him to be placed in his own name and that of his wife created a "tenancy by entirety."

[Ed. Note.—For other definitions of "Tenant by Entirety," see Words & Phrases.]

2. Descent and distribution ⇨61

The purpose of the statute relating to descent and distribution of estate of decedent leaving no issue, which estate was separate property of previously deceased spouse and came to decedent from such spouse by gift, descent, devise or bequest, is, in the absence of testamentary disposition, to turn the property back to the family from which it came rather than to permit it to descend to the decedent's family. Probate Code, § 229.

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*For subsequent opinion see 91 P.2d 887.

3. Descent and distribution ⟹61

Whether property which came to deceased wife by gift from predeceased husband was the separate property of the husband within statute relating to descent and distribution of such property, was to be determined as of the date on which the property was acquired by the husband, since the character of an acquisition whether movable or immovable is fixed at the time of the acquisition. Probate Code, § 229.

4. Husband and wife ⟹6(1)

Under Missouri Law, personal property owned by the husband is under his exclusive control subject only to the provision that he may not dispose of it in expectation of death for the purpose of defrauding his wife of her dower right given by statute.

5. Descent and distribution ⟹61

Where husband who was resident of Missouri purchased Missouri real estate with his own funds and placed the title in the names of himself and wife, husband made a "gift" to wife whereby wife acquired interest in property from funds which were of sole ownership of her husband, as respects descent of property under statute on death of wife without issue. Probate Code, § 229.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

6. Husband and wife ⟹246

Property acquired by a husband in a common-law state and there known and classified simply as the husband's property and in which the wife had no vested interest corresponding to her interest in community property is by the law of community classified as the husband's "separate property" with all the rights incident to that class of property under the law of community.

[Ed. Note.—For other definitions of "Separate Property," see Words & Phrases.]

7. Descent and distribution ⟹61

Under statute, property of wife who died without issue which was acquired by wife by gift from husband, which gift was effected by husband's purchase of Missouri realty with his own funds, and placing title in names of himself and wife, descended to son of husband rather than to heirs at law of wife under statute providing that, if decedent leaves no issue and estate was separate property of previously deceased spouse and came to decedent from such spouse by gift, such property goes in equal shares to children of deceased spouse. Probate Code, § 229.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding in the matter of the estate of Viola L. Allshouse, deceased, wherein Sarah Davis and others presented a petition for determination of heirship, which was contested by Harry A. Allshouse, Jr. From a judgment in favor of the contestant, the petitioners appeal.

Affirmed.

Eckman & Lindstrom, Arthur W. Eckman, Ralph G. Lindstrom, and R. L. Moore, all of Los Angeles, for appellants.

Voltaire Perkins, of Los Angeles, H. B. Jack Manard, of Kansas City, Mo., and Anderson & Anderson, of Los Angeles, for respondent.

WOOD, Justice.

The heirs at law of the deceased, Viola L. Allshouse, presented a petition to the lower court for determination of heirship. They now appeal from a judgment whereby it was decreed that Harry A. Allshouse, Jr., is entitled to distribution of the property in dispute in this litigation.

[1] The deceased and Harry A. Allshouse, Sr., were married in the year 1919 while both were domiciled in the state of Missouri. Their marital domicile remained in Missouri until the death of Mr. Allshouse on March 1, 1931. After her husband's death Mrs. Allshouse became domiciled in California. She died on April 1, 1936, a resident of California, without issue. The husband with his own funds purchased certain real estate in Missouri and also became the owner of certain personal property. He caused the title to the real estate to be placed in his own name and that of his wife, thereby creating what is known in Missouri as a tenancy by entirety. In the year 1929 he transferred approximately one-half of his personal property to his wife and in the same year the Missouri real estate was traded for California real estate and title was taken by the husband and wife in joint tenancy. Thereafter the husband quitclaimed his interest in the

property held in joint tenancy to his wife. The wife received the furniture by the husband's will, which was probated in Missouri.

The contestant, Harry A. Allshouse, Jr., is the son of the predeceased spouse of the decedent by a previous marriage. The trial court held that the property in dispute was acquired by the decedent by gift from her husband from his separate property during his lifetime and that it should be distributed to the respondent in accordance with the provisions of section 229 of the Probate Code, which are as follows: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation."

[2, 3] There can be no question but that the property came to decedent by gift from her husband. The question involved therefore requires a determination whether the property "was separate property of a previously deceased spouse". This question must be considered in view of the purpose of the legislature in enacting section 229 of the Probate Code, which has been well set forth in Estate of Putnam, 219 Cal. 608, 611, 28 P.2d 27, 28: "The reason and purpose of section 229 of the Probate Code is, in the absence of testamentary disposition, to turn the property back to the family from which it came, rather than to permit it to descend to the wife's family. In other words, the section was designed to benefit the natural objects of the bounty of the former owner." The issue whether the property which "came to" Mrs. Allshouse was the separate property of her husband must be determined as of the date on which the property was acquired by the husband. "The character of an acquisition, whether a movable or an unmovable, is fixed at the time of the acquisition." Treatise on the Law of Community Property by McKay, 2d ed., sec. 198, p. 152.

[4, 5] In the state of Missouri there is no community property law and property is held under the common-law rules. Personal property in Missouri owned by the husband is under his exclusive control, subject only to the provision that he may not dispose of it in expectation of death for the purpose of defrauding his wife of her dower rights given by statute. In Dyer v. Smith, 62 Mo.App. 606, 608, it is stated: "It has been well settled by a long and unbroken line of appellate court decisions in this state, that, 'although dower is given in personal estate by our statute, yet it was not thereby intended to restrain the husband's absolute control of it during his life, to give and dispose of it as he wills.'" And in Crecelius v. Horst, 89 Mo. 356, 358, 14 S.W. 510, 511, it is stated: "By the laws of this state, the widow is endowed in the personal property of the husband, but she is endowed in such personal property only as he owned at the time of his death. Until then he may dispose of such property without her consent, freed from any claim for dower." When Mr. Allshouse, Sr., purchased the Missouri real estate with his own funds, his personal property, and placed the title in the names of himself and wife, he made a gift to his wife, a gift whereby she acquired her interest in the property from funds which were of the sole ownership of her husband. In Alexander v. Alexander, Mo.App., 44 S.W.2d 872, it is held (page 874): "Where real estate is purchased by the husband and he has a deed thereto made to himself and wife, as husband and wife, they become tenants by the entirety, and the presumption is that he took the deed as he did as a gift or provision for his wife. * * * Evidence to overcome this presumption must be clear, cogent, and convincing, as well as definite and positive." Although property has not been classified as "separate" property under the laws of Missouri a California decision has recognized property owned by the husband there as separate property. In Brunner v. Title Ins. & Trust Co., 26 Cal.App. 35, 145 P. 741, the court was considering a case in which the property had been acquired by the husband. A controversy arose as to the effect of a gift from the husband to the wife, whether it was a gift or a transfer of property to be held in trust. The court said (page 742): "According to the laws of the state of Missouri, where all of the money above mentioned was acquired by the defendant, that money and the proceeds thereof in any form, in the absence of any gift thereof by the husband to the wife, remain his separate property."

[6] In a number of cases the California courts have been called up to determine the status of property transferred to California from common-law states in which no provision is made for separate and community property, with the result that the California courts have recognized property in the ownership of one of the spouses in the common-law states as "separate" property. In Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343, the property involved was acquired by the husband and wife while they were domiciled in the state of Montana. The court held that (page 2) "under the laws of that state, it was the husband's separate property, subject only to the wife's dower rights". In Estate of Warner, 167 Cal. 686, 140 P. 583, the court reversed a judgment in which certain lands had been held by the trial court to be community property. Warner had resided in Illinois, where there is no law of separate and community property, but where the wife has the common-law right of dower. From his own funds he purchased real estate in California. The court held (page 585): "It follows that the finding upon the status of the property in California was erroneous, for it is well settled that separate personal property, enjoyed under the laws of the domicile by one of the spouses at the time it was acquired, is not lost by its investment in real property in another jurisdiction where a different law is in force." In Estate of Arms, 186 Cal. 554, 199 P. 1053, the decedent, a resident of Illinois, had accumulated by his own efforts property in Illinois and in California. The court said (page 1056): "What has been said establishes the fact that the property which Harrison Arms accumulated and earned in Illinois, during coverture, was not community property of the marriage, but was his separate property. * * * Doubtless the incidents of ownership of separate property in Illinois are not precisely identical with the incidents of such ownership here, for the laws of the respective states relating to the use, enjoyment, disposition, and descent of property are not identical in all respects. But there is no substantial difference between the idea of separate property, as we understand it, and the conception of it prevailing in Illinois." In Shea v. Commissioner, 9 Cir., 81 F.2d 937, the court recognized as separate property certain property acquired through the efforts of the husband in Oregon, where there is no community property law. The court said (page 939): "So far as the petitioner's interest therein was acquired by descent or owned by him while he was domiciled in Oregon, it constituted his separate property under the law of Oregon which does not recognize community property. After the petitioner became domiciled in California, it remained his separate property under the law of California."

The general rule is concisely stated in 31 Corpus Juris, at page 16: "Property acquired by the husband in a common-law state or country, and there known and classified simply as his property, and in which the wife has no vested interest corresponding to her interest in community property, is, by the law of community, classified as his separate property with all the rights incident to that class of property under the law of community."

[7] We are not so much concerned with the name by which the property was known in the state of Missouri as we are with the incidents of the ownership in Mr. Allshouse. We must consider the essential rights which were vested in Mr. Allshouse at the time he acquired the property in Missouri. Although the property which came to decedent by gift from her husband was not specifically classified in Missouri as separate property, it nevertheless was possessed by him before the gift to his wife under ownership having "no substantial difference" from "the idea of separate property as we understand it". Since decedent died without issue and without disposition of the property by will or otherwise it now passes to the heir of her predeceased husband as provided in section 229 of the Probate Code.

The judgment is affirmed.

We concur: McCOMB, J., CRAIL, P. J.

GATES et al. v. WENDLING NATHAN CO. et al.

Civ. 1880.

District Court of Appeal, Fourth District, California.

June 25, 1938.

Rehearing Denied July 23, 1938.

Hearing Denied by Supreme Court Aug. 22, 1938.

1. **Appeal and error** ⚷853

Orders of trial court overruling demurrer to amended complaint and denying motion to strike out amended complaint were mere "interlocutory orders" which were not binding on reviewing court on appeal from judgment of nonsuit in favor of such defendant, and ground of demurrer and motion to strike could be considered by reviewing court de novo in determining whether or not a nonsuit was proper.

[Ed. Note.—For other definitions of "Interlocutory Order," see Words & Phrases.]

2. **Limitation of actions** ⚷199(1)

Where a defendant has pleaded the bar of statute of limitations, motion for nonsuit must be granted if the evidence shows the action to be barred.

3. **Limitation of actions** ⚷127(15)

Where complaint in death action which was filed within limitation period designated fictitiously named defendants but made no attempt to state causes of action against them, causes of action stated against such defendants which were alleged in amended complaint filed after expiration of limitation period to which bar of limitations was pleaded in answers were barred by limitations, and hence nonsuit as to such defendants was proper. Code Civ.Proc. § 340, subd. 3; § 474.

4. **Limitation of actions** ⚷127(2)

A bona fide attempt to state a cause of action against a party which fails by reason of some imperfection may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of statute of limitations in the interim.

5. **Death** ⚷39

Fact that one of plaintiffs in death action was a minor did not prevent running of statute of limitations to bar action. Code Civ.Proc. § 340, subd. 3.

6. **Appeal and error** ⚷932(1)

In death action, funeral expenses of deceased which were claimed as item of special damages would be assumed to have been included in general verdict awarding damages.

7. **Appeal and error** ⚷1004(3)

$4,586 general damages, exclusive of $414 special damages for funeral expenses, for death of decedent who left widow and children, was not so trivial as to shock conscience or require reviewing court to hold that trial court abused its discretion in allowing verdict to stand.

◆

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Lloyd Gates, by his guardian ad litem, Carrie Gates, and others, against Wendling Nathan Company and another, R. O. Deacon Lumber Company, and others, and Tom Jones and others, for the death of Elmer Gates who was killed when pinned between a load of lumber which slipped from a trailer from which it was being unloaded and a pile of lumber. From an adverse judgment in favor of plaintiff against R. O. Deacon Lumber Company and others, and from a judgment of nonsuit in favor of defendants, Tom Jones and others, the plaintiffs appeal.

Affirmed.

David E. Peckinpah, and Harold M. Child, both of Fresno, for appellants.

W. H. Stammer and Galen McKnight, both of Fresno, for respondents R. O. Deacon Lumber Co., Charles A. Dewey and George D. Farrar.

Nutter & Rutherford, D. R. Jacobs, and Stephen Dietrich, all of Stockton, for respondents Tom Jones, San Joaquin Lumber Co., W. H. Falconbury, and Mid-State Lumber Terminal.

HAINES, Justice pro tem.

On September 20, 1934, one Elmer Gates, who was at the time superintendent of the pole yard of the San Joaquin Light and Power Corporation at Fresno, was killed in an accident which occurred there in the course of the unloading of a truck and trailer, belonging to respondent R. O. Deacon Lumber Company and operated by respondents Dewey and Farrar. Gates was killed by being pinned between a load of lumber which slipped sideways from off the rear end of the trailer and a pile of cross-arm lumber which lay a few feet away from the trailer on that side.

It appears that the San Joaquin Light and Power Corporation had ordered from the Wendling Nathan Co., of San Francisco, a quantity of cross-arm lumber which was to be shipped by boat to Stockton and there transferred on the premises of the respondent Mid-State Lumber Terminal, a corporation, and the subsidiary of the respondent San Joaquin Lumber Company, to the trucks and trailers of the respondent R. O. Deacon Lumber Company, to be then hauled to Fresno. Respondent Jones is the manager of the Mid-State Lumber Terminal's yard at Stockton. Deliveries were to be made in that manner pursuant to contractual arrangements between the Wendling Nathan Co., the Mid-State Lumber Terminal and the R. O. Deacon Lumber Company. A shipment of cross-arms in lengths of 8, 10, 16 and 20 feet having been, in accordance with these arrangements, received at Stockton, was brought under a crane of the Mid-State Lumber Terminal and there assembled in truck and trailer loads under Jones' supervision by employees of San Joaquin Lumber Company. Dewey was in immediate charge of the truck and trailer here involved and Farrar was his helper. Both were employees of the R. O. Deacon Lumber Company. Dewey drove the truck and trailer under the crane and by the use of the latter, employees of the San Joaquin Lumber Company, under Jones' direction, proceeded in a single operation to pick up the whole trailer load and place it on the trailer. The trailer had a capacity of about 34,000 pounds. When the trailer was loaded, Dewey, with Farrar's help, chained the load to the trailer bed with a chain on each end of the lumber. The cross-arm material making up the load was of the varying lengths mentioned. On the extreme left side there was on top a group of pieces in dimensions of 4 inches by 6 inches with a length of 20 feet, piled above a group of pieces 4 inches by 6 inches and 16 feet long. Dewey says that he did not notice that there was more weight on the left side of the trailer than on the right. Dewey and Farrar proceeded to drive the truck and trailer, both loaded, to Fresno and into a shed in the pole yard of the San Joaquin Light and Power Corporation where cross-arm stock is kept. This building has a length of about 200 feet from west to east and a width of 60 or 70 feet. A narrow gauge railway runs through the center of the shed the long way. This is double track for part of the distance from west to east and for the rest of the way merges into single track. Dewey drove in from the west and stopped with his trailer straddling the southerly track near the point where the two tracks merge. There were piles of lumber on both sides. On each side of the trailer these were from 6 to 8 feet away from it. The method of unloading the trailer is to dump the load as a whole to the rear. For this purpose various items of equipment are provided. Legs are put down on either side of the frame under the rear end of the trailer to keep the latter from tipping up in front when the load is shifted backward. These legs consist of pieces of pipe about 30 inches long hinged at the top so as to swing down, and when so swung down there are "shoes" at the bottom about 8 inches square. When the legs are let down the shoes hit the rails. The latter are an inch or an inch and a half wide at the top and on either side of the rail is placed a block of lumber to widen the base on which the shoe rests. The rails rest on their own ties. In addition to these legs, the trailer is equipped with a roller at the rear with keepers or bearings at intervals across the back of the truck to keep the roller in place. These are bent inward to confine the roller but do not go completely around it because it is necessary to keep the top of the roller free. The roller is made to revolve by the use of 4-foot bars that fit into holes at its ends and, by the use of these bars, the load is rolled backward by man-power until when it has been shifted sufficiently to the rear, the trailer is pulled forward so as to release the front end of the load and drop the same to the ground. While this unloading is going on the front chain is released entirely from the load, whereas that in the rear, though free from the rack, is left loosely around the lumber to prevent the load from spreading. After the load has been rolled back about 3 feet the second chain is placed more tightly around it to keep it together when it drops.

On the occasion of the accident, according to Dewey, the deceased, Gates, cautioned him to put this last-mentioned chain about the load, to which he answered "We always do." The two men then walked along the left side of the trailer and truck to the cab of the latter, where Gates signed a tag. Dewey did not, just then, see anything more of Gates, but himself walked to the back end of the trailer and proceeded to roll the lumber off. He found Farrar there rolling the load. It had already been rolled back for the customary 3 feet preparatory to placing the confining chain about it. This was placed there by Dewey and Farrar. Then Dewey started to roll the load on back. Farrar stepped "along side the trailer about midway of the trailer". Dewey, in operating the bar in the roller, was standing on the left side of the trailer and about a foot and a half away from it facing "southeast", which would mean that he must have been looking diagonally across it toward the front. He was aware of Farrar's presence farther forward on the left side, but noticed nobody between himself and Farrar. His description of what next occurred is as follows:

"As I was rolling the lumber back, and the front end started to leave the trailer bed, I glanced up and seen the load coming towards me. I turned and ran towards the back end of the trailer, of the lumber, and I held my left hand out, and the lumber came over against me. It pushed me away from the lumber, and as I neared the back end of the load, why I was knocked down."

He says that when the lumber started to come toward him he had "rolled it back about where it balanced over". The lumber "did not start to tip off as it usually does; it started to raise off the bed of the truck as it usually did, and suddenly, why I just glanced up and it started towards me". He did not at the time hear any breaking of timber or of anything else. There was no warning to tell him that anything was breaking or coming toward him. The timber that braces the bed of the truck is broken on the left-hand side but he did not hear it crack or break. As he turned and ran back some of the lumber struck him. He had noticed no shifting of the lumber while he was hauling it. When he got up after being knocked down he saw a man "caught in there". That was when the load was almost up against the pile of cross-arms to the north. Dewey called to the power men who were running up to drive the truck forward and release the man who was caught, but he actually ran and got into the cab himself and drove the truck ahead "and the lumber fell down, and when it fell down off the corner of the trailer it straightened up somewhat and it released the man".

As appears from other testimony, the man turned out to be Gates, and was dead when released.

Farrar testified that he had not noticed Gates' presence. When the load tipped he was a foot and a half to two feet away from the trailer, at about its center on the left side. He was there watching the load slip back. The next thing he remembers is that the load started to come toward him. He heard no noise or cracking or breaking. When he saw the lumber coming toward him he turned and ran. He dodged north through an opening between the piles of cross-arms and ran clear outside the shed. Then he heard Dewey call out that there was a man caught. When the truck was pulled up Gates was released and the power company's employees carried his body out. After the lumber was off Farrar noticed that the beam was broken on the back of the trailer, that is, on the left side in the rear. The roller was tipped up in a slanting position.

One Sawyer, a subordinate of Gates, testified that he had given directions to the truck driver (Dewey) just where to stop when he entered the shed. Sawyer was outside the shed at the moment of the accident engaged in carrying out some directions of Gates but came in and helped carry Gates' remains away.

One Brock, garage foreman and equipment man from the San Joaquin Light and Power Corporation, made an examination of the cross sill on the trailer just after the accident to determine what caused it to break. It seems clear that it had broken through some excessive strain or load. With reference to the weight distribution he noticed that there was 20-foot cross-arm material piled on top at the left side of the load which would produce an overhang at the rear end and indicate excessive weight on that side. That was the side where the broken cross sill was. A load so placed would create more weight on the rear of the lumber at the time of unloading than when merely at rest. When at rest the weight will be distributed with some uniformity over all the cross sills of the body. There are two iron braces on each side of the rear end of the trailer chassis with insets in the sill. This he says is not safe construction because whenever any excessive strain is placed on one of these recesses or built-up portions of the sill a break is likely to occur there. Such a break at such a particular point did occur in this instance. Under normal conditions he thinks the roller was safe enough. When loads varied in weight, however, from one side to the other he thinks there should have been some locking device to hold the roller securely to the cross beam. This witness thought the excess length of the 20-foot cross-arms over 16-foot cross-arms produced an overhanging load of about 600 pounds, and that this excess weight on one side was enough to cause the accident. There is, according to him, a greater strain on the back of the trailer in unloading than in transportation.

One Howard, a builder of trailers, testified that the method of installation of the roller adopted by respondent R. O. Deacon Lumber Company is the one generally accepted.

The present action is prosecuted by Gates' heirs, consisting of his widow and two sons, one of whom is a minor appearing by his guardian ad litem, to recover the damages sustained by them in consequence of Gates' death. The original complaint was filed on November 1, 1934. The only defendants designated therein by their true names were the Wendling Nathan Co., the R. O. Deacon Lumber Company, Valley Lumber Company, Dewey and Farrar, but there were five fictitiously named defendants sued, and on February 3, 1936, summons was served on respondents Tom Jones, San Joaquin Lumber Company, W. H. Falconbury and Mid-State Lumber Terminal as constituting defendants originally sued under said fictitious names. Falconbury is president of the San Joaquin Lumber Company. As against these last four defendants, however, who, as just seen, were, if designated at all in the original complaint, designated only by said fictitious names, there was, in the original complaint, no attempt whatever to state any cause of action, all that was therein said about them being that their true names "are unknown to plaintiffs and plaintiffs sue them by their respective fictitious names as herein set forth and pray that the true names of said defendants, when ascertained, may be inserted herein together with their appropriate charging allegations". After service, however, of process on these four defendants, the plaintiffs, that is the present appellants, filed on April 9, 1936, an amended complaint in which these defendants, as well as the defendants originally designated by their true names, were all charged in apt terms with negligence proximately contributing to Gates' death. The said four last-named defendants demurred to the amended complaint setting up the bar of subdivision 3 of section 340 of the Code of Civil Procedure and repeatedly moved to strike out the amended complaint in so far as it affected them. Their demurrer was overruled and their motions to strike denied. In their answer they again pleaded the same statute of limitations. The court, however, eventually granted a motion for nonsuit made in their behalf "by reason of plaintiffs' failure to prove a sufficient cause" and judgment was entered in their favor accordingly. The court dismissed the case as to the Valley Lumber Company and Wendling Nathan Co. upon hearing the opening statement of counsel for the plaintiffs (appellants) as to what could be proved against them. With respect to defendants and respondents R. O. Deacon Lumber Company, Dewey and Farrar, the case was tried upon appropriate pleadings and a verdict against them in favor of plaintiffs and appellants in the sum of $5,000 rendered, upon which judgment was in due time entered. Plaintiffs and appellants, that is, the Gates heirs, appeal from the judgment in their favor as against the three last-named defendants, complaining of its insufficiency and from the judgment of nonsuit entered in favor of Jones, San Joaquin Lumber Company, Falconbury and the Mid-State Lumber Terminal. No complaint is made of the dismissal of the action as to Wendling Nathan Co. and Valley Lumber Company.

[1] The orders of the trial court overruling the demurrer to the amended complaint of the four respondents, Jones, San Joaquin Lumber Company, Falconbury and Mid-State Lumber Terminal, and denying their repeated motions to strike out that pleading were, of course, mere interlocutory orders and in no way binding on this court in its consideration of an appeal from the judgment of nonsuit, and there is no reason why, in considering whether or not a nonsuit was in order, the applicability of the statute of limitations pleaded may not be here passed on de novo. In other words, the trial court's rulings on the demurrer and motion to strike have in no sense become res judicata.

[2, 3] The record fails to disclose in detail the grounds upon which the motion for nonsuit in behalf of the respondents Jones, San Joaquin Lumber

Company, Falconbury and Mid-State Lumber Terminal was made. The reason assigned by the court for granting it has already been referred to. In our opinion, regardless of the reason that the trial court actually gave for granting the motion, its action must, in so doing, be sustained for the reason that appellant's right to maintain this action against all or any of these four respondents is clearly barred by subdivision 3 of section 340 of the Code of Civil Procedure fixing one year as the limit of time within which an action may be commenced for the death of one caused by the wrongful act or neglect of another. It is settled that when a defendant has pleaded the bar of the statute of limitations a motion for nonsuit must be granted if the evidence shows the action to be barred. Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Bass v. Hueter, 205 Cal. 284, 270 P. 958; Wrightson v. Dougherty, 5 Cal.2d 257, 54 P.2d 13. Regardless, therefore, of what the trial court's theory was in granting the motion for nonsuit, the circumstance that as against these four respondents the statute of limitations constitutes a bar is sufficient reason for sustaining the judgment.

[4, 5] These respondents make the point that the record shows that they were not parties whom appellants, when they filed the action, had in mind at all as possible defendants, that the permission given by section 474 of the Code of Civil Procedure to sue parties whose names are unknown, by fictitious names, and to later amend by substituting their true names, ought to be held to authorize such substitution only when, in filing the case, the identity of the intended defendant is known and only his name unknown. Citing Town of Hancock v. First National Bank of Oxford, 93 N.Y. 82, 85. This is a most interesting question, but we do not think it necessary for us here to determine it. Assuming, without deciding, that these four respondents can be treated as having been persons originally sued herein under fictitious names, the fatal weakness in appellants' present effort to pursue them is that until after the bar of the statute of limitations had been interposed no attempt whatever was made to state a cause of action against all or any of them. We are not, of course, unmindful of the settled rule that a bona fide attempt to state a cause of action against a party, which fails by reason of some imperfections, may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of the statute of limitations in the interim (Ruiz v. Santa Barbara Gas & Electric Company, 164 Cal. 188, 194, 195, 128 P. 330; Rauer's Law, etc., Co. v. Leffingwell, 11 Cal. App. 494, 105 P. 427), but we have yet to read of a case where the running of the statute has been held to be avoided by filing a complaint wherein a defendant is designated by a fictitious name and the only allegations as to him are that the plaintiff is ignorant of the defendant's true name and, when he knows it, will amend by substituting it, and at that future time make some charge against such defendant. Yet that seems to us precisely what appellants, as to these four defendants, have attempted here. If procedure of that description can be tolerated, all statutes of limitation might as well be at once and forever repealed. The further contention that the statute has not here run because one of the plaintiffs is a minor is squarely answered by the opinion of this court in Haro v. Southern Pacific R. Co., 17 Cal.App.2d 594, 595, 62 P.2d 441, following Sears v. Majors, 104 Cal.App. 60, 285 P. 321. In our opinion the foregoing considerations are decisive of the present appeal in so far as the four respondents referred to are concerned and no useful purpose would be served by pursuing the inquiry as to what their liability might or might not have been had appellants seasonably attempted to state a cause of action against them.

No appeal has been taken by the defendants R. O. Deacon Lumber Company, Dewey and Farrar or any of them from the $5,000 judgment entered in pursuance of the jury's verdict against them, but the only appeal from that judgment is taken by the plaintiffs. Their complaint, in so far as these respondents are concerned, is that the award of damages was inadequate. The record shows that plaintiffs and appellants, before taking their appeal, moved the court for a new trial and that their motion was denied. Two of the grounds stated in their notice of motion were "insufficiency of the evidence to justify the verdict" and "insufficiency of the evidence to justify the verdict in that said damages awarded were inadequate". These three last-named respondents now make the point that the evidence is insufficient to have justified any verdict establishing any liability against them and that for that reason the damages awarded against them cannot possibly be inadequate. As indicating the proper course to be taken in these circumstances by the court appellants refer us to the case of Lambert v. Kamp, 101 Cal.App. 388, 281 P. 690, where the judgment was, for the reason given, affirmed, and to the case of Bencich v. Market Street Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398. The last-mentioned case was one in which, though a motion for new trial had been denied below, the Appellate Court deemed the record to show that the jury must have fixed damages that were inadequate, not from considering the extent to which the appellant was damaged, but through some compromise between the views of persons who believed that the respondent was not to blame for the injury at all, and those who believed it liable and would, but for such compromise, have fixed the award at a sum commensurate with the damages shown. In that case the inadequacy of the award was clear from the circumstances that so much of it would obviously be accounted for by the special damages shown, as to leave an unsubstantial sum to cover the general damages. In these circumstances the judgment was reversed and the case remanded to the superior court for retrial on all the issues joined.

This court has recently had occasion in Wallace v. Miller, 78 P.2d 745, hearing denied by Supreme Court on June 17, 1938, and in Zeller v. Reid, 79 P.2d 449, to discuss the bearing of Bencich v. Market Street Railway Company, as respects the course to be taken when a plaintiff, after denial in the superior court of his motion for new trial, has on appeal urged the insufficiency of the damages awarded. In Wallace v. Miller it was mathematically demonstrable from the fact that the award was in the exact amount of only one of the items of special damage proved, that the jury had ignored other special damages shown without conflict in the evidence and had made no award of general damages at all, although these too had appeared without conflict to have been sustained. This court held that in these circumstances there had manifestly been no agreement on the question of liability but some compromise on that subject resulting in a verdict which, if there were any liability, was plainly inadequate. In that situation a retrial upon all of the issues was ordered. However, in that connection this court said (page 748):

"We find nothing in the case of Tripcevich v. Compton, Cal.App., 77 P.2d 286, that necessarily conflicts with the conclusions we have reached. The court there merely held that on the record before it the trial judge did not abuse his discretion in granting a new trial on the question of damages only.

"As far as appears from that opinion, the damages awarded were general and there were no special damages involved, especially special damages concerning the amount of which there was no controversy. Setting the amount of general damages involves an exercise of a rather broad discretion on the part of the triers of fact in reaching a just conclusion as to the amount that will compensate an injured party for the loss suffered. This is a question upon which there is often, we might be justified in saying, frequent, divergence of honest opinion in cases where there might be no difference of opinion on the question of liability. While the amount of general damages awarded should always have a reasonable relation to the loss suffered, there of necessity can be no fixed rule of the exact measure of general damages to be awarded for somewhat similar injuries. The facts of each case and the sound discretion of the triers of fact should be permitted to govern the award of general damages in practically all cases. It is only in a case where the amount of the award of general damages is so disproportionate to the injuries suffered that the result reached may be said to shock the conscience, that an appellate court will step in and reverse a judgment because of greatly excessive or grossly inadequate general damages."

In Zeller v. Reid, supra, this court had before it a situation wherein a jury had awarded damages in the sum of $1,000 to a plaintiff for the death of her minor son. This court there said (page 451): "We can find nothing in the evidence that would force the conclusion that the verdict in this case was the result of a compromise on the part of the jurors or indicating that some of them had surrendered their views on the questions of the negligence of defendants and the contributory negligence of Harold merely for the purpose of bringing in a small verdict under the rules announced in Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845, Bencich v. Market Street Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, and Wallace v. Miller, Cal.App., 78 P.2d 745. Rather it falls within the rule adhered to in Tripcevich v. Compton, Cal. App., 77 P.2d 286. The two lines of decisions are not conflicting and can be readily harmonized. See Wallace v. Miller, supra. Under the rule of the Tripcevich Case the trial judge exercised a reasonable discretion in granting a new trial on the question of damages only."

[6, 7] In the instant case the only item of special damages shown was $414, incurred for funeral expenses of the deceased. While the verdict does not specifically mention this item, it may be assumed to have been included in the $5,000 of damages awarded. This would have left $4,586 as the amount of general damages allowed. While it must be admitted that the allowance was not a liberal one, it is hardly so trivial that it can be said to shock the conscience or to require us to hold that in allowing it to stand the trial court abused its discretion.

For the reasons given the judgment of nonsuit is as to the defendants Jones, San Joaquin Lumber Company, Falconbury and Mid-State Lumber Company affirmed and the judgment entered upon the verdict is, as to the defendants R. O. Deacon Lumber Company, Dewey and Farrar, also affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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27 Cal.App.2d 480

HEINECKE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 11862.

District Court of Appeal, Second District, Division 2, California.

July 9, 1938.

1. Prohibition 🔑11

A writ of prohibition will not issue to restrain superior court from conducting hearing on order to show cause in contempt proceeding, over which it has jurisdiction, on assumption that it will render erroneous decision.

2. Prohibition 🔑11

A writ of prohibition will not issue to restrain act of inferior tribunal, having jurisdiction over subject matter, on assumption that it will rule erroneously.

3. Prohibition 🔑9

An application for writ of prohibition to restrain superior court from conducting hearing on order to show cause why petitioner should not be punished for contempt in failing to comply with certain provisions of property settlement agreement with his former wife must be denied pending continuance granted by such court, where there is nothing to indicate what action it will take when petitioner's objections are presented to it, as District Court of Appeal will assume that former court's rulings will conform to law and facts shown at time of hearing.

WOOD, J., dissenting.

Original proceeding by Charles W. Heinecke for a writ of prohibition to restrain the Superior Court in and for the County of Los Angeles from conducting a hearing on an order to show cause why petitioner should not be punished for contempt in failing to comply with certain provisions of a property settlement agreement between him and his former wife. On demurrer to the petition.

Demurrer sustained, application for writ denied, and alternative writ discharged.

Jerrell Babb, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Asst. Co. Counsel, and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain respondent Superior Court from proceeding to hear an order to show cause why defendant should not be punished for contempt for failure to comply with certain provisions of a property settlement agreement executed by him and his former wife. A demurrer has been filed to the petition.

The material facts alleged in the petition are:

August 15, 1932, petitioner was named as defendant by his wife in an action for divorce. September 9, 1932, petitioner and his wife entered into a property settlement agreement. September 30, 1932, petitioner filed an amended cross-complaint for divorce in the action instituted against him by his wife, and after default was duly entered to the cross-complaint he obtained an interlocutory decree of divorce on October 19, 1932, which contained with reference to the property settlement agreement of the parties the following order:

"It is hereby further ordered and decreed that the property settlement agreement made and entered into between the parties to this action on the 9th day of September, 1932, be made and is a part of this Interlocutory Judgment of Divorce."

August 31, 1934, a final decree of divorce was entered which contained this provision:

"It is further ordered and decreed that wherein said interlocutory decree makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto."

April 5, 1938, there was issued from respondent court and directed to petitioner an order to show cause why he should not be punished for contempt for failure to comply with certain provisions of the property settlement agreement above mentioned. April 25, 1938, the return date in the order to show cause, the following minute order was entered upon the records of the clerk of respondent court:

"Monday, April 25, 1938

"Department 8

"Present: Hon. Leslie E. Still, Judge; G. H. Pratt, Deputy Clerk; Lou Breker, Deputy Sheriff; and the following proceedings were had:

"D 106028

"Margaret E. Heinecke vs. Charles W. Heinecke

"Order to show cause re contempt comes on for hearing; Meserve, Mumper, Hughes *& Robertson* appearing as attorneys for the plaintiff and the defendant present with his attorney, Jerrell Babb. E. N. Frankenberger, Reporter from 2:15 P. M. to 3:00 P. M. Defendant is sworn and testifies. On defendant's promise to make the payments, order to show cause is continued to May 25, 1938, at 2:00 P. M. Defendant is ordered to return if he has not paid plaintiff 20 per cent of his salary. All future payments are to be made through K. J. Scudder, Court Trustee."

[1, 2] This is the sole question necessary to be determined:

Will a writ of prohibition, predicated upon the assumption that the Superior Court will render an erroneous decision, issue to restrain said court from hearing an order to show cause in a contempt proceeding over which it has jurisdiction?

This question must be answered in the negative. A writ of prohibition will not issue to restrain the act of an inferior tribunal where it has jurisdiction over the subject matter based on the assumption that the inferior court will rule erroneously. Benvenuto v. Superior Court, 181 Cal. 293, 184 P. 672; In re Estate of Turner, 181 Cal. 467, 468, 185 P. 171; Dady v. Superior Court, 1 Cal.App.2d 581, 583, 36 P.2d 1092; 50 Corp.Jur. (1930) 681, sec. 54.

In Benvenuto v. Superior Court, supra, our Supreme Court in denying an application for a writ of prohibition thus states the rule:

"We deem it proper to say that this denial is without reference to the merits of the legal question attempted to be presented by the application. Regardless of all other questions, we cannot assume to anticipate the action of the trial court on the application for confirmation of the attempted sale referred to in the petition."

In Dady v. Superior Court, supra, a proceeding for a writ of prohibition, Mr. Justice Hahn speaking for this court said at page 583, 36 P.2d at page 1092:

"We may not in a proceeding of this character anticipate that the court's decision will be contrary to the law and the facts as they appear at the examination. [Citing cases.]"

[3] From the record before us it appears that respondent court issued an order to show cause why petitioner should not be punished for contempt for failure to comply with certain provisions in a property settlement agreement. At the time set for the hearing upon this matter petitioner appeared and agreed to make certain payments, whereupon the matter was continued to a future date for hearing and petitioner ordered to return at said time. There is nothing to indicate what action the respondent court will take when the objections

urged here by petitioner are presented to it, and this court will assume in the absence of a showing to the contrary that the rulings of the Superior Court will conform to the law and the facts as they are made to appear at the time of the hearing.

Applying the rule of law above stated to the foregoing set of facts, it is apparent that the petition fails to state sufficient facts to warrant the issuance of a writ of prohibition.

For the foregoing reasons the demurrer to the petition is sustained, the application for a writ of prohibition is denied, and the alternative writ heretofore issued is discharged.

I concur: CRAIL, P. J.

WOOD, Justice.

I dissent. In my opinion the court was without jurisdiction to order petitioner to make the payments to the court trustee or to return to court if the payments should not be made. Baxter v. Baxter, 3 Cal.App. 2d 676, 40 P.2d 536.

27 Cal.App.2d 253

In re GRAFMILLER'S ESTATE.

STEARNS et al. v. WATERLAND.

Civ. 6099.

District Court of Appeal, Third District, California.

June 23, 1938.

1. Executors and administrators 🔑33

The probate court or judge thereof is not required to accept resignation of executor, but the moment a resignation in writing is filed, it becomes an established fact, and is not subject to withdrawal or dependent upon acceptance by probate court or any judge thereof. Pol.Code, § 996; Probate Code, § 520.

2. Executors and administrators 🔑467

The word "may," within statute providing that if resigning executor fails to properly render an account probate court may take certain action, must be construed as mandatory, where it appears that rights of third parties are involved. Probate Code, § 520.

[Ed. Note.—For other definitions of "May," see Words & Phrases.]

3. Executors and administrators 🔑37(4)

Orders failing to appoint an alternate executor of an estate, and refusing to revoke letters testamentary theretofore issued to an executor who filed a written resignation, were appealable. Probate Code, §§ 520, 1240.

4. Executors and administrators 🔑33

Where executor filed a written resignation and at executor's request another filed a petition for his appointment as executor and subsequently executor gave notice of withdrawal of his resignation as executor, probate court had but one duty to perform, and that was to require executor who had resigned to account and appoint his successor. Probate Code, § 520; Pol.Code, § 996.

5. Executors and administrators 🔑1

While "executors and administrators" are not public officers in sense that they are charged with sovereign powers, they are not mere employees, but are "officers" without being invested with sovereign powers, and statutes relating to officers' bonds apply to them. Probate Code, § 520; Pol. Code, § 996.

[Ed. Note.—For other definitions of "Administrator," "Executor" and "Officer," see Words & Phrases.]

6. Executors and administrators 🔑33

The Legislature intended same construction to be given to statute specifying when an office becomes vacant as to statute authorizing an executor or administrator to resign his appointment by writing filed in superior court to take effect upon settlement of his accounts, relative to effect of a written resignation, where, prior to enactment of statute, executors and administrators were denied right to resign without receiving permission of appointing power, and same rule prevailed as to public officers until enactment of statute. Probate Code, § 520; Pol. Code, § 996.

7. Executors and administrators 🔑35(2)

When executor takes position of animosity and attempts to deprive heirs and devisees named in will of any portion of estate upon a mere technicality, his appointment should be promptly revoked, since an executor or administrator occupies position of trust and confidence, and when he claims estate adverse to heirs and devisees of deceased, he can act neither fairly nor honestly. Probate Code, § 520.

8. Witnesses ⚷206

In proceeding for revocation of letters testamentary on ground of incompetency of executor, testimony of one of attorneys was not inadmissible on theory that it was confidential, where third person was shown to be present.

9. Executors and administrators ⚷35(15)

Evidence required revocation of letters testamentary given to executor on ground of executor's animosity and his apparent attempt to deprive heirs and devisees named in will of any portion of the estate on a mere technicality. Probate Code, § 520.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Laura Antoinette Grafmiller, deceased. From an order failing to appoint Albert E. Stearns as alternate executor of the estate of Laura Antoinette Grafmiller, deceased, he appeals, and from an order refusing to revoke the letters testamentary theretofore issued to Tyre H. Waterland, as executor of the last will and testament of Laura Antoinette Grafmiller, deceased, Annie Gertrude Van Tine appeals.

Reversed and remanded.

Johnson & Curtright, of Sacramento, for appellant Stearns.

Evan J. Hughes, of Sacramento, for appellant Van Tine.

Busick & Busick, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Two appeals are presented in this cause upon one transcript with separate briefs. Both causes of appeal, however, will be considered in one opinion. One appeal is by Albert E. Stearns, from the order failing to appoint him as alternate executor of the estate of Laura Antoinette Grafmiller, deceased. The other appeal is by Annie Gertrude Van Tine, from an order of the probate court refusing to revoke the letters testamentary theretofore issued to the respondent Tyre H. Waterland.

The record shows that on or about the 30th day of April, 1935, Laura Antoinette Grafmiller made and executed her last will and testament, disposing of all of her property, and naming the respondent executor thereof. Later on, by a codicil added thereto, Albert E. Stearns, the appellant, was named as an alternate executor in said last will and testament, to be appointed and act in the event that the respondent Waterland, could not, or would not, serve as such executor.

Laura Antoinette Grafmiller died on the 24th day of March, 1937, leaving an estate in the county of Sacramento, and in the county of Alameda, variously estimated as of the value of about $20,000. On the 12th day of April, 1937, respondent Waterland was appointed the executor of said last will, and letters testamentary were issued to him. He thereafter duly qualified as such executor and entered upon the duties as such executor. Thereafter, and on or about the 28th day of April, 1937, the respondent Waterland, by an instrument in writing, resigned his office as such executor. The instrument in writing is in the following words and figures, to-wit:

"I, the undersigned, heretofore appointed as executor of the estate of the last will and testament of the above named testatrix, do hereby decline to further act as such executor, and respectfully request that an order of this court be made accepting my resignation. Dated, this 28th day of April, 1937.

"[Signed] Tyre H. Waterland."

(We have omitted the title of court and cause.) This instrument in writing was filed with the clerk of the court.

On the 4th day of May, 1937, and at the request of Tyre H. Waterland, Albert E. Stearns filed a petition for his appointment as executor of the last will and testament of said deceased. On the 11th day of May, 1937, a substitution of attorneys took place. On the 10th day of May, 1937, respondent Tyre H. Waterland gave notice of the withdrawal of his resignation as executor, to the superior court and to the Honorable Peter J. Shields, as judge thereof; also, to Albert E. Stearns as his attorney.

The draftsman of the written resignation of Waterland just set forth herein appears to have been laboring under the impression that the common-law rule prevailed in this state, and that the acceptance of the resignation of Waterland was necessary that it might become effective. This, however, while once apparently the rule prevailing in this state, is no longer the law. Both the Political Code and the Probate Code provisions provide for an officer submitting a written resignation. Section 996 of the Political Code specifies when an office becomes vacant, only one of which we need mention as involved herein, to-wit: Upon the written resignation of the incumbent.

[1] Section 520 of the Probate Code, in so far as it is involved herein, reads: "An executor or administrator may resign his appointment at any time by writing filed in the superior court, to take effect upon the settlement of his accounts." The executor or administrator is given just one right by this provision of the Probate Code,—he may resign his office by a written instrument to that effect. The time of his being relieved from responsibility is simply dependent upon his filing an account of his administration, The probate court or the judge thereof is not required to either formally or otherwise accept the resignation. The very moment a resignation in writing is filed, it becomes an established fact, and is not subject either to withdrawal, or dependent upon an acceptance by the probate court, or any judge thereof.

[2] The probate court is by the same section given certain powers. If the resigning executor fails to promptly render an account, the section provides that the probate court may take certain action. Where it appears that the rights of third parties are involved, the word "may", here, must be construed as mandatory. Los Angeles County v. State of California, 64 Cal.App. 290, 222 P. 153; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 229 P. 1020.

A somewhat similar question was before this court in the case of Meeker v. Reed, 70 Cal.App. 119, 232 P. 760, in which the resignation of certain councilmen of the city of Santa Rosa was involved, and the question of acceptance of resignations was considered and passed upon. This court there said (page 762): "The argument of counsel takes up in extenso the question of officers de jure and de facto, which, however, for reasons hereinafter stated, we think unnecessary to consider. While other jurisdictions have held to a different rule, it appears to be the settled law of this state that a resignation takes effect immediately upon the date mentioned in the written resignation, filed as provided by law by the officer tendering his resignation. No acceptance is required. It is also the settled law of this state that if an officer, after tendering his resignation, continues to discharge the duties thereof, he does so as a de facto officer, and is not a mere usurper. This ruling is founded upon public necessity, and to prevent an hiatus in government."

In People ex rel. U. S. Webb v. Spencer M. Marsh, 30 Cal.App. 424, 159 P. 191, the effect of a written resignation and an attempted withdrawal thereof was considered. It was there held that the written resignation ipso facto terminated the officer's official position, and no withdrawal thereof could be had, as no acceptance by another officer was necessary. It may be here stated that both in the Reed Case and the Marsh Case, hearings were denied by the Supreme Court.

In the Marsh Case a district attorney by the name of D. V. Mahoney tendered his written resignation as district attorney of the county of San Diego. This resignation was in writing, and filed as prescribed by section 995 of the Political Code. Before his successor had been appointed Mahoney attempted to withdraw his resignation by serving notices upon the board of supervisors, stating his withdrawal, just as appears to have been attempted in this case by the serving of a notice of withdrawal. It was there held that under the provisions of section 995 of the Political Code, which provided for the filing of a written resignation, and not providing for any method of withdrawing the same, and there being nothing in the Code provisions requiring an acceptance by the appointing power, the mere fact that the appointment of Marsh was made after the attempted withdrawal of his resignation by Mahoney did not affect the validity of the appointment of Marsh as district attorney of San Diego county.

In the case at bar section 520 of the Probate Code does not provide any method of withdrawing a written resignation, nor does that section of the Code anywhere specify that the probate court must accept the resignation. As we have said, the probate court has simply the remaining power, the rendering a settlement of account. The section does not give the probate court, or judge thereof, any power either to accept or reject such written resignation. The fact that the written resignation of the respondent asked for the acceptance of his written resignation is only just so much surplusage.

In the case of People v. Marsh, supra, the opinion of which goes into the subject very extensively, it is held, that the common-law rule requiring acceptance by the appointing power, when a written resignation is presented, is no longer the law in this state; that the Code provisions specifying the act to be taken by the resigning officer, and not mentioning any acceptance as necessary by the appointing power, has eliminated the necessity of an acceptance, and the resignation takes effect without any such acceptance. The argument of the respondent that the acceptance of Waterland's resignation must have been made by the probate court before a successor could be appointed, even where acceptance was necessary, appears to be negatived in the case of Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 120 P. 767.

We find by an examination of the authorities that in states where the Code provisions are similar to ours, acceptance is unnecessary. State ex rel. Williams v. Fitts, 49 Ala. 402; Pace v. People, 50 Ill. 432; Gates v. Delaware County, 12 Iowa 405; State ex rel. Roberts v. Lincoln, 4 Neb. 260; State ex rel. Nourse v. Clarke, 3 Nev. 566; People ex rel. Hanrahan v. Board of Metropolitan Police, 26 N.Y. 316; Reiter v. State, 51 Ohio St. 74, 36 N.E. 943, 23 L.R.A. 681; State ex rel. West v. Breckinridge, 34 Okl. 649, 126 P. 806.

[3] The respondent raises the point that no appeal lies in these cases. However, section 1240 of the Probate Code, and especially the last clause thereof, is a complete answer to the respondent's objection that an appeal does not lie.

[4] Under the foregoing conditions, as shown by the record presented to the probate court, we think the court had but one duty to perform, and that was to require Waterland to account, and appoint his successor.

[5, 6] While section 996 of the Political Code may be held to refer specially to public officers, yet by parity of reasoning there seems to us to be no reason why the same rule of construction applied in section 996, supra, should not be held to govern our conclusions in interpreting section 520 of the Probate Code. Both sections are in derogation of the common law, and confer a right or privilege upon the person tendering his resignation which did not exist under the common law, to-wit: a right to resign without acceptance. As defined in 11 California Jurisprudence, page 214, executors and administrators, while not public officers in the sense that they are charged with sovereign powers, the Code provisions relating to bonds of officers, do apply to administrators and executors. To be sure, they are officers of the court, and the court is really the custodian of the estates of deceased persons, and the administrator or executor may be said to be mere stakeholders. Executors and administrators, while acting of course, are under the control and direction of the court. But that does not in any wise limit the provisions of section 520 of the Probate Code. Executors and administrators are not mere employees; they are distinctly officers without being invested with sovereign powers. As we read the cases, under the law as it existed prior to the enactment of section 520 of the Probate Code, executors and administrators were denied the right to resign or relinquish their positions without first having received permission of the appointing power. It seems that the same rule prevailed as to public officers until the enactment of section 996 of the Political Code. Therefore, it would seem reasonable to conclude that the legislature intended the same construction to be given to one section of the Code as to the other, relative to the effect of a written resignation.

The appellants in this case further urge that the respondent should be estopped from questioning the right of Stearns to be appointed executor of the last will and testament of Laura Antoinette Grafmiller. Having stood by and encouraged the appellant Stearns to make application for such appointment, it is urged that equitable principles should be applied, and the respondent denied the privilege of changing his position adversely to the interests of the appellant. The following cases lend support to the appellants' position: Bunting v. Willis, 68 Va. 144, 27 Grat. 144, 21 Am.Rep. 338; State ex rel. Williams v. Fitts, 49 Ala. 402; State ex rel. Ryan v. Murphy, 30 Nev. 409, 97 P. 391, 720, 18 L.R.A.,N.S., 1210; In re Robinson's Estate, 65 Cal.App. 588, 224 P. 765, in which Presiding Justice Conrey, quoting from an opinion of Judge Coffey of the superior court of San Francisco, used language which aids appellants' contention that irrespective of what we have heretofore said, the respondent Waterland should not be allowed to change his position or withdraw his resignation to the injury of Stearns whom he had voluntarily led to file a petition for appointment, and that the respondent should be estopped against interposing any objection to the appointment of Stearns.

The petition of Annie Gertrude Van Tine for the revocation of the appointment of Waterland is based upon not simply the allegations of fraudulent conduct on the part of Waterland, but also upon his apparent attempt to convert to his own use and ownership several thousand dollars of the moneys left by said deceased, where his alleged ownership thereto is decidedly questionable. The petition and the testimony hereinafter set forth shows not simply the animosity of the respondent Waterland, but his apparent attempt to deprive the heirs and devisees named in the last will and testament of Laura Antoinette Grafmiller, deceased, of any portion of the estate.

[7-9] It seems to us unnecessary to cite authorities when an executor takes the position as shown by the testimony in this case that his appointment should be promptly revoked. An executor-administrator occupies a position of trust and confidence, and when he claims the estate, as shown by the record, upon a mere technicality, adversely to the heirs and devisees of the deceased, no argument is required to show that he can neither act fairly nor honestly. His testimony, as well as the testimony which we have set forth herein, shows evasion, indirection and concealment, any one of which is a badge of fraud. During the course of his examination he admits the ownership of the money by the deceased, and yet claims ownership in himself, from the mere fact that the account of the deceased was placed in the bank in a certain manner so that he might be able to pay the bills of the deceased. The record shows that for a number of months prior to her death, Laura Antoinette Grafmiller was unable to go to town, and was unable to transact any business. We may also add, the record shows that she signed her name by a mark. Under such conditions she had her accounts in the bank arranged in such manner that Waterland might pay the bills as they came in. The testimony showing the incompetency of Waterland is quite lengthy, but we set it forth in full. We may here state that objection was made to the testimony of one of the attorneys, on the theory that it was confidential, but as a third person was shown to be present, the objection appears to us to be without merit. The testimony relied upon, and which we think demanded the revocation of the Letters Testamentary theretofore given to respondent Waterland, is as follows:

"A. Yes, this is the—it is my writing right there. 'No cash belonging to the estate excepting that collected from tenants of property'. That's my writing.

"Q. Were there any other bank deposits that you know of? A. None whatever except what I had. I know that is Laura's, but I didn't have anything whatever to do with it.

"Q. Do you intend to claim that money that Mrs. Grafmiller had in the Capital National Bank? A. Well, that's the future; I can't talk about that.

"Q. What are your intentions? Do you intend to claim that? When you said on this statement you gave to Mr. Johnson, 'No cash belonging to the estate except rents collected,' it was your intention to keep that money? A. That money was put in a sack and now it is in the Bank of America.

"Q. Mrs. Grafmiller was in poor health for some years before she died, was she not? A. What?

"Q. Mrs. Grafmiller was in poor health for a number of years before she died, was she not? A. About two years.

"Q. And how long was it that she couldn't get down town at all? A. Well, about two years and a half I went down with her. That was the first time she fell down. She fell down twice.

"Q. And didn't she tell you that was the reason for that account, so that you could draw the money out and pay bills? A. Well, I didn't write it. She had somebody write it, the two books.

"Q. I see. You had nothing whatever to do with it? A. Nothing whatever. Except it was given to me. I didn't ask for it.

"Q. When was it given to you? A. Well, I could give it to you exact here. The first was August 30, 1933.

"Q. That was the first deposit shown in the book? A. That was the first one that was put in the book for me.

"Q. For you? A. To take care of.

"Q. What? A. For me to take care of. Collections and like. After that I was doing all of the depositing and withdrawing, and so forth. Collections. On September the sixth, 1933.

"Q. And you had nothing to do with putting it in that form? A. Well, I was handling her money all the time, so I must have—sure, I had—

"Q. You always considered it her money? A. Sure, yes, sir, I did. The bank book will show it there. Yes, he (Mr. Van Tine) came over and asked questions, how much money did she have, and so forth.

"Q. And what did you tell him? A. I laughed.

"Q. Did you tell him there was going to be litigation? A. Litigation means nothing today.

"Q. Well, did you tell Mrs. DePoister on that occasion at your house that the reason for resigning was that Mrs. Van Tine was calling you a thief for keeping the $7,000.00? A. No, I knew too much to tell her on that. You can mark it down.

"Q. Well, what did she say? A. Well, you guys cut that out. I don't know about it. Why not cut it out?

"Q. Well, what was said about your resigning as executor? A. Well, you will have to ask those that talked about it. Wait a minute, just a second. When you are handling over $3,000.00 a year for a sick woman that was absolutely helpless—it run over $3,000.00 a year—paying it out. She had a doctor come there three times a week, a chiropractor. Her sister objected to it, but it was none of my business. She got it from me.

"Q. I am referring now to what you said to Mr. Johnson about there being money in the estate or no money in the estate? A. I didn't say either way.

"Q. Just what you wrote on this paper? A. Why certainly. I would be very foolish to say there wasn't any money in there because the bank book shows it.

"Q. Well, just how did you happen to write this here that you say is in your own handwriting after giving a list of the real property, no cash belonging to the estate?

"Mr. Busick: He had no cash he said. That's what he said.

"A. No cash belonging to the estate excepting that collected from tenants of property.

"(Testimony of Mrs. Ruby de Poister, deceased's niece):

"A. I said: 'I am up here as a friend and not an enemy', and I didn't understand the wording of the property and I wanted him to tell me about it, and so we got to talking and he said that Mrs. Van Tine wasn't—wasn't going to get a cent if he could prevent it. He is very bitter toward her.

"(The Court): How is Mrs. Van Tine related to Mrs. Grafmiller? A. Sisters.

"Q. What? A. Sisters.

"(Mr. Hughes): She is named as a residuary legatee. A. And he also said he had deeds to every piece of property and he wouldn't give anybody anything unless he wanted to.

"Q. Did he say anything about having resigned? A. He said he had resigned.

"Q. Did he state any reason for it? What did he say? Just tell the court what he said. A. Well, he said that Mrs. Van Tine had called him a thief on account of the $7,000.00 that was in the bank, and he was honest and he wouldn't stand that from anybody, and he was regusted—disgusted, rather, and he was going to get out. In fact, he had resigned, he said.

"(Testimony of P. H. Johnson, attorney):

"A. I wanted to see if Mr. Roifsen would be out there, the witness, the other witness to the will, was here, and I went around to his seat and asked him if the witness was here, and he said he was, and then he (Waterland), immediately said to me, 'There is going to be a bombshell in this case', and, of course, I didn't know what he meant, and I asked him what he meant by a bombshell, and he said, 'I meant just exactly what I said; there is going to be a bombshell in the case.' 'Well', I said, 'who is going to explode it?' 'Well, you will find out quick enough.'

"A. The first thing was the purpose for which he went to the office, was to sign the Letters Testamentary that had been granted, and prepare them for filing, and that was done, and then Mr. Waterland said again that there was going to be a bombshell in this matter, and I asked him what he meant by a bombshell, and he said: 'Well,' he said, 'old Miss Van Tine and George Van Tine thought they were—and the lawyers—that there was a whole lot of money in this estate, but that they were going to be badly fooled, because there wasn't any'. And then he pointed his finger at me and said, 'You are going to get stuck, too,' and at that point I proceeded to tell the gentleman, 'Never say that to me again,' and I told him very firmly—I didn't abuse him, but I told him never to make that statement to me in the office again, and then he commenced to talk about other things, and I said, 'The thing, now, that we want is an inventory of this estate,' and he talked about a couple of little lots up in North Sacramento, that the heirs could have them, they weren't worth anything, he didn't care, and laughed about it. He said there was a little property down at the Bay somewhere they could have if they wanted, he didn't care, and so forth, and I said, 'Well, now, what I want, Mr. Waterland, is an entire list of all the property that Mrs. Grafmiller possessed at the time of her death, in order that I may prepare and submit to the court, and also for appraisal, an inventory of the property of the estate.' He didn't make any reply to that, went on talking about other things, and I came back to it several different times, what I had to have; he was the only man that could give it to me, because if I didn't have the data I couldn't prepare the inventory. Then he pulled out of his inside pocket a little statement, this statement that is introduced in evidence, and he talked about this—And then I said to him, 'Is there any cash in this estate, Mr. Waterland?' And he said, 'Absolutely not', and I said, 'No cash at all?' 'No, there is no cash'. 'Well', I said, 'then, Mr. Waterland, you better write that on the statement', and he did so—that is his handwriting there —and then I looked at him and I said, 'Mr. Waterland, you—you don't intend to claim the money in the bank that you have stated to me is there, do you, as your own?' He said, 'That is exactly what I intend to do. Mrs. Grafmiller gave it to me before her death.' And I said to him, 'Well, she didn't give you anything in her will, did she?' And he didn't answer to that, and then he made some other remarks about the heirs in the case thinking there was a whole lot of money and they were going to get badly left, and there wasn't any money, and that if they wanted to see him he lived at such and such a place on Ninth Street, anytime they wanted to see him. I stated to him that was his privilege, if he wanted to claim that; that he would probably get in trouble. That was about the end of the conversation; he got up and left.

"Part Petitioner's Exhibit 1 written by Waterland:

" 'No cash belonging to the estate excepting that collected from rentals of property.'

"Q. What was stated at that time? A. Well, I again asked him for the inventory for the property of the estate so that I could prepare it—have the data to prepare the inventory, and he refused to give it to me, that is, he didn't give it to me; he had this statement, and at that time he showed me a bank-book, a cover of a bank-book—he wouldn't let me have the bank-book itself; he showed me the cover that time. Well, at that time I only saw the cover and I don't know whether it was the—it was the same book. It has the same number, because I wrote it down in my book at that time, 38364. He took the bank-book itself and kept the book and threw the cover over to me—and at that time I didn't see the bank-book itself, but I saw the cover, and written on it was '38364, Laura H. Grafmiller or Tyre H. Waterland'.

"Q. Now, when did you see Mr. Waterland again? A. Well, he also said at that time that he intended to resign, to get out. Well, I again advised him that I would have to have an inventory of the property so that—or the data, so that I could prepare an inventory of the property, and tried to get from him the—where the property was located, the description of the property, and all the property that she owned, personal and real estate, and after talking to him about that matter for sometime he said, well, that statement there was the only property she had, and I told him that it would be very hard for me to prepare an inventory from that; I would have to go to the records and see if I could find out the property she owned, and from other sources, and he again stated that he was going to get out, he was tired of it, he had two or three other little things he wanted to do, and that as soon as they were done, he was going to get out. Well, I again asked him for the inventory of the property, and he talked the same as he did before, about a few lots up in North Sacramento or around different places, and these heirs could have them, they weren't worth anything anyway; he didn't care anything about them, and they could have them. Then he stated again that this little list of the property that he had given me on this paper was all that he could give me, and that he was going to resign, he was going to quit. I said, 'Well, when are you going to do that, Mr. Waterland?' He said, 'Right now'; he said, 'I have resigned right now'. And then Mr. Curtright asked him if he wanted us to prepare a resignation for him, and he said he did. Mr. Curtright went into the other room, sat down at the machine and prepared this resignation, and brought it in and handed it to Mr. Waterland, and Mr. Waterland read it and signed it, and said that—asked us at that time to appoint Mr. Stearns, and that Mr. Stearns was a good man, and to file a petition to appoint him, that he was a good man and he would make a good executor, and got up and walked out. Well, on numbers of times, that is, three or four different times after the will was made, he always had this bank-book in his pocket, and he would come in and sit down at the desk and talk about the estate, and at least three different times he showed me this bank-book, and I asked him if that was the amount of cash that Mrs. Grafmiller had, and he always made the statement to me, 'Oh, yes, that is Laura's money, that is the money in the bank'. And at the first time I saw this book there was something like—that is, approximately—nine thousand dollars in the bank, and the last time I saw it there was between seven and eight thousand. Now, subsequent to that last time that I saw this book, when he came into the office, he wouldn't let me see the book. I asked him several times when I was trying to find out whether there was any cash in the estate or not, to let me see the book; he always had the book in his inside pocket, but he would take the book out, out of the cover, and hold the book and throw the cover over to me—wouldn't let me see the book, and from that time on I never saw the book, but I did see the cover, on the date that I have already testified to, and wrote down the number of the book, and what was on the back of the cover of the book. That is the envelope; I mean by the cover, the envelope enclosing the book. And he always spoke of the money in the estate as 'Laura's money'. I never at any time heard any claim by Mr. Waterland—As to his claiming any portion of this money, until the morning after the conversation in this courtroom on the twelfth of April, when I asked him if he intended to claim.

"Q. What did he say? A. He told me that he had an arrangement with Mrs. Grafmiller to draw out money out of the bank to pay the ordinary expenses of her illness, and her—the upkeep of her property, and so forth; that he was handling the entire estate, and that nobody else had any right to do anything with it, and that she wouldn't let anybody else handle the money but him, and that he had an arrangement whereby he could draw money sufficient to pay these debts as they would become due.

"Cross Examination:

"Q. All right, tell me. A. All right. When I discovered the fact that Mr. Waterland was going to claim some money that didn't—that I thought didn't belong to him, that belonged to the estate, then I told him that my duty, as far as his personal proposition was concerned, was at an end, that I wasn't representing him personally, but I was representing a man who was executor of the estate of Laura Grafmiller, and that, so far as I was concerned, that if he intended to do that, I didn't want to represent him any longer.

"Q. And Mrs. Grafmiller didn't tell you anything about the money that was on deposit in the Capital National Bank in the joint names of herself and Mr. Waterland? A. No, she didn't tell me it was deposited in the joint names, and she told me about her money and her property.

"Q. And— A. She told me the money that she had in the banks, and that it was her money, and that Mr. Waterland had an arrangement with her to pay the—approximately what money she had, and the property she had in different places—didn't give me any description—and stated that she had an arrangement with Mr. Waterland to pay the expenses, that he was attending to those things for her, and that the money was hers. She didn't tell me she had given any money to Mr. Waterland or intended to.

"Q. I will ask you if you ever asked Mr. Waterland to resign? A. I never did.

"Testimony of C. K. Curtright (attorney):

"The Court: What is the use? Mr. Johnson's testimony is as good as anybody's. Nobody is going to disprove him except to prove he was mistaken. The objection will be overruled. And your testimony would be the same as Mr. Johnson's? A. Yes, sir. The door was left ajar and I could hear the conversation, and the conversation Mr. Johnson testified to with regard to the resignation is substantially the conversation. He stated that he wished to resign. With Mr. Johnson, but overheard by me. Mr. Johnson came out and spoke to me—the door was still open; Mr. Waterland in the other room—'Can you prepare a resignation?' and I said 'Yes'. So I came through the door between the outer office and the inner office to get the form book from the shelf, which is near the door, and as I came in I stopped in the door and spoke to Mr. Waterland and said, 'Do I understand that you want us to prepare a resignation for you?' He said, 'Yes, that is correct'. So I took the form book off the shelf, took it into the next room, leaving the door open, typed up the resignation, leaving the signature line blank,—that was the only blank on the resignation,—took it in and laid it down almost in front of Mr. Waterland, and I had prepared a copy for him, and he signed the resignation in my presence without any request being made by anybody that he do so, and shoved the whole thing, the original, the copy, and the office copy across the desk to Mr. Johnson. And I went out. I said, 'You are Mr. Waterland, Mrs. Grafmiller's agent'. He said, 'Yes, I take care of all of her affairs out there'. And I am positive, and I remember this statement most distinctly; he said, 'Laura has plenty of money; Mrs. Grafmiller has lots of money; she doesn't have to worry about anything'. He said, 'I take care of all her affairs for her, and', he says, 'she has got it fixed down at the bank so I can go down there and, when anything is due, I can pay it'. He says, 'You know she is sick.' 'Yes', I said, 'I know that; and she can't get around'. And he says, 'Old George and Old Annie'—that is referring to Mrs. Grafmiller's sister and her husband,—'are always out there snooping around, but they won't get anything out of me. There is plenty of money down there; it is Laura's money, and I am going to take care of it. I am going to see she is taken care of; the rest of them don't do anything for her.'

"Testimony of Albert Stearns (Alternate Executor and Petitioner for Letters):

"A. Well, the most important, they had quite a talk over the signed papers, something like that—I didn't pay any attention, and there was something about some money in the bank, and referred to it in this way: Mr. Johnson says to him,—well, it was referred to as a joint account between Mr.—Mrs. Grafmiller and Mr. Waterland, and Mr. Johnson made the remark, something like this: 'You don't mean to say that you are going to claim that money?' 'Well, the bank says it is mine', he says; he says, 'I can draw every cent of it if I want to'. That was the conversation, exactly, or nearly, that way.

"Q. And I will ask you if you had any conversation with Mr. Waterland after Mrs. Grafmiller's death but prior to his appointment as executor? A. Yes.

"Q. And where? A. At my house, two or three times.

"Q. And what did Mr. Waterland tell you on that occasion about the administration of this estate? A. Well, I tried to—he told me that he was going to—he was going to get out. That is the conversation, mostly; and, of course, I was a—he was going to get out. I was a little on the alert to find out what property there was. I couldn't get very much information definitely as to what it was, and that was most of the conversation. On at least three different times he was at the house, or twice, anyway, prior to the time that he was appointed here.

"Q. How did you happen to be in the courtroom the day his petition came up? A. Why, Mr. Waterland told me it was coming up at a certain time, and that is the only way I had any notice of it; so I thought, 'Well, I better go down and see what is going on, maybe he might resign,' for he told me he was going to get out. I didn't know that he would.

"Q. Had he told you before you appeared that day in court that he would probably get out, or words to that effect? You state what he said. A. He made the remark at least twice that he was going to get out—

"Q. I see. A.—prior to that time.

"Q. He came to your house? A. Yes, he came to my house.

"Q. And the estate was discussed? A. Well, yes. I was trying to get a line on the property, if he was going to get out, and I couldn't get much out of it, only he said he was going to get out.

"Q. And you said you had been watching the estate because of the fact that Mr. Waterland told you he was going to get out? A. That was the idea, and when Mr. Johnson, told me he resigned, I supposed that was my duty as alternate, to apply.

"Q. Did he say anything about any animosity or difficulty with the heirs or the legatees? A. Well, yes, he said about some difficulty with the heirs.

"Q. Did he mention that to you? A. Yes, he did mention that to me, that there might be a disagreeable case, or something like that."

It follows from the foregoing that the orders of the probate court should be, and they are hereby reversed, and the cause remanded for further proceedings in accordance with this opinion and the provisions of section 520 of the Probate Code relative to enforcing a settlement of his accounts by the respondent Waterland, and the appointment of his successor.

We concur: PULLEN, P. J.; THOMPSON, J.

27 Cal.App.2d 293

Ex parte LYONS.*

Cr. 511.

District Court of Appeal, Fourth District, California.

June 24, 1938.

Hearing Dismissed by Supreme Court July 21, 1938.

1. Constitutional law 🔑**90, 274**

Freedom of speech and of the press, which is protected by the first amendment from abridgment by Congress, is among the fundamental rights and "liberties" protected by the due process clause from impairment by the states. U.S.C.A.Const. Amends. 1, 14; Const.Cal. art. 1, § 9.

[Ed. Note.—For other definitions of "Liberty," see Words & Phrases.]

2. Constitutional law 🔑**90**

Labor unions had right under constitutional guaranty of freedom of speech to attempt to force shop keepers to close on Sunday by a secondary boycott, consisting of peaceful picketing with placards, as against contention that such picketing was a private nuisance, and hence injunction against such picketing and imprisonment for contempt based thereon were improper. Civ. Code, §§ 992, 993, 3479, 3481; Code Civ.Proc. §§ 526, 731; U.S.C.A.Const. Amends. 1, 5, 14; Const.Cal. art. 1, §§ 1, 9, 13, 21.

3. Constitutional law 🔑**90**

The right to picket peacefully, under constitutional guaranty of free speech, is not confined to disputes between employer and organized labor over laws or conditions of employment, rate of pay, unionization, or employment of nonunion men, but extends to dispute concerning Sunday closing of shops, though such dispute is not a "labor dispute" as that term is generally understood. U.S.C.A.Const. Amends. 1, 14; Const.Cal. art. 1, § 9.

[Ed. Note.—For other definitions of "Labor Dispute Concerning Terms or Conditions of Employment," see Words & Phrases.]

4. Constitutional law 🔑**90**

The constitutional guaranty of free speech is not confined to labor organizations but is general and extends to every class or group of citizens. U.S.C.A.Const. Amends. 1, 14; Const.Cal. art. 1, § 9.

5. Constitutional law 🔑**90**

Under constitutional guaranty of free speech, the exact method used in conveying opinions to the public, whether publicly spoken or printed, is unimportant if opinions are conveyed peacefully, quietly, and without violating statute or ordinance. U.S.C.A. Const. Amends. 1, 14; Const.Cal. art. 1, § 9.

6. Torts 🔑**12**

A contracting party may not maintain action against third party who, with or without bad motive, induces other contracting party to breach the contract, where contract does not establish relation of master and servant, and third party uses no fraud, threats, violence, falsehood or deception, and receives no benefit to himself.

7. Constitutional law 🔑**90**

A secondary boycott peacefully and properly conducted is legal under the constitutional guaranty of free speech, whether enforced by peacefully displaying a newspaper headline or by conveying similar information on a banner or in letters. U.S.C.A.Const. Amends. 1, 5, 14; Const.Cal. art. 1, §§ 1, 9, 13, 21.

8. Contempt 🔑**54(4)**

The affidavit by which a contempt proceeding is instituted must state facts constituting the offense in order to support an adjudication of contempt.

9. Habeas corpus 🔑**22(2)**

Where complaint in suit to enjoin picketing of shops for purpose of compelling Sunday closing and affidavit in contempt proceeding to punish violation of such in-

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*Hearing dismissed by Supreme Court for lack of jurisdiction.

junction, merely charged peaceful picketing in aid of a secondary boycott, person imprisoned for contempt was entitled to habeas corpus for his discharge.

◆

Proceeding in the matter of the application of Frank Lyons for a writ of habeas corpus, to obtain relief from confinement under a contempt order.

Petitioner discharged.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for petitioner.

Victor H. Parry, of Bakersfield, for respondent.

MARKS, Justice.

Frank Lyons filed his petition in this court seeking release from confinement under an order finding him guilty of contempt of court and committing him to jail for a period of five days.

Clyde W. Rowlinson and Wayne Odom were copartners in a grocery store and vegetable market in or near the city of Bakersfield in Kern county, California. They conducted their business under the name "Riverview Drive In Market". They operated their store themselves except with the help of one occasional employee who worked about thirty hours a week. They rented space in their market to Bernard A. Daly and John F. Daly who conducted a retail meat market without the aid of any employees.

The Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 193, is an unincorporated association, known as a labor union, as is the Retail Clerks' International Protective Association, Local No. 137. G. Harold Woodard is secretary of the Butchers Local, and Wm. H. Bailey is the business Agent of the Retail Clerks Local.

Neither Rowlinson and Odom nor Daly and Daly had any agreement with organized labor. They had no dispute nor difference with organized labor concerning wages, hours or conditions of employment, unionization of employees, employing nonunion labor or any other matter that usually gives rise to labor troubles or differences. The only controversy was over the closing of their places of business on Sunday. In this respect this case is unique in American jurisprudence in so far as we are advised by counsel or can ourselves ascertain. We have found no case where a retail business establishment was picketed by a labor union representative to force Sunday closing.

Rowlinson and Odom and Daly and Daly kept their places of business open seven days a week. In January, 1938, they were approached by Woodard and Bailey as representatives of the two labor unions who requested them to close their places of business and to sign a contract to keep them closed from twelve o'clock midnight on each Saturday night to twelve midnight on each Sunday night. The shopkeepers refused to sign the agreement but did keep their places of business closed for four consecutive Sundays to test the practicability of such Sunday closing. They opened their shops for business at about seven-thirty o'clock on the morning of Sunday, February 27, 1938. At about ten o'clock a picket, or pickets, appeared bearing placards upon which appeared the words "Unfair," "Unfair to Organized Labor," and "Unfair to Organized Labor, Local No. 193". On and after March 3, 1938, pickets daily paced back and forth on the sidewalk bearing similar placards. There is no showing that the pickets did or said anything to anybody other than to silently bear the placards. They did not attempt to otherwise interfere with the shopkeepers, their businesses or customers or with anyone entering or leaving the premises. We are not informed of the number of persons engaged in the picketing except from the use of the plural, "pickets". Whether this is intended to mean more than one picket acting at the same time, or a relay of one picket following another on the same day, we do not know. It at least appears that on April 5, 1938, petitioner Frank Lyons was picketing alone.

On March 18, 1938, the shopkeepers filed an action in the superior court of Kern county seeking to enjoin the two unions, their officers, agents, employees and members (sued as John Does and Richard Roes) from continuing the picketing and to recover $607.50 actual, and $10,000 punitive damages. It is alleged that the grocery and vegetable business fell off $150 per week and the meat business $52.50 per week as a result of the picketing.

An order to show cause was issued and on April 2, 1938, a temporary restraining order was made restraining the picketing. As we have observed, petitioner was picketing on April 5, 1938. The restraining order was served on him. He refused to desist, was cited for contempt of court, found guilty of contempt and sentenced to confinement in the county jail for five days. This proceeding followed. There is no intimation that his action caused any disturbance or that he did anything other than what is known as "peaceful picketing".

There appear to be no Sunday closing or antipicketing ordinances in either Kern county or in the city of Bakersfield. There is no Sunday closing or antipicketing statute of the state of California applicable to the parties to this controversy. This case is simply one in which a group of citizens attempted to force the shopkeepers to close their places of business on Sundays. That the group composed the membership of two labor unions is unimportant. Union members have no greater right to attempt to force a place of business to close on Sunday than has any other group of citizens and at the same time no less right. We must measure the rights of the respective parties to the Sunday closing controversy by general principles, and in so far as the cases dealing with picketing in labor disputes announce those general principles, they are applicable here.

The plaintiffs in the injunction action base their hopes of success on those provisions of the federal and state Constitutions granting to every citizen the right to acquire, possess and enjoy property, and guaranteeing to him the equal protection of the laws of the land. Amendments 5 and 14 to the U.S.Const., U.S.C.A.Const. Amends. 5, 14; secs. 1, 13 and 21, art. 1, California Const. Petitioner bases his right, to peacefully picket, on the provisions of the first and fourteenth amendments to the federal Constitution, U.S.C.A. Const. Amends. 1, 14, and on section 9 of article 1 of the state Constitution which guarantee the unrestricted right of free speech. Thus we have here a recurrence, in a somewhat novel form, of that struggle between property rights and personal rights which has occupied the attention of the courts of the land since the organization of the Republic. The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech, and perhaps justly so, for free discussion contains the germ of progress which keeps flowing the blood stream of the Republic.

The rules governing these two rights are summarized in 11 American Jurisprudence, pages 1108, 1109, 1117, as follows:

"The people have protected not only their persons from unreasonable treatment by governmental authority by virtue of the Bill of Rights, but also their property. By virtue of the Fifth Amendment to the Federal Constitution and the provisions of the various state Constitutions it was early provided that the Federal, state, and local governments could not take private property for public use without just compensation. This power is further governed as to both the Federal and state authority by the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, as well as the provisions of the various state Constitutions, that no person shall be deprived of his property without due process of law. * * *

[1] "The Constitution of the United States and the Bill of Rights of many of the states contain prohibitions against the enactment of laws which would abridge the freedom of speech or of the press. * * * By virtue of later decisions of the Supreme Court, the rule has become firmly settled that the right of freedom of speech and of the press, which is protected by the First Amendment from abridgment by Congress, is among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states. * * *

"Not only is the freedom of speech and of the press protected from infringement by the legislative department, but it is also safeguarded from judicial abridgment. An essential element of the liberty of the press is its freedom from all censorship over what shall be published and exemption from control, in advance, as to what shall appear in print. Consequently, it has been asserted that the right of freedom of speech and the press cannot co-exist with the idea of preventing such freedom of speech or of the press by injunction. Thus, the right to boycott has been asserted under the constitutional guaranty of freedom of speech and of the press, and an instance is given where the authority to enjoin persons from exercising freedom of speech peaceably in assistance of a boycott has been vigorously denied." See Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann. Cas. 1165; Dailey v. Superior Court, 112

Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am. St.Rep. 160.

The cause of the plaintiffs in the injunction case must of necessity rest on the following reasoning: There is no law or ordinance prohibiting them from keeping their places of business open on Sunday. It was therefore their legal right to do so. In so doing they were entitled to the free use of their own property and the uninterrupted trade of their customers. The good will of their business was a part of their property which they were entitled to enjoy (secs. 992, 993, Civ.Code) and which is protected by constitutional guaranties. Good will has been defined "to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices. (Story on Part., Sec. 99.) * * * According to Lord Eldon it is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in." Bell v. Ellis, 33 Cal. 620. The actions of petitioner in picketing the places of business of the shopkeepers was for the purpose of compelling them to cease exercising their lawful right of doing business on Sunday. It interfered with their property right of having their customers do business with them freely. It caused them substantial and continued loss by injuring the good will of their business. It amounted to "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of * * * property" (Sec. 3479, Civ.Code) which constituted a nuisance. As the shopkeepers alone were damaged it constituted a private nuisance. (Sec. 3481, Civ.Code.) It was a continuing private nuisance. A continuing private nuisance that causes continuing damage to property may be enjoined. (Secs. 526, 731, Code Civ.Proc.) As defendants in the injunction action were guilty of maintaining a continuing private nuisance the trial court was fully justified in enjoining them. As petitioner knowingly violated the terms of the restraining order he was guilty of contempt of court and was properly punished for his contempt. Therefore, he should be remanded to custody.

[2] The foregoing arguments might be persuasive had not the courts of California established and clearly defined the right to peacefully picket a place of business in the case of a labor dispute, as generally understood, and the right to conduct a boycott and a secondary boycott. In view of those rules the foregoing arguments entirely lose their force and cannot be sustained. Of course we have here no labor dispute as that term is generally understood. However, we cannot conclude that fact sufficient to distinguish the cases in principle. In California there is no statute either prohibiting or permitting peaceful picketing, under the circumstances here involved, as is now the case in some jurisdictions. See Senn v. Tile Layers Protective Union, Local No. 5, 222 Wis. 383, 268 N.W. 270, 872; Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; Lauf v. E. G. Shinner & Co., Inc., 58 S.Ct. 578, 82 L.Ed. —.

[3-5] In this state the right to peacefully picket rests upon the constitutional guaranty of the right of free speech. We cannot see how the right to peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a dispute between an employer and organized labor over hours or conditions of employment, rate of pay, unionization of employees or employment of non-union men and not extended to a dispute between a business man and any citizen or group of citizens who may differ with him on a question of business policy. The guaranty of the right of free speech is general and extends to every class or group of citizens. As that guaranty is not confined to labor organizations, decisions in those cases announcing the principles upon which the right rests in the cases involving the ordinary labor dispute are important and controlling here. Because we have a difference of opinion on the question of closing a mercantile establishment on Sunday as the cause of the peaceful picketing, that fact should not make the rules announced in those decisions any less applicable. Citizens have just as much and no less right to differ on the wisdom of Sunday closing as they have to entertain different opinions on conditions of employment or rates of pay. The exact method used in con-

veying these opinions to the public is unimportant provided they are peacefully and quietly done in an orderly manner and not in violation of the provisions of a statute or an ordinance. As was said in Dailey v. Superior Court, supra (44 P. page 459):

[6] "It is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke, a citizen may speak, write, or publish his sentiments with equal freedom * * *."

It is settled in California that an action will not lie in favor of one contracting party against a third party who through bad motives, or otherwise, induces another contracting party to breach the contract where it is not one establishing the relation of master and servant and where the person causing the contract to be broken uses no fraud, threats, violence, falsehood or deception and receives no benefit to himself. Boyson v. Thorn, 98 Cal. 578, 33 P. 492, 21 L.R.A. 233. In other words in California, "a bad motive does not convert an act otherwise lawful into a ground of action". Parkinson Co. v. Building Trades Council, 154 Cal. 581, at page 594, 98 P. 1027, at page 1032, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, per Beatty C. J.

From the evidence before us it is clear that the unions sought to force the shopkeepers to close their places of business on Sunday by means of what has been termed a secondary boycott, that is, by attempting to induce by arguments (not by threats, coercion or intimidation), their patrons to transfer their business to other merchants.

[7] The legality of a secondary boycott, peacefully conducted and without picketing was sustained in the case of Parkinson Co. v. Building Trades Council, supra. In the concurring opinion of Mr. Justice Sloss, in this portion of which three other justices concurred, it was said:

"The injunction then, must rest upon the principle that it is unlawful, in an effort to compel A. to yield a legitimate benefit to B., for B. to demand that C. withdraw his patronage from A. under the penalty of losing B.'s services or patronage to which he has no contract right. That there are many cases sustaining the affirmative of this proposition is true. [Citing cases.]

"So there are many to the contrary. [Citing cases.] * * *

"Upon a consideration of the authorities, I think the sounder rule is that one who is under no contract relation to another may freely and without question withdraw from business relations with that other. This includes the right to cease to deal, not only with one person but with others; not only with the individual who may be pursuing a course deemed detrimental to another who opposes it, but with all who by their patronage aid in the maintenance of the objectionable policies. In other words, if the defendants violated no right of the Parkinson Company by refusing to work for it, they violated none by refusing to work for contractors who used material bought of Parkinson. Such refusal, as is shown in the opinion of the Chief Justice, and as is stated in the testimony of plaintiff's manager and principal witness, was the 'sum total of the interference' which was practiced or threatened. * * * I see no reason why workmen have not the same absolute right to dispose of their labor as they see fit. So long as they abstain from breach of contract, violence, duress, menace, fraud, misrepresentation, or other unlawful means, they may lawfully inflict such damage as results from the withholding of their labor or patronage. To quote again from Judge Holmes's opinion in Vegelahn v. Guntner [167 Mass. 92, 44 N.E. 1077, 35 L.R.A. 722, 57 Am.St.Rep. 443], 'If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.'

"The terms 'intimidation' and 'coercion,' so frequently used in the discussion of this question, seem to me to have no application to such acts as were here committed. One cannot be said to be 'intimidated' or 'coerced,' in the sense of unlawful compulsion, by being induced to forego business relations with A., rather than lose the benefit of more profitable relations with B. It is equally beside the question to speak of 'threats' where that which is threatened is only what the party has a legal right to do."

We next turn to the case of Jordahl v. Hayda, 1 Cal.App. 696, 82 P. 1079, in which the defendants picketed plaintiff's restaurant, the pickets carrying a banner on which was printed (page 1080), "Boycott. Fairwind Restaurant, declared an unfair restaurant by Cooks' and Waiters' Alliance, Local No. 220. Public is asked not to patronize the place." The trial court found on sufficient evidence that defendants had threatened and intimidated plaintiff's patrons and thus kept his trade away. The trial court enjoined defendants "from stationing themselves in the doorway of said restaurant or upon the sidewalk in front of the same and there interfering with the business of plaintiff by intimidation, insults, or threats to his patrons, thereby inducing persons not to patronize the restaurant of said plaintiff; and said defendants, * * * are hereby especially enjoined from in any manner interfering with the said business of plaintiff by means of threats or intimidation of any kind or nature, directed against the patrons or customers * * * of said plaintiff and from interfering by means of threats or intimidation with any person that may be working for plaintiff, or may desire to work for him in his said restaurant." This judgment was affirmed on appeal. It was not even contended that the carrying of the banner was in itself and standing alone, unlawful.

The Jordahl Case was cited with approval and quoted from in the case of Southern California Iron & Steel Co. v. Amalgamated Association, etc., Workers, 186 Cal. 604, 200 P. 1, which was a picketing case in which there was evidence of threats of violence and of intimidation. In deciding the case the Supreme Court said (page 4):

"From the foregoing authorities these principles may be deducted: In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services. Furthermore, it is lawful for the employee who has quit to peaceably persuade a fellow-employee to leave his position. Moreover, if there are a number of employees who have left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal. But where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals, are unlawful, and may be enjoined. However, it is not necessary to the enjoining, of such acts, that it be shown there was actual force or expressed threats of physical violence used. It was said in Allis-Chalmers Co. v. Iron Molders' Union (C.C.) 150 F. 155, 173, that 'Intimidation * * * includes persuasion by or on behalf of a combination of persons, * * * resulting in coercion of the will from the mere force of numbers.' The same rule is thus stated in Martin on Labor Unions, supra: 'Even a simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose.' * * *

"The judgment as entered, however, is too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business, and not for the purpose of intimidating employees of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business."

The judgment was modified so as to enjoin defendant from intimidating or coercing plaintiff's employees or those seeking employment. The portion of the judgment restraining defendants from hindering, in any manner set forth, plaintiff's business was stricken out. As modified, the judgment was affirmed.

The case that must be controlling here is Lisse v. Local Union No. 31, Cooks, Waiters, etc., 2 Cal.2d 312, 41 P.2d 314. In that case there was picketing and the display of headlines of newspapers in an effort to divert customers from the plaintiff's cafe. The Supreme Court modified the restraining order issued by the trial court so that it permitted peaceful picketing and only enjoined acts of intimidation and coercion. In connection with the display of newspaper headlines used in connection with the boycott, it was said (page 316):

"With respect to the display of the labor journal in front of respondents' place of business by appellants' representatives, it is of course true that the constitutional guarantee against abridgment of the freedom of the press carries with it freedom of circulation and sale of the publication (Ex parte Jackson, 96 U.S. 727, 24 L.Ed. 877), and obviously the fact that a newspaper may support and advocate the cause of a trades union in a controversy with an employer, and uses its columns and headlines to bring to the attention of the public the claim of the union that the particular business in question is being operated in a manner deemed unfair to labor, serves as no legal ground for interfering with the sale or circulation of such newspaper in the immediate vicinity of the place where such business is carried on, or elsewhere. But it is held in the case of Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 8 L.R.A.(N.S.) 460, 117 Am.St.Rep. 145, 9 Ann.Cas. 1219, that it is an invasion of the constitutional right to acquire, possess, and enjoy property, to place pickets in front of a place of business bearing placards and signs for the purpose of intimidating the patrons or employees of such place of business, and that such acts will be enjoined; and in the present case the trial court found, as already shown, that the display of said journal in front of respondents' place of business was not in good faith for the purpose of circulating or selling the same, and that said journal was not offered for sale in the usual and ordinary manner by newspaper vendors, but was displayed by appellants' pickets as a sham and subterfuge for the purpose of intimidating the patrons and employees of said place of business. It is evident, therefore, that the acts of appellants' representatives in displaying said journal in front of respondents' place of business in the manner and for the purposes found were brought within the rule of the Goldberg Case, supra, prohibiting the illegal display of signs and placards.

"The injunctive relief granted, however, was, in our opinion, too broad, for the reason that, not only do the terms thereof go so far as to infringe upon the constitutional right to freely circulate and offer said newspaper for sale upon the public streets, but under the law of this state, in the absence of contractual obligations, a trades union, besides having the right to call a strike, has the legal right also to carry on in connection therewith a boycott, both primary and secondary; and it is evident that the comprehensive terms of the injunction herein enjoin appellants from doing some of the acts which under the decisions of this state it may lawfully do in furtherance of a secondary boycott. As said in Pierce v. Stablemen's Union, 156 Cal. 70, at page 75, 103 P. 324: 'The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, in the discharge of one employee, the engagement of another—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employees may engage in a "boycott," as that word is here employed. As here employed it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion, to induce others interested in, or sympathetic with, their cause, to withdraw their social intercourse and business patronage from the employer.'"

We can find no sound legal distinction between attempting to enforce a secondary boycott by means of peacefully displaying a newspaper headline and peacefully conveying similar information on a banner or in letters which were the means of communication used by the defendants in Parkinson Co. v. Building Trades Council, supra.

Respondents rely upon the cases of Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 8 L.R.A.,N.S., 460, 117 Am.St.Rep. 145, 9 Ann.Cas. 1219; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Rosenberg v. Retail Clerks' Association, 39 Cal.App. 67, 177 P. 864; and Moore v. Cooks', Waiters', etc., Union No. 402, 39 Cal.App. 538, 179 P. 417.

Each of these cases involved picketing to enforce a secondary boycott. In the first three there were acts of the pickets that amounted to coercion, threats, menace and intimidation. The Moore Case rests largely upon the theory, announced by the court, that (page 418) "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching". The same thought runs through the other three cases although in each of them it clearly appears that the picketing was far from peaceful. That being the case, those expressions were clearly dicta. Those expressions in the Rosenberg and Moore Cases were expressly disapproved in Lisse v. Local Union No. 31, supra. In the same case the Goldberg, Bowen & Co. and the Pierce decisions were limited in effect to their facts which show clearly that the picketing was not peaceful. Therefore, the four cases upon which respondents rely cannot be considered controlling here because in three of them there were threats and coercion by the pickets which is not present in the instant case, and the reasons on which the fourth decision rests have been expressly disapproved by the Supreme Court.

In the instant case there was but one picket active on the day on which the alleged contempt was committed. The actions of that picket were peaceful in every respect. His only fault was in carrying the banner we have mentioned. He did not address any of the shopkeepers or any one of their customers. It is true that the sign he carried did induce certain customers to withhold their trade from the shopkeepers. The legal effect of petitioner's actions was to enforce a secondary boycott. As we have seen, a secondary boycott peacefully and properly conducted is legal in California under the constitutional guaranty of the right of free speech. It is now too late for us to question such right. In a republic it is necessary that the rights of freedom of speech and freedom of the press be zealously guarded by the courts. Those rights form the life stream of liberty. History teaches us that when those rights are suspended, the right to possess and enjoy private property rapidly vanishes.

[8, 9] The following rule is announced in Berger v. Superior Court, 175 Cal. 719, 167 P. 143, 144, 15 A.L.R. 373: "It is thoroughly settled in this state that the affidavit by which a contempt proceeding is instituted, in order to sufficiently support an adjudication of contempt, must state facts constituting the offense. It is the complaint in such a case, and if defective in that respect, the adjudication cannot stand." See, also, McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; In re Lake, 65 Cal.App. 420, 224 P. 126. The complaint in the injunction suit and the affidavit charging the contempt charged only peaceful picketing in aid of a secondary boycott which is legal in California. It follows that as neither the complaint nor the affidavit charged the commission of an act that could be enjoined petitioner must be discharged.

Before closing this opinion we should again call attention to the fact that no statute or ordinance prohibiting or regulating picketing is here involved. What may be the right under the police powers of the state, or any of its political subdivisions, to prohibit or regulate the use of public streets or sidewalks for picketing is not before us and is not decided.

Petitioner is discharged and his bail exonerated.

I concur: BARNARD, P. J.

HAINES, Justice pro tem (concurring).

I concur for the reason that the case appears to me to be controlled by the authority of Lisse v. Local Union No. 31, Cooks, Waiters, etc., 2 Cal.2d 312, 41 P.2d 314.

27 Cal.App.2d 406

FRENZER v. MUTUAL BEN. HEALTH & ACCIDENT ASS'N et al.

Civ. 5910.

District Court of Appeal, Third District, California.

July 1, 1938.

Hearing Denied by Supreme Court Aug. 29, 1938.

1. Insurance ⇨665(5)

While plaintiff must establish an accident to recover on accident policy covering death resulting directly and independently of all other causes from bodily injuries sustained through purely accidental means, the accident may be proved by circumstantial evidence.

2. Evidence ⇨14

It is common knowledge that a thorn or pin scratch might not be sufficient to cause complaint or be visible to the eye and yet be sufficient to introduce poison into the system from which death might later result.

3. Insurance ⚷665(5)

That a piece of steel was found in insured's hand showed of itself that an "accident" had been sustained within accident policy, since pieces of metal do not get into one's hand except through external, violent, and accidental means.

[Ed. Note.—For other definitions of "Accident; Accidental," see Words & Phrases.]

4. Insurance ⚷665(5)

Evidence that insured, who was engaged in single hand drilling, complained to companion of severe pain in right hand, that no visible sign of any bruise, cut, or other injury was perceptible, that on following day physician observed evidence of a bruise, that on day following an X-ray disclosed a small particle of steel lodged in hand, and that thereafter insured died of blood poisoning, showed that insured sustained an "accident" within accident policy covering death resulting directly and independently of all other causes from bodily injuries sustained through purely accidental means.

5. Insurance ⚷467

When disability follows from accidental injury within such time as processes of nature consume in bringing affected person to state of total disability to prosecute every kind of business pertaining to his occupation, such disability is "immediate" within accident policy covering disability if insured suffers an accident which immediately from date of injury continuously and wholly disables insured.

[Ed. Note.—For other definitions of "Immediate," see Words & Phrases.]

6. Insurance ⚷467

Where insured died from blood poisoning 40 days after particle of steel entered his hand, disability and death were "immediate" and "continuous" within accident policy which required as condition for recovery to be established that insured suffered an accidental injury which immediately from date of injury continuously and wholly disabled insured.

[Ed. Note.—For other definitions of "Continuous," see Words & Phrases.]

7. Insurance ⚷138(1)

That accident policy was approved by state insurance department did not prevent court from considering whether policy was misleading and whether it conformed to requirements of insurance act. St.1935, p. 496.

8. Insurance ⚷454

A provision of accident policy that any accidental injury resulting in septicemia shall be paid as provided in sections providing for illness indemnity did not preclude recovery for death of insured resulting from blood poisoning, where first part of policy provided for coverage if insured should through accidental means sustain bodily injury and no restriction or limitation appeared cutting down such general language, and no reference was made to any later provision. St.1935, p. 496.

9. Insurance ⚷146(3)

Where language of a policy is susceptible of two constructions, that which is most beneficial to insured will be adopted.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by William J. Frenzer against the Mutual Benefit Health & Accident Association, sued as the Mutual Benefit Health & Accident Association of Omaha, to recover on an accident policy. From a judgment for plaintiff, defendant appeals.

Affirmed.

Donahue, Hynes & Hamlin, of Oakland, and Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Honey & Mayall, of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action to recover upon an accident policy issued by defendant herein. Judgment was in favor of plaintiff from which defendant prosecutes this appeal.

The principal grounds for reversal are the insufficiency of the evidence to establish an accident or accidental injury; the interpretation of the provisions in the policy requiring the accidental injury to be completely disabling from the date of the accident, and the meaning and effect of part K of the policy.

In 1923 the Mutual Benefit Health and Accident Association issued to Archie Zugar a policy of health and accident insurance, which provided for a death benefit in the event the assured should die from accidental means as defined in the policy. The policy was in full force and effect at the time of the death of Zugar, and the face value of such policy at the time of his death was $8000.

For some two weeks next preceding the 12th day of March, 1936, the insured, Archie Zugar, and Albert Folsom were mining in Calaveras county. During this period Zugar was engaged principally in single hand drilling, wherein the drill was held in one hand and struck with a hammer in the other. Late in the afternoon of March 12, 1936, Zugar became violently ill and complained to his working companion, Mr. Folsom, that he was suffering from a very severe pain in the right hand. Mr. Folsom examined the hand of Mr. Zugar but could find no visible sign of any bruise, cut or other injury. He immediately took Mr. Zugar to his home, and on the following day Mr. Zugar went to the office of Dr. Linwood Dozier in Stockton, who examined the hand but found no external wounds but did observe evidence of a bruise. The hand was swollen and inflamed. The day following, Mr. Zugar was taken to a hospital where he was again attended by Dr. Dozier. A day or two later X-ray pictures were taken of the hand which revealed a small particle of foreign substance in the palm of the right hand, which the doctors stated, in their opinion, was a particle of steel. Some time thereafter the hand was amputated, but on April 21st, Mr. Zugar died, the cause of death being general septicaemia or blood poisoning.

A sister of Mr. Zugar was named as beneficiary in the policy, and after his death she assigned her claim and rights under the policy to the plaintiff herein.

The insuring clause of the policy of insurance and the provisions therein for accident and illness indemnities are as follows:

"MUTUAL BENEFIT
HEALTH and ACCIDENT
ASSOCIATION
OMAHA

"(Herein called Association)

"Does Hereby Insure

"*Insuring Clause:* Archie Zugar (Herein called the Insured) of City of Groveland, State of California, by occupation a master mechanic against loss of life, limb, sight, or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely accidental means (suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

"ACCIDENT INDEMNITIES
SPECIFIC LOSSES

"PART A.

"If the insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay in lieu of all other indemnity:

"For Loss of Life..............$4,000.00

* * * * * *

"ILLNESS INDEMNITIES
CONFINING ILLNESS FORTY-EIGHT DOLLARS PER
WEEK FOR LIFE

"PART H.

"The Association will pay, for one day or more, at the rate of Forty-eight ($48.-00) Dollars per week for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

* * * * * *

"NON-CONFINING ILLNESS
TWENTY-FOUR DOLLARS
PER WEEK

"PART I.

"The Association will pay for one day or more, at the rate of Twenty-four ($24.-00) Dollars per week, but not exceeding five weeks, for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

* * * * * *

"PART J.

"COVERED AS SICKNESS

"PART K.

"All diseases are covered by this policy. Any accidental injury, fatal or otherwise, resulting in hernia, boils, carbuncles, felons, abscesses, ulcers, infection, septicaemia, ptomaine poisoning, cancer, diabetes, fits, peritonitis, apoplexy, sunstroke, freezing, hydrophobia, sprained or lame back, shall be paid as provided in Part H or I, anything to the contrary notwithstanding."

It is the contention of appellant that it devolved upon plaintiff to establish that Mr. Zugar died as the result of bodily injuries through accidental means. The trial court so found, and we are fully convinced that the court was justified from the evidence in so finding.

Mr. Folsom testified that he and Mr. Zugar were engaged in sinking a shaft using steel drills in connection with the work, and that as the drills were used they would in time crack and splinter. He also testified that while Mr. Zugar made no complaint of any injuries on the particular day in question, nevertheless they both, quite frequently, struck themselves on the hands with their hammers. He also testified he examined Mr. Zugar's hands when he complained of the pain, and while the hands did not show any evidence of a fresh wound, they were, on account of the work he had been doing, very calloused, cracked and rough.

Dr. Dozier, the attending physician, testified that Zugar was suffering from a type of infection known as septicaemia, which was first localized in the palm of the right hand and then spread by the blood stream to various parts of the body. When asked as to what, in his opinion, caused the septicaemia in Mr. Zugar's hand, he stated he believed it was caused by a blow or a direct injury which allowed organisms to get into the hand, from an external condition introducing germs from outside of the body into the hand. The doctor also stated that in examining the hand there was plenty of evidence of an accident without the use of X-ray, and although the skin was not apparently broken, there was evidence of a bruise. He also testified that the poisoning was not due to the piece of steel in the hand, but to the infective bacteria which the foreign body carried into the tissue. Such infection starts immediately, so the doctor testified, the rapidity with which it appears, depending upon the virulence of the organisms which are carried in, and the ability of the patient to resist that type of infection. Ordinarily within twelve hours from the time of entrance the infection will appear. The doctor also testified that when he saw the patient on the 13th of March, it was apparent that something had happened within the twenty-four hours immediately preceding the time he saw him. On cross-examination Dr. Dozier also stated that it only required a microscopic opening for the germs to enter, and that it was entirely possible a piece of steel as small as that located in Mr. Zugar's hand could carry infection with it and be projected with such force as to completely bury itself in the hand without leaving an open wound.

[1] While it is true that it is necessary for plaintiff to establish an accident to recover under this policy, the accident may be proved by circumstantial evidence. Jenkin v. Pacific Mutual Life Insurance Co., 131 Cal. 121, 63 P. 180; Huntly v. U. S. F. & G. Co., 207 Cal. 551, 279 P. 425; Losleben v. California State Life Ins. Co., 119 Cal. App. 556, 6 P.2d 1012; Hirschberg v. Goodwin, 113 Cal.App. 550, 298 P. 855.

[2] Appellant contends that Mr. Zugar made no complaint as to any injuries, and that such a small particle of steel could not have caused such an effect, but it is a matter of common experience that a thorn or pin scratch might not be sufficient to cause complaint or be visible to the eye, and yet be sufficient to introduce the poison into the system from which death might later result. The fact, therefore, that there was no open wound or no particular complaint at the time of the injury was not particularly convincing. Mr. Zugar was a man engaged in rough strenuous work and frequently injured and bruised his hands and, as testified by Mr. Folsom, was not inclined to complain of such every day occurrences.

[3, 4] The fact that a foreign body such as a piece of steel was found in Mr. Zugar's hand shows of itself that an accident had been sustained, as pieces of metal do not get into one's hand except through external, violent and accidental means. In Losleben v. California State Life Ins. Co., supra, the court held that evidence of the fact that the entry could have been caused by accidental means was sufficient to create an inference that an accident had occurred requiring the case to be submitted to the jury, and here, in addition to that we have the attending physician testifying directly that the injury to Mr. Zugar's hand must have been caused by some external force allowing the entry of the bacteria.

In the case of Carpenter v. Pacific Mutual Life Ins. Co., 145 Wash. 679, 261 P. 792, the decedent was a farmer and due to the nature of the physical work he performed about the farm his hands had small cuts and abrasions thereon. One day he skinned a sheep and the next day complained of pain in the arm, and within five days thereafter died of blood poisoning. It was the theory of the plaintiff that decedent was infected by bacteria entering through preexisting cuts on the hands. The trial court gave judgment for defendant, which was reversed on appeal. The Appellate Court held that the fact that there was no evidence as to how or when the accidental injury was inflicted, was not fatal to the plaintiff's case since it was only necessary to show that death was caused by violent, accidental or external means, and that the very existence of an infection demonstrated that an accident must have occurred. "The germ enters from the outside; therefore it is external. It is a foreign substance forced into the circulatory system; therefore it enters by violence. Its entry was not intended or expected; therefore it was accidental." (Page 794.)

Another point urged by appellant is that the policy here sued upon requires that in order for the plaintiff to recover it must be established that the insured suffered an accidental injury which immediately from the date of the injury, continuously and wholly disabled the insured. The company now claims plaintiff failed to so prove. The facts here in evidence show that Mr. Zugar first complained of pain in the hand at five o'clock in the afternoon of March 12th. The next morning he visited Dr. Dozier who treated the infection. Dr. Dozier testified that such an infection would appear within twelve hours of the time of entrance of the bacteria, and that, in his opinion, "when I first saw him on the 13th of March, it was apparent that something had happened within the twenty-four hours preceding the time I saw the man", and the doctor testified, as we have already pointed out, that the length of time in which such an infection would become apparent depended upon the virulence of the organism and the ability of the patient to resist the infection, and that in this case the infection was very virulent "because it has gone so terribly fast, and it was too virulent for the man to fight".

[5] While courts are not altogether in accord in the interpretation of the meaning of the words "immediately and totally disabling" as used in the policy, the weight of authority is toward the so-called process of nature rule; that is, that when a disability follows from an accidental injury within such time as the processes of nature consume in bringing the affected person to the state of total incapacity to prosecute every kind of business pertaining to his occupation such disability is immediate under the terms of the policy. 6 Cooley's Briefs on Ins., 2d ed., 5269; 7 Couch, Cyclopedia of Ins.Law, 5786; 1 Cor.Jur., p. 468; 41 A.L.R. 1376, note.

[6] In Feeley v. Boyd, 143 Cal. 282, 76 P. 1029, 65 L.R.A. 943, our court, in construing the words "immediate delivery" in a contract of sale held such language does not mean a delivery instantly, but must be given a reasonable construction. From the evidence in the instant case all of the doctors testified that septicaemia would become visible in from eight to twenty-four hours, although one defense doctor said it might be several days before the infection was demonstrated. In Thomas v. Mutual Benefit, etc., Ass'n, 136 Kan. 802, 18 P.2d 151, the same defendant we here have before us, raised the same question now under consideration upon identical policy provisions, and the strict construction contended for was rejected by the court in a well considered opinion.

The last point urged by appellant is that plaintiff is prevented from recovering for the death of the insured by the provisions of part K of the policy, which provides that, "Any accidental injury, fatal or otherwise, resulting in * * * infection, septicaemia * * *, shall be paid as provided in Parts H or I, anything to the contrary notwithstanding". Part H provides for payment at the rate of $48 per week, disability, resulting from diseases which confine the insured continuously within doors and requires regular visits by a physician. Part I provides for the payment of $24 per week disability resulting from diseases which do not confine the insured continuously indoors.

Respondent contends that part K in the policy is invalid for the reason, it does not conform to the requirements of the Insurance Code (Stats.1935, p. 496), formerly found in Statutes of 1917, page 957, Deerings General Laws, Act 3736, which provides that any portion of a policy of accident and health insurance which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold face type and with greater prominence than any other portion of the text of the policy.

[7, 8] Appellant suggests that this question was not raised during the trial and that it had no opportunity to show that this particular form of policy here involved was filed with the state insurance commissioner of the state of California, and approved by that officer on the 26th of July, 1919. Regardless of the fact that this particular provision and the policy itself was approved by the state insurance department does not prevent us from considering the matter, and stating that in our opinion the policy is misleading and does not conform to the requirements of the Insurance Act. Part A states that if the insured shall, through accidental means, sustain bodily injuries as described in the insuring clause, that the company will pay certain losses. No restriction or limitation appears cutting down this general language nor is any reference made to any later provision. In part K, however, appears the language hereinbefore quoted to the effect that any accidental injury, fatal or otherwise, resulting in various specified injuries shall be paid upon an entirely different scale and standard than that set forth in part A. The policy itself is divided into two parts, part A appearing under the heading, Accident Indemnities, and part K is found under Illness Indemnities.

In the case of Mutual Benefit, Health & Accident Ass'n v. Ryder, 166 Va. 446, 185 S.E. 894, we again have the same company as here before us, presenting a case very similar to the situation here. In that case the assured was injured on September 29th, when the index finger of his right hand was lacerated. He dressed the wound himself until October 10th, when a physician was called, and found that infection had developed. Treatment was continued for some time, then first the finger was amputated, and later the arm. The assured grew worse and died on December 15th. The evidence showed that the assured died of blood poisoning as the result of the wound in his finger. The provisions of the policy carried by him are almost identical with the provisions of the policy under consideration. It was contended by the company that this provision prevented the plaintiff from making a recovery under the policy. In a well considered case supported by many authorities the court there held that blood poisoning resulting from an accidental wound was within the protection of the policy. The court also held that in accident and health policies the insurer could not in any policy for one accident promise to pay a certain sum and then reduce such sum by another method of calculation.

Part A of the policy under discussion promises to pay for certain specific losses which have occurred within thirteen weeks from the date of the accident "in lieu of all other indemnity". It purports to be a complete method of dealing with the specific losses there mentioned. It does not refer to part K or to any portion of the policy for clarification. In the case of a death benefit the assured is allowed over three months from the date of the accident within which to die and the association is still liable. It would hardly be possible for anyone to receive an accidental injury which subsequently caused his death to go through a period of thirteen weeks without developing some one of the specific conditions named in part K.

However, assuming that it was the intention of the association that part K should refer back to part A, then it was violative of the various provisions of the Insurance Code which prescribes the manner of printing such exceptions in the policy, and part K must therefore be held as invalid.

[9] If, however, the language of part A and part K may be considered as conflicting then the general rule should apply that where the language of the policy is susceptible of two constructions that which is most beneficial to the insured should be adopted.

For the foregoing reasons the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

SEMPLE v. ANDREWS.

Civ. 11531.

District Court of Appeal, Second District, Division 1, California.

June 22, 1938.

Hearing Denied by Supreme Court Aug. 18, 1938.

1. Appeal and error 🔑907(3)

On appeal from judgment roll alone, omitting entirely the evidence given at the trial, it must be presumed that evidence fully supported findings and judgment of trial court sitting without jury.

2. Appeal and error 🔑679(1), 1039(2)

Alleged uncertainty or ambiguity in complaint cannot be considered prejudicial error after a full and complete trial on the merits, particularly when none of evidence is brought before appellate court.

3. Appeal and error 🔑1040(10)

When a case has been tried and a judgment rendered on the facts, to warrant a reversal on ground of error in overruling a demurrer interposed on ground of uncertainty or ambiguity in complaint, it must appear that some substantial right of demurrant has been affected, or some prejudicial error, as distinguished from abstract error, suffered by him.

4. Libel and slander 🔑80

In action for slander, complaint alleging that plaintiff was only daughter of famous female evangelist, and that defendant told newspaper reporters that such female evangelist "has been intimidated, threatened and blackmailed for the last time. This time she is prepared to fight to the finish. While she regrets that the war will be with her own flesh and blood—with her own daughter—the only course ahead of her is protection from destruction of the organization which has consumed the best years of her life," was sufficient as against a general demurrer. Civ.Code § 46.

5. Libel and slander 🔑6(1), 9(1)

The statutory definition of slander includes almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally or with respect to his occupation. Civ.Code, § 46.

6. Libel and slander 🔑19

In determining whether words are slanderous, alleged slanderous publication must be construed as well from expressions used as from the whole scope and apparent object of the writer. Civ.Code § 46.

7. Libel and slander 🔑19

The allegedly slanderous publication must be measured, not so much by its effect when subjected to critical analysis of a mind trained in the law, but by natural and probable effect upon mind of average hearer or reader, and a defendant is liable for what is insinuated as well as for what is stated explicitly. Civ.Code, § 46.

8. Appeal and error 🔑927(2)

On appeal from judgment of nonsuit, allegations of complaint must be taken to be true.

9. Evidence 🔑20(1)

A court will take notice of relation in which a minister of the gospel stands to church with which he or she is connected and with community in which he or she lives, so far as personal morality and fundamental principles upon which religion is based are concerned.

10. Libel and slander 🔑80

A complaint in action for slander was not demurrable on ground that it was uncertain as to person defamed where complaint alleged that plaintiff was only daughter of female evangelist who was president of a church with which plaintiff was affiliated as an officer and member, that differences of opinion had arisen between plaintiff and her mother as to matters of administration, that defendant stated concerning plaintiff that she had intimidated and blackmailed her mother and that plaintiff was destroying or attempting to destroy the church and was guilty of crime involving moral turpitude. Civ.Code, § 46; Code Civ.Proc. § 460.

11. Appeal and error 🔑907(3)

In considering appeal supported by judgment roll only, all presumptions and intendments are to be indulged favorably to and in support of judgment, and it must be presumed that there was evidence sufficient to support findings and judgment and that whatever might have properly occurred at trial to cure defects of complaint in any vital particular did actually occur.

12. Appeal and error 🔑1032(1)

Prejudicial error will never be presumed, and burden is upon appellant to show that it exists. Code Civ.Proc. § 475; Const. art. 6, § 4½.

13. Appeal and error ⟹1032(1)

An injury is not presumed from error but must be affirmatively shown. Code Civ. Proc. § 475; Const. art. 6, § 4½.

14. Appeal and error ⟹671(3)

Where transcript of proceedings had at trial of slander action was not before appellate court, appellate court could not say, even if error were present in pleadings, that such error resulted in miscarriage of justice, but to so declare, appellate court would have to examine entire cause, including evidence. Code Civ.Proc. § 475; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Roberta Semple against Willedd Andrews to recover damages for slander, wherein defendant demurred. From a judgment for plaintiff, defendant appeals.

Affirmed.

Willedd Andrews and Joseph Scott, both of Los Angeles, for appellant.

Stanley Arndt and Joseph Fainer, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by the defendant from a judgment in favor of plaintiff for damages in the sum of $2,000 and costs in an action for slander. The complaint presents two causes of action, and although the first cause of action is denominated by defendant as an action for libel, there is no question but that both causes of action sound in slander.

In her complaint plaintiff alleged that she then was and for many years last past had been by profession an ordained evangelist; that as such evangelist she was and had been well known to and recognized by thousands of persons; that plaintiff had acquired and maintained and then possessed a "good and favorable" reputation, all of which was to the defendant well known. Plaintiff then alleged that she was a member of the board of trustees and an officer and member of the Echo Park Evangelistic Association and Church of the Four Square Gospel, an evangelistic organization and church respectively; and further, that plaintiff as such was and is well known to thousands of persons throughout Southern California. The complaint then sets forth that plaintiff was the only daughter of Aimee Semple McPherson, president of the board of trustees and founder of both the association and church above referred to, as well as being pastor of said church; and that a difference of opinion had arisen between plaintiff and her mother as to matters of administration in connection with both the association and the church. It is then alleged that upon an occasion on or about October 1 or 2, 1936, defendant was interviewed by a news reporter for a Los Angeles daily newspaper, and then and there falsely and maliciously published and made a statement of and concerning the plaintiff for publication in the press of Los Angeles county and throughout the nation, which statement, it was alleged, defendant intended to be given widespread circulation through the daily press, so that hundreds of thousands of persons should read and see the same. It was during this conversation with the newspaper reporter that the alleged slanderous statements were made, and which alleged slander consisted in appellant's having said, speaking of and concerning respondent, that "Mrs. McPherson has been intimidated, threatened and blackmailed for the last time. This time she is prepared to fight to the finish. While she regrets that the war will be with her own flesh and blood—with her own daughter—the only course ahead of her is protection from destruction of the organization which has consumed the best years of her life."

It is then alleged that by using the word "organization" defendant then and there referred to and intended to refer to and meant the Echo Park Evangelistic Association and the Church of the Four Square Gospel, and that the persons hearing or reading said words generally so understood them as defendant planned and intended. Then follows an allegation that "by said words of defendant set forth in the preceding paragraph, said defendant published and charged, understood, meant and intended to mean, that plaintiff had intimidated, threatened and blackmailed, and had attempted to blackmail, her mother, Aimee Semple McPherson, and that plaintiff was destroying or attempting to destroy the Echo Park Evangelistic Association and the Church of the Four Square Gospel, and was guilty of a crime involving moral turpitude, to-wit: extortion and attempted extortion, and the persons who read or heard said words generally understood them as to meaning, all as defendant planned and intended".

The second cause of action of the complaint is identical with the first, except that instead of charging the allegedly slanderous statements to have been made to one named reporter, it sets forth that the same were made to various unnamed reporters of daily newspapers and news services, which allegedly slanderous statements set forth in the second cause of action are identical with those in the first cause of action, except that the word "blackmail" was not therein used.

[1] Appellant demurred both generally and specially to respondent's amended complaint. The demurrers were overruled, whereupon an answer was filed. Subsequently appellant filed an amended answer and later an amendment to the amended answer, and the cause went to trial on the issues raised by the aforesaid pleadings and amendments thereto, before the court sitting without a jury. This appeal comes before us on the judgment roll alone, omitting entirely the evidence given at the trial. Accordingly, it must be presumed that the evidence fully supports the findings and judgment. Myers v. Canepa, 37 Cal.App. 556, 174 P. 903, 906.

[2, 3] Appellant contends that the complaint fails to state a cause of action and that his demurrer should have been sustained for the reason that in the allegedly slanderous statement attributed to him the name of the respondent was not specifically mentioned as being the one who had intimidated, threatened and blackmailed in the past and that the statement of a future action does not refer to any crime; also, for the reason that, so far as the second cause of action is concerned, the complaint fails to allege injury to the reputation or to the feelings of respondent. Appellant having filed both a general and special demurrer, it should therefore here be noted with reference to appellant's special demurrer, which was overruled, that thereafter he filed an answer containing both denials and affirmative defenses, upon all of which issues trial was had. It is manifest that any alleged uncertainty or ambiguity in the complaint cannot be considered prejudicial error after a full and complete trial on the merits (Baker v. Miller, 190 Cal. 263, 212 P. 11), particularly when, as here, none of the evidence is brought before us (Myers v. Canepa, supra; Sledge v. Stolz, 41 Cal.App. 209, 182 P. 340). When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty or ambiguity in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint. How can this court determine that appellant was injured by the overruling of the special demurrer in this case in the absence of the record showing what occurred at the trial? It may have been that appellant consented to the trial on its merits without objection to the evidence introduced in support of the complaint, notwithstanding its defects.

[4] As against appellant's general demurrer the complaint herein was sufficient. Section 46 of the Civil Code defines slander as "a false and unprivileged publication other than libel, which:

"1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

"2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

"3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

"4. Imputes to him impotence or a want of chastity; or,

"5. Which, by natural consequence, causes actual damage."

[5, 6] The code definition of slander, like that of libel, is very broad, and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally or with respect to his occupation. Schomberg v. Walker, 132 Cal. 224, 64 P. 290; Stevens v. Snow, 191 Cal. 58, 214 P. 968; Tonini v. Cevasco, 114 Cal. 266, 272, 46 P. 103. In the determination of this question, the alleged slanderous publication is to be construed "as well from the expressions used as from the whole scope and apparent object of the writer". Stevens v. Storke, 191 Cal. 329, 334, 216 P. 371, 373; Bettner v. Holt, 70 Cal. 270, 11 P. 713. The case last above cited states that (page 715) "not only is the language

employed to be regarded with reference to the actual words used, but according to the sense and meaning, under all the circumstances attending the publication, which such language may fairly be presumed to have conveyed to those to whom it was published; so that in such cases the language is uniformly to be regarded with what has been its effect, actual or presumed, and its sense is to be arrived at with the help of the cause and occasion of its publication.

"And in passing upon the sufficiency of such language as stating a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of a complaint for libelous publication according to its natural and popular construction."

[7] That is to say, the allegedly slanderous publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average hearer or reader. A defendant is also liable for what is insinuated as well as for what is stated explicitly. Schomberg v. Walker, supra, page 227, 64 P. 290.

Appellant's contention that the "complaint must be certain as to the person defamed" is answered by section 460 of the Code of Civil Procedure, which reads: "In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken." Appellant apparently is laboring under the impression that when an alleged slanderous statement fails to contain a name from which a hearer thereof knows the plaintiff, the alleged slander is not actionable per se as to plaintiff, and that in order to recover damages for such publication the plaintiff must allege facts and circumstances known to the hearer or reader of the alleged slander by means of which the hearer or reader was reasonably certain that the plaintiff was the person defamed by the publication; or allege other facts which show that plaintiff sustained special damage by reason of the publication. This is not an altogether correct conception of the law. Appellant has confused the rules of pleading with the rules of evidence. The complaint alleged, in language which we have quoted, the fact that at the time of the publication of the alleged slander plaintiff was the only daughter of Aimee Semple McPherson, president of the board of trustees and founder of the Evangelistic Association and Church, with which religious organizations plaintiff was affiliated as an officer and member; that differences of opinion had arisen between plaintiff and her mother as to matters of administration of the affairs of said religious organizations. It was further alleged that during the existence of this controversy between plaintiff and her mother, the defendant uttered the alleged slanderous statements of and concerning plaintiff. The complaint further set forth the fact that by the use of the word "organization" in the alleged slanderous statement, defendant then and there referred to and intended to refer to and meant the association and church aforesaid, and that persons hearing or reading the allegedly slanderous statements generally so understood them. The complaint also averred that the publications were meant and intended to mean that plaintiff had intimidated, threatened, blackmailed, and attempted to blackmail, her mother, and that plaintiff was destroying or attempting to destroy the Echo Park Evangelistic Association and the Church of the Four Square Gospel, and was guilty of a crime involving moral turpitude, to-wit, extortion and attempted extortion. Beyond this, the complaint further averred that persons who heard or read the claimed slanderous words generally so understood them. So far as the rules of pleading are concerned, it is clear that the complaint stated a cause of action for slander of and concerning the plaintiff. In this regard, referring to section 460 of the Code of Civil Procedure, the Supreme Court, in the case of Harris v. Zanone, 93 Cal. 59, 65, 28 P. 845, 846, has said: "By this provision the inducement and colloquium are dispensed with, and, if the words charged are libelous in themselves, the plaintiff is only required to allege that the libelous words were spoken 'of and concerning the plaintiff.' This is an issuable fact, as was the colloquium under the former system, and, if denied, must be established at the trial."

[8-10] It must be borne in mind that the complaint alleges, and for present pur-

poses it must be taken to be true, that respondent for some time prior to the publication of the alleged slander had been a duly ordained minister of the gospel. A court can take notice of the relation in which a minister of the gospel stands to the church with which he or she is connected and with the community in which he or she lives, so far as personal morality and the fundamental principals upon which religion is based are concerned. The profession of evangelist peculiarly requires that a member of such profession be morally and ethically beyond reproach and abstain from intimidation, threats, or blackmail or attempted blackmail; and this is particularly true when we consider that the alleged victim of the asserted intimidation and blackmail was the mother of plaintiff. It is only reasonable to conclude that the words allegedly published by defendant as aforesaid tended directly to injure and did injure plaintiff in her profession as evangelist, and imputed to her general disqualification in those respects which the said profession peculiarly requires. The complaint is therefore immune to general demurrer upon the theory advanced by respondent.

[11-14] In the case at bar, reference to the clerk's transcript shows that upon the trial of the action one of the issues as presented by appellant's amendment to his first amended answer was the claim that respondent herein did threaten her mother that unless the latter signed each of several agreements submitted to her, an action would be filed against the mother which would result in a receiver being appointed for the church organization, and further, that unless plaintiff's mother signed certain agreements in favor of plaintiff, that plaintiff's mother would be declared an incompetent and unfit to be the pastor of the church of which both mother and daughter were officers and members. In appellant's amended answer he pleads the truth of the charge that respondent and her agent intimidated, coerced and threatened the mother of respondent. In considering an appeal supported by the judgment roll only, all presumptions and intendments are to be indulged favorably to and in support of the judgment. In other words, it must be presumed that there was evidence sufficient to support the findings and the judgment, and that whatever might have properly occurred at the trial to cure the defects of the complaint in any vital particular did actually occur. Prejudicial error will never be presumed, and the burden is upon the appellant to show that it exists. There is no such showing here. Whatever may have been the interpretation put upon section 475 of the Code of Civil Procedure prior to the adoption of section 4½ of article 6 of the Constitution, it is settled that injury is no longer presumed from error, but must be affirmatively shown. Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238. Where, as in the instant case, the transcript of the proceedings had at the trial is not before us, we are in no position to say, even if error were present in the pleadings, that such error resulted in a miscarriage of justice. To so declare, we must base our declaration upon an examination of the entire cause, including the evidence; and this opportunity is denied us by reason of the appeal herein having been taken upon the judgment roll alone.

For the foregoing reasons, the judgment appealed from is affirmed.

I concur: DORAN, Acting P. J.

PACIFIC WESTERN OIL CO. v. BERN OIL CO., Limited, et al.*

Civ. 2202.

District Court of Appeal, Fourth District, California.

June 28, 1938.

Hearing Granted by Supreme Court
Aug. 25, 1938.

1. Jury 🔑13(5)

A jury trial of equitable issues arising in an equitable action does not exist as a matter of right.

2. Jury 🔑13(1)

The right to try a legal issue arising in an equitable case before a jury is not universal but must be determined upon the pleadings, issues, and facts appearing in a particular case.

3. Jury 🔑13(14)

The defendants were not entitled to submission of issues of case to jury, notwithstanding that damages were asked, where gist of action was to secure an injunction to prevent the removal of oil from

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*For subsequent opinion see 87 P.2d 1045.

property over what might have been a long period of years with an accounting for the oil already received, and the prayers for damages were merely incidental to the equitable relief sought.

4. Appeal and error ⚿=1062(2)

The refusal to submit issue of damages in equitable action to jury was not reversible error where the correct measure of damages was applied by the trial court.

5. Mines and minerals ⚿=51(5)

A statute fixing measure of damages for oil extracted without right as the value of the oil at time of extraction without interest after deducting cost of development, operation, and production, is not applicable where a well is intentionally diverted into the land of another. Code Civ.Proc. § 349¾, as added by St.1935, p. 2285.

6. Mines and minerals ⚿=51(5)

Defendants who intentionally diverted oil well into oil pool which they knew was under plaintiff's land and was not under their land were chargeable with value of oil taken from pool without any deduction for expenses incurred in bringing oil to the surface.

7. Equity ⚿=66

He who seeks equity must do equity.

8. Mines and minerals ⚿=52

A plaintiff instituting action July 17, 1934, to restrain defendants from removing oil from oil pool located only under plaintiff's land through wells located on defendants' land was not guilty of laches, notwithstanding that drilling of wells was commenced on May 17, 1933, where plaintiff did not obtain knowledge that wells were intentionally drilled so as to penetrate oil pool until after March 20, 1934, when surveys and reports were secured through a grand jury investigation.

9. Mines and minerals ⚿=51(3)

Evidence warranted recovery of judgment against individual defendant for value of oil removed from oil pool located only under plaintiff's land through wells on adjoining land on ground that individual defendant participated with corporate defendant in intentionally drilling wells so that they would cross boundary line and be bottomed in and produce oil from such pool.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Pacific Western Oil Company, a Delaware corporation, against Bern Oil Company, Limited, a California corporation, and others to restrain defendants from removing oil from strata underlying lands on which the plaintiffs had an oil and gas lease and for an accounting as to any oil or gas already removed. From the judgment, the Bern Oil Company, Limited, and Sam Bernstein appeal.

Affirmed.

Abe Richmond and Sidney J. Unickel, both of Los Angeles, for appellants.

Borton, Petrini & Conron, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment restraining the defendants from taking oil from certain land controlled by the plaintiff and awarding compensation for oil already taken.

Briefly stated, the general facts are as follows: The plaintiff, as lessee under an oil and gas lease covering a certain quarter section of land, drilled for oil and completed seven producing wells thereon. In the course of operations it was discovered that due to a "fault" which ran across this quarter section oil could be produced on a part of this land but not on the remainder. Acting under a right given in its lease the plaintiff, on May 18, 1931, quitclaimed approximately 104 acres of this land to the owner and lessor, retaining a described tract of about 56 acres upon which oil had been developed, and specifically reserving all rights thereto as given by the original lease. For convenience, the 56 acres which were retained will be referred to as parcel A and the 104 acres which were reconveyed will be referred to as parcel B.

On March 13, 1933, the defendant Brunwin procured a lease covering parcel B from the owner, to whom it had been reconveyed. Brunwin, with two associates, Abe Bernstein and Sam Bernstein, commenced the drilling of wells on parcel B and then organized a corporation, the defendant Bern Oil Company, through which the project was continued. The corporation was largely owned by these three individuals, who acted as its officers and remained in active charge and management of its affairs. Three wells were drilled on parcel B, one being 21½ feet, one 17 feet and one 39 feet east of the boundary line between parcel B and parcel A, a surveyor having been employed by the defendants to exactly locate that boundary. Each of these wells was intentionally diverted from the perpendicular in a westerly direction in order to bottom the well in the producing area underneath parcel A. In each instance the producing portion of the well was located from 290 feet to 480 feet west of the boundary line between the two tracts and within parcel A. This result was accomplished by the use of a mechanical device, commonly called a whip stock, capable of diverting a well from the vertical. To this end the defendants employed an expert in surveying and controlling directional drilling. This expert used an instrument and method commonly called a "singleshot" in order that the course and extent of deviation of the wells might be known and charted as the work progressed, and from time to time furnished the defendants with reports showing the extent and direction to which the wells had been diverted, and finally furnished them with a plat or graph showing the point of completion of the wells under the surface of parcel A. There is evidence that in each instance the well had to be "whipstocked" to the west, through the fault, and under parcel A in order to produce.

The first of these wells was completed on June 20, 1933, the second on September 4, 1933, and the third on January 16, 1934, and oil was taken from all of them. In November, 1933, the plaintiff wrote a letter to the defendants demanding that they cease trespassing upon its lands. In March, 1934, a grand jury investigation of the defendants' activities was started, resulting in an indictment against the individuals for grand theft. See People v. Brunwin, 2 Cal. App.2d 287, 37 P.2d 1072. The defendants continued to produce oil and the present proceeding was begun on July 17, 1934, a preliminary injunction being issued on August 6, 1934. The injunction was disobeyed and after citation the individual defendants above named were adjudged guilty of contempt and fined. An attempt to review the contempt proceeding by writ of certiorari failed. Bern Oil Co. v. Superior Court, 5 Cal.App.2d 21, 41 P.2d 939.

In addition to alleging most of the facts above set forth the complaint herein alleged that the defendants Brunwin, Abe Bernstein and Sam Bernstein entered into a conspiracy with the object and purpose of obtaining the right to occupy the surface of parcel B in order to commence thereon the drilling of wells, to drill these wells in such a manner as to cause them to cross over the boundary line and under parcel A, thus penetrating the pool or deposit of oil under said land, and through such wells to remove such oil and bring it to the surface of parcel B; that in pursuance of such plan and conspiracy they obtained a lease from the owner of parcel B and started wells thereon which were intentionally diverted into parcel A and into the oil pool or deposit underlying that parcel at a distance of several hundred feet from the boundary line between the two parcels; that thereafter they commenced to remove oil from parcel A and continued such removal, bringing the same to the surface of parcel B; that they thus removed and converted to their own use oil of a value of $75,000 to the damage of the plaintiff in that amount; that after the organization of the Bern Oil Company these acts were performed by the individual defendants through the agency and instrumentality of that corporation; and that the defendants have installed upon parcel B a derrick and apparatus for the drilling of a fourth well and threaten and intend to drill such fourth well in a similar manner across the boundary and into parcel A. The prayer is for a temporary injunction pending the trial and thereafter for a permanent injunction restraining the defendants from removing oil from strata underlying the lands of the plaintiff, from removing oil from any of the three wells which have been mentioned, from diverting or directing the drilling of any other well in such a manner as to cross the boundary line between the parcels A and B, for the sum of $75,000 damages, for an accounting as to any oil or gas already removed, and for such other relief as may be just and appropriate.

While the answer does not deny that the defendants secured a lease covering parcel B, that they entered that land and installed machinery and equipment for drilling, that they employed mechanics skilled in the art of directional drilling or that they intentionally so controlled the direction of the drilling of these wells as to cross over under parcel A, it does deny that these things were done in pursuance of any conspiracy and it is further alleged that the defendants have no knowledge as to the penetration of the oil deposit underlying parcel A or as to the distance of such alleged penetration from the boundary line of parcel B, and on that ground it is denied that the three wells drilled upon parcel B penetrated the oil deposit under parcel A to a distance of several hundred feet from the boundary line. It is admitted that oil has been produced from the three wells thus drilled by the defendants and it is alleged that it is impossible to ascertain definitely the actual location of the bottom of an oil well by any means now known. It is denied that any oil produced from these three wells is the property of the plaintiff, and denied that the plaintiff has been damaged in any amount. It is then alleged that any oil taken from these wells belonged to the defendants, that the plaintiff had surrendered and abandoned all its rights in and to any oil strata, and all its rights in and to any part of the land covered by the original lease, except that the plaintiff had retained the right to produce oil from the seven wells in operation when the quitclaim deed was given to the owner of the land, and that said wells were all located in a zone known as the "Upper Vedder Zone" being approximately 1400 feet in depth, while the three wells drilled by the defendants were located at a depth of approximately 2000 feet in a zone known as the "Lower Vedder Zone". These last allegations disclose the main issue upon which the case was tried, the defendants having contended throughout that the rights of the plaintiff were limited to the operation of the seven wells existing at the time parcel B was reconveyed to the owner of the land and that the defendants had the right to remove oil from any strata on parcel A which was lower than the one which had been penetrated by those wells.

The court found in all respects in favor of the plaintiff, sustantially in accordance with the allegations of the complaint, finding the existence of such a conspiracy to drill wells upon parcel B in such a manner as to direct them over the boundary and into parcel A for the purpose of removing oil therefrom, and that in pursuance of this conspiracy and plan experts in the art of controlling the direction of drilling wells were employed for the purpose of diverting these wells, and they were so diverted, over the line and into parcel A. It was further found that oil was thus removed from parcel A, that the defendants well knew that there was a productive pool or deposit under parcel A, and no such production deposit under parcel B, and that the defendants "intentionally, secretly and fraudulently employed the right to occupy the surface of parcel B for the purpose of accomplishing a clandestine and secret penetration of such productive oil pool" underneath parcel A and the removal therefrom of oil. It was then found that from the accounting which had been had of the production and sale of oil thus taken by the defendants from underneath parcel A and converted to their own use, it appeared that oil of the value of $107,371.93 had been so removed, and that the royalty thereon which had been paid to the owner of the land, and which otherwise would have been payable by the plaintiff, amounted to $17,737.26.

Abe Bernstein died before judgment was entered and the action was dismissed as to him and the executors of his estate. Judgment was entered against the other defendants perpetually enjoining them from removing through the three wells referred to or through any other well any oil, gas or other hydrocarbon substances from any point beneath the surface of parcel A, and awarding judgment against the defendants H. M. Brunwin, Sam Bernstein and Bern Oil Company, Ltd., jointly and severally, in the sum of $89,643.97. From this judgment two of the defendants have appealed.

[1, 2] Appellants' first contention is that the court committed prejudicial error in denying their request for a jury trial. Appellants state their position as follows: "The gist of this action was for damages and as ancillary thereto the plaintiff requested injunctive relief. The basis of the action being at law, the defendants were entitled to try the issues before a jury." It may first be observed that this matter was similarly presented to the trial court, a demand for a jury being made as to all of the issues and no request having been made for a jury in connection with the issue of damages alone. While there is some conflict in the authorities with respect to the right to have legal issues arising in an equitable action tried by a jury it is well settled that a jury trial is not a matter of right in so far as the equitable issues are concerned. Even the right to try a legal issue arising in an equitable case before a jury is not universal but must depend upon a number of considerations and must be determined upon the pleadings, issues and facts appearing in a particular case. In Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.2d 659, the court said (page 661):

"In determining whether an action is legal or equitable, and consequently whether a jury may be demanded, the court is not bound by the form of the action, but rather by the nature of the rights involved, as determined from the whole of the pleadings, and the facts of a particular case. The allegations of the complaint, the answer, and the cross-complaint may be considered, as may also the prayer for relief in the complaint and in the answer. 15 Cal.Jur. 334, § 12. There is no right to a trial by jury where the gist of the action as thus determined is for the enforcement of some right cognizable only in equity, even though legal relief results as an incidental part of the recovery. The fact, therefore, that the prayer contains a demand for damages is not controlling, for where the cause of action is essentially equitable, the prayer for damages is merely incidental to the relief sought, and if the action is properly brought in a court of equity, that court will determine all the issues in the case. McCarthy v. Gaston Ridge Mill & Mining Co., 144 Cal. 542, 78 P. 7."

[3] We think it rather clearly appears that this action was essentially equitable in character rather than one for damages. The gist of the action is to secure an injunction to prevent the removal of oil from this property over what might well be a long period of years, with an accounting for the oil already removed. While some damage was alleged and proved this feature of the case is directly involved in the accounting asked for and is purely incidental to the main issues of the case, which were equitable in nature. While the accounting involved an element of damage which was referred to in the complaint the prayer for damages was merely incidental to the equitable relief sought and the rules laid down in the authority above referred to are controlling.

[4] A further consideration is that no prejudice appears in any event. In Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App.2d 170, 66 P.2d 1215, this court said (page 1225):

"In the instant action where the facts disclosed by the record indicate that the correct measure of damages was applied by the trial court and that in our opinion a jury properly instructed and properly performing its duty could have returned no other verdict than one favorable to respondent for the precise amount which was here awarded as damages, we are constrained to follow the rule announced in the former of the two above-noted groups of decisions and to declare that no error was committed by the trial court in refusing the demand of appellants for a jury trial on the issue of damages."

There was no contest here as to the amount of the damage already suffered or as to the amount involved in the accounting. The court took the figures given by the appellants as to the amount and value of the oil which had been removed, deducting the amount of the royalty paid to the landowner which would have been payable in any event, and the appellants stipulated to the correctness of these amounts thus in effect stipulating that if they were liable at all on account of the oil already removed the amount was that which was included in the judgment. In our opinion, no reversible error appears in connection with the refusal to submit the issues of this case to a jury.

[5-7] It is next urged that the court erred in not compelling the respondent as a prerequisite to injunctive relief to reimburse the appellants for all moneys expended by them in connection with the drilling of wells upon parcel B. This is based upon the contention that since the respondent was asking for equitable relief it should be ordered to do equity; that the wells on parcel B were drilled by the appellants with the knowledge and tacit consent of the respondent and, therefore, the respondent should be barred from equitable relief by the principles of estoppel and laches; and that the appellants were entitled to such reimbursement under the provisions of section 349¾ of the Code of Civil Procedure, which section was adopted after this action was begun.

The act adopting section 349¾ (Stats. 1935, p. 2285) contained a declaration of policy declaring that there are many oil and gas wells in this state which are not wholly within the land owned or controlled by the owners or operators of the wells, that until recent years there was no way to determine even approximately the subsurface location of the well, and that in many cases such wells were drilled without any intent to invade the land of another. It fully appears that this section was not intended to have any application in a case where a well is intentionally diverted into the land of another. In the instant case it fully appears that the respondent retained all rights given by its original lease in so far as parcel A is concerned and it not only appears that the appellants' lease applied only to parcel B but the court found upon ample evidence that the appellants well knew that the productive pool of petroleum oil underlying parcel A did not extend to or underlie parcel B and that they intentionally, secretly and fraudulently employed the right to occupy the surface of parcel B for the purpose of accomplishing a clandestine and secret penetration of the oil pool underlying parcel A and the removal therefrom of oil, well knowing that this oil was the property of the respondent. Under such circumstances the appellants were chargeable with the value of the oil without any deduction for expenses incurred in bringing it to the surface. Lightner Min. Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093. Under such circumstances the appellants had no equities and may not rely upon the equitable rule that he who seeks equity must do equity. Hibernia Sav. & L. Society v. Ordway, 38 Cal. 679; Richman v. Bank of Perris, 102 Cal.App. 71, 282 P. 801.

[8] Nor is there any room here for the application of the principles of laches or estoppel as against the respondent. The appellants contend that the respondent knew what was being done and tacitly consented thereto because this proceeding was not begun for several months. Drilling was begun on the first of the three wells on May 17, 1933, and the well was completed on June 20, 1933. When a representative of the respondent inquired as to whether this well was being whipstocked he was told by the appellants they were trying to keep the well straight. After that well was completed the respondent was told that the bottom of the well was within parcel A but was not told that this had been intentionally done. The second well was started August 10, 1933, and completed September 14, 1933, and the third well was begun on November 24, 1933, and completed on January 16, 1934. No information as to the underground location of these wells came to the respondent until after the respective wells were completed and there is evidence that surveys and reports were intentionally kept from the respondent. The respondent had no information as to the underground location of the second and third wells until after March 20, 1934, when through a grand jury investigation surveys and reports were secured. There was no estoppel both because the respondent did not possess full information prior to or during the drilling of the wells and because the facts were fully known to the appellants, who were intentionally and secretly proceeding against the property of the respondent, and they were in no way or manner deceived or misled by anything done by the respondent. While the respondent learned after its completion that the first well penetrated their land it was not informed that this had been intentionally done or that there was any intention to do the same thing as the second and third wells were drilled. Since it was refused access to surveys and reports it became necessary for the respondent to ascertain the facts and to procure evidence in other ways. Not only would this take considerable time in view of the natural difficulties involved in obtaining such evidence, but the respondent was justified in taking steps to be very sure of the facts before proceeding with a charge of this nature. This action was begun on July 17, 1934, and it cannot be held as a matter of law that the trial court erred in failing to find that the respondent was guilty of laches which would bar relief.

[9] The only other point raised is that the evidence was insufficient to justify the rendition of a money judgment against the appellant Sam Bernstein. It is contended that there is no evidence showing that this appellant participated in the acts of which the respondent complains. While the appellants set forth certain of the testimony in this regard they omit several other portions of the testimony which is to a contrary effect. Among other things, one witness testified that he visited parcel B with Sam Bernstein and that Sam Bernstein explained to him the plan to drill wells on parcel B in such a manner that they would cross the boundary line and be bottomed in and produce oil from parcel A. The most that can be said is that a conflict appears, and the evidence fully sustains this portion of the judgment.

For the reasons given the judgment is affirmed.

I concur: MARKS, J.

27 Cal.App.2d 372

SASSANO v. ROULLARD.

Civ. 1891.

District Court of Appeal, Fourth District, California.

June 29, 1938.

1. Trial 🔑343

A jury's verdict for plaintiff in negligence action implied findings adverse to defendant on issues of defendant's negligence and plaintiff's alleged contributory negligence.

2. Appeal and error 🔑999(3)

Where verdict in negligence action was for plaintiff, and defendant failed to appeal or to ask for a new trial, implied findings adverse to defendant on issues of defendant's negligence and plaintiff's alleged contributory negligence were deemed a final determination of such issues.

3. Trial 🔑139(1), 140(1)

The jury is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses.

4. Damages 🔑208(1)

Question of the award of damages and the amount thereof is primarily for the jury.

5. New trial 🔑69, 72

In motion for new trial, the trial judge is under duty to weigh the evidence again and its sufficiency and measure the credibility of the witnesses.

6. New trial 🔑75(1), 76(1)

On motion for new trial, trial judge is under duty to consider adequacy of the amount of damages and to grant a new trial if damages are either excessive or inadequate, or himself reduce excessive damages.

7. Appeal and error 🔑977(1)

The duty of the trial judge to exercise a reasonable and lawful control over verdicts cannot be shifted to an appellate court.

8. Appeal and error 🔑1004(1)

The power of appellate courts to control the amount of damages comes into play only when the facts before it are such as to suggest passion, prejudice, or corruption of the jury.

9. Trial 🔑309

In personal injury action, where plaintiff, who had sustained permanent scar on forehead and nose, was a witness so that trial judge and jurors saw scar, what they saw was evidence to be considered in determining amount of damages.

10. Appeal and error 🔑932(1)

In personal injury action where plaintiff sustained scar on forehead and nose, and record contained no sufficient description of the scar, Court of Appeal presumed that what trial judge and jury saw when plaintiff testified supported the verdict and judgment as to amount of damages.

11. Damages 🔑96

The assessment of the amount of general damages must be largely left to the sound discretion of the jury, since there is no fixed standard by which the exact amount of money that will compensate one for a personal injury may be determined.

12. Damages 🔑130(4)

$250 damages for scar sustained on forehead and nose of seven-year-old boy *held* not so inadequate as to indicate passion or prejudice, in view of meager description of the scar in record and of fact that trial judge denied plaintiff's motion for new trial, notwithstanding remark of judge after return of verdict that, if plaintiff was entitled to recover anything, he was entitled to recover much more than $250.

13. New trial 🔑75(4)

The trial judge was under duty to correct any mistake made by jury in amount of damages awarded.

14. Appeal and error 🔑933(1)

It was presumed that the trial judge faithfully performed his duty in ruling on motion for new trial.

15. Appeal and error 🔑717

The oral or written opinion of a trial judge stating his reasons why he did or did not take a certain action is not controlling on appeal.

16. Appeal and error 🔑1004(1)

Where general damages alone are involved, an appellate court should hesitate to conclude that a verdict is a result of a compromise simply because the amount of the award is small.

◆

Appeal from Superior Court, Fresno County; E. N. Rector, Judge.

Action by Leslie Sassano, by L. A. Sassano, his guardian ad litem, against Joel

Roullard to recover for injuries sustained in an automobile accident. Judgment for plaintiff for $250, and plaintiff appeals.

Affirmed.

Arthur Frame, of Clovis, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment in the sum of $250 in favor of Leslie Sassano, a minor of the age of seven years, for damages awarded him for injuries suffered in an automobile accident which occurred on November 11, 1936, on Herndon avenue in Fresno county. Leslie's forehead and nose were cut by flying glass. The wound has completely healed. He suffered no permanent ill effects from the cut except a scar that will remain with him through life.

Plaintiff has appealed from the judgment and in his brief argues two questions: (1) That the evidence is sufficient to support the implied finding of the jury that the negligence of defendant was the proximate cause of the accident; and (2) that the damages awarded were grossly inadequate and were a result of a compromise on the question of the negligence of defendant being the proximate cause of the collision.

[1, 2] We are not here concerned with the question of the sufficiency of the evidence to sustain the implied finding of the jury that the negligence of defendant was the proximate cause of the accident. Defendant has not appealed and the correctness of that implied finding is not challenged by him. Under this state of the record the rule controlling is stated in Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845, as follows:

"The verdict of the jury in favor of plaintiff implied findings adverse to the defendant upon the issue as to its own negligence and plaintiff's alleged contributory negligence. By its failure to appeal or ask for a new trial, these implied findings, if fairly made, must be deemed a final determination of such issues as fully as though defendant, after filing its answer, had stipulated to the facts so found."

[3-6] The principal question for our consideration is that of the adequacy of the damages to compensate for the injuries suffered. In considering this question we must bear in mind the firmly established rules that the jury is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses; that the question of the award of damages and their amount is primarily one for the jury; that on a motion for new trial the trial judge sits as a thirteenth juror; that it becomes his duty to again weigh the evidence and its sufficiency and measure the credibility of the witnesses; that in so doing it is also his duty to consider the adequacy or inadequacy of the amount of damages awarded; that if he finds the damages either excessive or inadequate it is his duty to grant a new trial either generally or upon the special issue of the amount of damages or himself reduce excessive damages.

[7, 8] Doing justice between litigants is the prime object of the law. It is in the trial court that this object should be sought and can be obtained by a trial judge who will fearlessly perform the duties of his office and who will exercise a reasonable and lawful control over verdicts. This is a responsibility that cannot be shifted to an appellate court. It rests on the shoulders of the trial judge and no other for the power of appellate courts to control the amount of damages awarded comes into play only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the jury. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 203 P. 768; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83; Webster v. Harris, 119 Cal.App. 46, 6 P. 2d 88.

The description in the record of the injuries suffered by Leslie are meager. We know that there was a lacerated cut on the right side of his forehead running from the hair line into his eyebrow and a minor cut on his nose. We also know that the only lasting result will be a scar. We do not know the size nor the appearance of the scar. We can find no effort to describe it in the record.

[9, 10] The child was a witness in the case and both the jurors and the trial judge saw this scar. What they saw was evidence. In the absence of any sufficient description of the scar in the record, we must presume that what they saw supported the verdict and judgment (Ethel D. Co. v. Ind. Acc. Comm., 219 Cal. 699, 28 P.2d 919), or in other words, that the scar was not a serious blemish and that the permanent damages suffered were slight.

Of course there were no special damages alleged or attempted to be proved. The cost of medical attention for the child was a charge against his parents. He was in the second grade in school and did not lose his standing because of the injuries. The damages awarded were general.

[11] There is no fixed standard by which we may determine the exact amount of money that will compensate one for an injury. Clare v. Sacramento, etc., Co., 122 Cal. 504, 55 P. 326. In the absence of such a standard or precise rule the assessment of the amount of general damages of necessity and to a large extent must be left to the good sense and sound discretion of the jury. Grant v. Los Angeles Transfer Co., 45 Cal.App. 731, 188 P. 294. As we have already seen, it is only when the amount of the award indicates passion, prejudice or corruption on the part of a jury that an appellate court can interfere with the amount of an award.

[12, 13] We must admit that the amount of damages awarded here was small but in view of the meager description of the injuries in the record we cannot say that the amount, standing alone, indicated passion, prejudice or corruption on the part of the jury. This is especially true in view of the fact that the trial judge denied plaintiff's motion for new trial. If the jury had made a mistake in the amount of the award it became the duty of the trial judge to correct it. He approved the verdict and its amount by denying the motion for new trial.

Plaintiff calls attention to the following remarks of the trial judge made just after the jury had returned its verdict:

"Ladies and gentlemen of the jury, I hardly ever criticize the verdict of the jury. I think I did it once long ago in my own court in Merced county. Of course I think nearly any person would say if he is entitled to anything he is entitled to more than $250. Now that scar on his face is going to last him throughout his life. It is a compromise verdict, I guess. Now I hardly think right now that I will disturb your verdict, but I know that it isn't adequate at all if he is entitled to anything. Now on that point, on that question, you see I haven't a very strong impression in reference to that. In this case that was rendered in my county recently, why they admitted negligence and the only question was the amount of damages, and it was absolutely entirely inadequate. And I just granted a new trial on that ground. I guess a good many of you thought that maybe he wasn't entitled to any damages at all, very doubtful in this case. And that is the reason you brought in such a small verdict. Now you know if it was your own child and you wanted to assess the real damages to him, the actual damage, you know that it is more than $250. And I am not going to ask you to agree with me, but you know it, of course. You wouldn't carry that scar for several thousand dollars, any of you, I know it positively. Well now I am not censuring you very badly because some of you think maybe he wasn't entitled to anything at all and you just sort of compromised. I am saying this because this accident here, I don't know for sure whether he is entitled to anything or not, but I know this, if he is entitled to anything he is entitled to 10 times that sum, easily. Yes, easily so."

It is argued that it must be concluded from the foregoing statement that the verdict was inadequate and that it was the result of a compromise within the rule announced in the case of Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398. Of course, the trial judge's statement supports both of those arguments.

[14, 15] The question for us to decide here is not what were the views of the trial judge immediately after the verdict was announced, but what they were when he ruled on the motion for new trial after the lapse of time had given him occasion for mature reflection and study on the question. If he entertained those views when he ruled on the motion he should have promptly granted a new trial. Otherwise he would have been derelict in his duty. We must presume that in ruling on the motion for new trial the trial judge faithfully performed his duty. Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774. In other words, we must conclude that after mature reflection the judicial mind had been changed and that the views expressed when the verdict was received were no longer the views of the judge. We make these observations with the rule in mind that the oral or written opinion of a trial judge stating his reasons why he did or did not take a certain action are not controlling on appeal.

[16] Since the decision of Bencich v. Market St. Ry. Co., supra, it has been fre-

quently argued that verdicts were the results of compromises on the part of jurors. We have had occasion to observe that where, as in the Bencich Case, special damages proved were admittedly in excess of the amount of the verdict rendered, there was strong evidence of a compromise on the part of certain jurors who did not believe that any verdict should have been returned in favor of plaintiff. Wallace v. Miller, Cal.App., 78 P.2d 745. On the other hand, where the general damages awarded were small, but to a certain extent compensatory, no such conclusions follow. Tripcevich v. Compton, Cal.App., 77 P.2d 286; Zeller v. Reid, Cal.App., 79 P. 2d 449. It may be very generally stated that where general damages alone are involved an appellate court should be slow to conclude that a verdict is a result of a compromise simply because the amount of the award is small. Instead, it should generally govern its actions by those rules we have already set forth concerning grossly excessive or grossly inadequate verdicts.

Under the facts before us we cannot conclude that the award, though small, indicates passion, prejudice or corruption on the part of the jury, or failure on the part of the trial judge to perform his duty. Because of the small amount of the verdict we cannot presume he committed prejudicial error when he denied the motion for new trial.

Judgment affirmed.

I concur: BARNARD, P. J.

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27 Cal.App.2d 416

BICKFORD et al. v. LAWSON.

Civ. 5757.

District Court of Appeal, Third District, California.

July 2, 1938.

Hearing Denied by Supreme Court Aug. 29, 1938.

1. Physicians and surgeons 🔑18(9)

Evidence of malpractice of physician in setting broken bones of patient's leg which failed to set properly was insufficient for jury.

2. Physicians and surgeons 🔑15

A physician's failure to take X-ray pictures of a fractured limb does not constitute negligence under all circumstances, and the necessity of taking X-ray pictures depends entirely upon the circumstances of the particular case.

3. Physicians and surgeons 🔑14(4), 18(8)

The question as to whether the reduction and treatment of a fractured limb without taking X-ray pictures constitutes negligence on the part of a physician depends upon what an ordinarily skillful physician practicing in the patient's locality in the exercise of due care and professional judgment would do under like circumstances, and the determination of the question depends upon expert testimony.

4. Physicians and surgeons 🔑18(8)

The mere fact that nature failed to supply a normal development of callus to properly unite bones of patient's leg within period of two months or more after the fracture occurred, or that the physician failed to discover the unusual condition, did not prove that the physician was guilty of any negligence creating liability for malpractice.

5. Appeal and error 🔑205

In action for malpractice in setting a broken leg, the court's sustaining of objection to question seeking to elicit statement charging physician with specific act or omission of negligence, assumed to have been made by another physician and not denied by physician charged with malpractice, was not reversible error in absence of an offer to prove an uncontradicted charge of negligence.

6. Evidence 🔑538

In action for malpractice in setting a broken leg, expert testimony of a physician relating to necessity of using X-ray pictures and employing tension method of reducing a fractured limb was inadmissible where it was based upon the physician's personal judgment and physician conceded that he did not know what the practice of other physicians in the locality was in that regard.

7. Evidence 🔑538

To qualify a medical expert witness to testify to the negligent reduction and treatment of a fractured limb by another physician, the witness must possess the required professional knowledge, learning, and skill to express his opinion with due authority, and must be familiar with the method of treatment of similar ailments and with knowledge and skill required therein by other physicians in that locality.

8. Evidence ⚷553(2)

In suit for malpractice in setting broken leg, the sustaining of objection to hypothetical question propounded to a physician as an expert witness was proper, where such physician had not rendered the patient professional service, and the hypothetical question did not contain all the essential circumstances incident to the setting of the limb and to the treatment thereof disclosed by the evidence, upon which a fair and intelligent opinion could be expressed.

9. Evidence ⚷553(2)

The sustaining of an objection to a hypothetical question is not error where the facts related in the question omit material undisputed evidence necessary to a fair, intelligent, and sound opinion of the witness regarding the problem to be determined.

10. Evidence ⚷553(2)

The chief test of the competency of a hypothetical question, which seeks to elicit the professional opinion of a physician regarding the treatment of a patient, is whether it is a full and fair recital of all the essential evidence disclosed by the record on the particular issue which is involved.

11. Evidence ⚷553(2, 4)

Where a hypothetical question assumes facts in direct conflict with the undisputed evidence or omits material facts upon which a determination of the problem depends, the question should be rejected because it is misleading and is likely to lead witness to a false conclusion.

12. Evidence ⚷512

In suit for malpractice in setting a broken leg, evidence of expert witnesses relating to customary use of X-ray pictures, the use of tension method of reducing a fractured limb, and the usual treatment of physicians in the locality in the reduction of a fractured limb, was admissible, where the witnesses qualified themselves to testify regarding customary practice in reducing and treating similar fractures in that vicinity.

13. Appeal and error ⚷1050(1)

In suit for malpractice in setting a broken leg, the erroneous exclusion of expert testimony relating to use of X-ray pictures, the use of tension method of reducing a fractured limb, and the usual treatment of physicians in the vicinity in the reduction of a fractured limb, did not require reversal where evidence indicated that the reduction of the fracture was properly made without the use of X-ray pictures and without artificial tension.

14. Physicians and surgeons ⚷15

The omission of an accepted method of treating an ailment by a physician does not constitute actionable negligence unless it substantially contributes to the patient's injury.

15. Physicians and surgeons ⚷15

The failure of a physician to take X-ray pictures after reducing fracture of patient's leg, if contributing to the injury of the patient whose leg failed to set properly, was a mere error in judgment, and did not constitute actionable malpractice.

◆

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Mollie Bickford and another against F. M. Lawson for malpractice in setting a broken leg. From a judgment rendered pursuant to a directed verdict in favor of the defendant, the plaintiffs appeal.

Affirmed.

H. W. McGowan and Wright L. Callender, both of Willows, for appellants.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

The plaintiffs have appealed from a judgment rendered pursuant to a directed verdict in favor of the defendant in a suit for damages for alleged malpractice in setting a broken leg. The verdict was directed on the theory that the plaintiffs failed to qualify certain medical experts to testify to the alleged malpractice and that there is no competent evidence upon which the jury was authorized to find a verdict against the defendant.

The appellants contend the court erred in striking from the record the testimony of Dr. William Harlan, in rejecting evidence of the use of X-ray machines in reducing and treating fractures of the nature which was involved in this case, and in sustaining objections to other evidence tending to show that the defendant was guilty of negligence in setting and treating the limb.

The defendant is a duly licensed physician and surgeon who has practiced his profession in the town of Willows, in Glenn county, for twenty-six years. October 23, 1935, the plaintiff, Mollie Bickford, while walking along a pathway stumbled over a rock and fell to the ground, fracturing both bones of the right leg above the ankle. Temporary splints were adjusted to mobilize the limb by a neighbor, who is a practical nurse. The patient was taken in an automobile to Willows, a distance of 22 miles, to secure the professional service of Dr. Lawson. The defendant examined the injured limb without removing the patient from the machine and readily ascertained that both the tibia and the fibula were broken. He advised taking her to the Enloe Hospital at Chico or to the Woodland Hospital because they were equipped with the most modern facilities for treating such cases. The patient objected to going to either of those hospitals on account of her financial circumstances. She was therefore taken to the County Hospital, which was not equipped with an X-ray machine. The doctor said it was easy to tell from an exterior examination the nature of the fractured bones and that he believed he could properly set the limb without the use of an X-ray machine. The patient was placed on an operating table and an anaesthetic was administered. The doctor then made a critical examination and reduced the fractured bones by pulling on the heel of the foot and by manipulation with his hands. A fairly accurate adjustment of the bones was thus secured. The bones were placed in substantial apposition and remained undisturbed in that position. Plaintiffs' witness, Dr. T. H. Brown, who took an X-ray picture of the fracture some two months later, said:

> "It shows that the fragments of the bone are in pretty good apposition, that is the fragments are brought into a nice position as far as being opposite to each other is concerned. * * * It shows the edges of the bone here are in close apposition to these opposed edges."

In setting the broken bones, Dr. Lawson measured the leg with a steel tape, placed a stockinet on the limb and adjusted a temporary plaster of paris cast to prevent the fractured bones from slipping out of position. After adjusting the cast he again measured the leg and determined that the alignment was proper by means of a straight edge rule. He then split the cast and fastened it in place with adhesive tape to allow for possible expansion from swelling of the limb. Thereafter he examined the patient carefully every day until November 11th, being entirely satisfied with the apparent result. On the last-mentioned date, the swelling of the limb having subsided, he removed the original cast and replaced it with a permanent cast, extending from the toes to a point six inches above the knee. He again renewed his measurements both for alignment and adjustment of the bones. He furnished the patient with calcium tablets to aid the process of nature in knitting the bones and then discharged her from the hospital warning her against placing weight or strain upon the broken limb. Thereafter the patient visited the doctor once a week until December 20, 1935. From time to time the cast was adjusted to relieve pressure and to minimize the pain. During this entire time the doctor found the limb to be in satisfactory condition. There was nothing to indicate that the bones were not properly uniting.

December 19, 1935, Mr. and Mrs. Bickford visited Dr. William Harlan, a physician at Arbuckle, 35 miles from Willows. He took an X-ray picture of the fractured limb. The following day Mrs. Bickford told Dr. Lawson that the picture disclosed the fact that the bones had not united and that they were out of alignment. At the request of the defendant they visted Dr. Brown at Orland, who took another X-ray picture, discovering that while the bones were in "nice position as far as being opposite to each other is concerned", they were not properly united and there was evidence that nature was not supplying the normal or proper amount of osseous fluid to form the callus. The defendant then advised his patient to consult a bone specialist. She went to the University of California Hospital at San Francisco for that purpose. She did not thereafter consult with the defendant. Through the medical staff of the last-mentioned hospital an operation to aid the uniting of the bones was performed January 2, 1936. The limb was then placed in a cast. On March 23d, through the advice of the hospital physicians, the cast was removed and the limb was left without support other than the usual bandages. The bones failed to properly unite. The lack of callus left a weakened condition. April 23d the cast was replaced. This suit for damages for malpractice was then commenced against the defendant and the trial occurred June 2,

1936. At the close of plaintiffs' evidence the court directed the jury to return a verdict in favor of the defendant. From the judgment which was accordingly rendered, this appeal was perfected.

[1] We are of the opinion the court properly directed a verdict against the plaintiffs. There is no substantial evidence to support a judgment against the defendant for malpractice in setting the broken leg. In their effort to prove that Dr. Lawson was guilty of negligence in diagnosing the nature of the injury, in reducing the fracture and in treating the patient, they rely upon the fact that he failed to use an X-ray machine, or mechanical tension on the limb and that the bones did not properly unite because of a lack of normal development of callus.

[2, 3] It is true that Dr. Lawson took no X-ray picture of the fracture for the reason, as he stated, that "I did know [the character of the fracture] in a general way, I could feel the break, and feel the general direction of it. * * * My judgment was that I could judge the thing, the bone in her leg, by feeling it and seeing it, and that is the way I was satisfied to treat it that way". The defendant possessed no X-ray apparatus. He advised the patient to go to the Woodland or Enloe Hospital where all modern apparatus were accessible, but she declined to do so because of her financial circumstances. The doctor believed he could properly reduce the fracture and treat the injury without an X-ray machine. The chief use of that machine in the case of an ordinary fracture of a limb is to ascertain the nature of the broken bones to secure an accurate adjustment thereof. Apparently he succeeded in properly reducing the fracture without the X-ray picture, for Dr. Brown, who took a picture of the limb two months later testified that the bones were then in "nice position as far as being opposite to each other is concerned". There is absolutely no evidence that Dr. Lawson did not adjust the broken bones in direct alignment and in absolute apposition. With the exception of the use of an X-ray machine, and without artificial tension on the limb there is no contention that he did not follow the most approved method of medical experts in that vicinity in setting the broken bones. It may not be said, as a matter of law, that the failure to use an X-ray machine in the reducing of a fractured limb constitutes negligence under all circumstances. The necessity of employing an X-ray apparatus in reducing a fractured limb depends entirely upon the circumstances of the particular case. The question as to whether the reduction and treatment of a fractured limb without the use of an X-ray machine constitutes negligence, depends upon what an ordinarily skilled physician practicing in that vicinity, in the exercise of due care and professional judgment, would be required to do under like circumstances. The determination of those questions depends upon expert testimony. Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642; Arais v. Kalensnikoff, Cal.Sup., 74 P.2d 1043.

In the present case the plaintiffs called three medical experts. Dr. Brown took an X-ray picture of the injured limb December 20th, two months after the leg was broken. He testified very fully regarding the condition of the fracture as it then appeared. In substance he testified that he found the bones in nice apposition, but that there appeared to be an absence of callus to properly unite them. This furnishes no evidence of negligence on the part of the defendant in the absence of expert testimony of acts or omissions on his part indicating a lack of ordinary professional treatment of the fractured limb in conflict with the recognized practice of other skilled physicians in that vicinity. In 20 California Jurisprudence, page 1077, section 23, it is said: "It is held that liability is not established by a failure to take X-ray photographs of an injured limb." In support of the preceding declaration of law, see Scherer v. Eidenmuller, 45 Cal.App. 372, 187 P. 445.

[4] The mere fact that nature failed to supply a normal development of callus to properly unite the bones within the period of two months or more after the fracture occurred, or that the defendant failed to discover that unusual condition, does not prove that he was guilty of any negligence which created a liability for malpractice on his part. There is no evidence in this case that the defendant erred in his professional judgment in reducing the fracture or in treating the patient, which contributed to the absence of a normal supply of callus. No expert witness testified to any such omission on his part. The formation of callus depends on the age and physical condition of the patient. Callus forms much more quickly in a young and strong patient than in an

older or weaker person. Where the system lacks calcium or adequate lime salts the fractured bones knit very slowly and sometimes not at all. Herzog's Medical Jur. p. 257, sec. 324.

The court did not err in sustaining an objection to a question seeking to elicit a statement assumed to have been made by Dr. Brown in the presence of the defendant and Mrs. Bickford immediately after examining the X-ray picture which was taken on December 20th. It is asserted this question was propounded for the purpose of proving an admission of negligence on the part of the defendant. Evidently Dr. Lawson made no statement in the nature of an admission at that time. At the request of counsel to "Go ahead and state what Dr. Lawson said," Dr. Brown replied, "He really didn't have much to say. I don't recall him saying anything right now, I don't believe he did." To the subsequent question, "What did Dr. Brown say in his presence?" an objection was sustained. The only competent purpose of the last inquiry would be to uphold the theory that Dr. Brown then charged the defendant with some specific act or omission of negligence which he failed to deny. It does not appear that any such accusation was made by Dr. Brown. The plaintiffs did not then claim that such an accusation was made by Dr. Brown. There was no offer to prove by the witness any such statement.

[5] In the absence of such an offer to prove an uncontradicted charge of negligence, the ruling of the court did not constitute reversible error. Snowball v. Snowball, 164 Cal. 476, 479, 129 P. 784; Grandy v. Southern Pacific Co., 9 Cal.App. 2d 441, 444, 49 P.2d 1127; People v. Pereles, 125 Cal.App.Supp. 787, 792, 12 P.2d 1093.

The court did not err in striking from the record the testimony of Dr. William Harlan, on the ground that he was not qualified as an expert witness for the reason that it affirmatively appears that he had no knowledge of the customary method of treatment of similar fractured limbs employed by other members of the medical profession in that locality.

Dr. Harlan had practiced his profession at Arbuckle, thirty-five miles from Willows, for a period of over twenty years. He was called by the plaintiffs as an expert witness and he was examined at length. At the request of plaintiffs he took three X-ray pictures of the fractured limb on December 19th, and testified, over the objections of the defendant, to the result of the defendant's setting of the leg. He did not testify that the bones were not found to be in proper apposition or alignment, but he did say that while there was evidence of the presence of callus there was a lack of adequate supply thereof, and that the bones had not properly united and that the limb was weak. Over the specific objection of the defendant on the ground that a foundation for his expert testimony for the purpose of showing negligence in this malpractice case had not been established, he was first permitted to answer a lengthy hypothetical question to the effect that it was not accepted medical practice in that or any other locality to attempt to set a broken leg without the use of X-ray apparatus and without applying traction or tension upon the foot to adjust the bones. He testified there were three approved methods of applying traction for that purpose, namely, by means of weights, pulling on the limb and with the aid of steel bars or pins. He admitted it was a matter of judgment as to which should be used. The purpose of such tension was conceded to be the procuring of proper alignment and contact of the ends of the broken bones. There seems to be no dispute regarding the fact that the bones were in "nice position". They were held in that position by the plaster cast. On cross-examination it was conclusively established that the doctor was not qualified to testify as a medical expert in this malpractice case for the reason that he admitted he did not know what the practice of other physicians was in reducing and treating such fractures in that or any other locality. He testified in that regard:

"Q. You have answered the [hypothetical] question propounded to you by saying no. You mean that isn't the way you would have done it *yourself?* A. Yes. It isn't the way I would have done it. * * * It seems as though any of us would use traction towards trying to set a bone of that type in an individual the size she was. In a smaller person it would be done with ease, but an individual her size it couldn't be done without traction. Q. In other words, this is true: That after taking the picture on December 19th, some seven or eight weeks subsequent to the date of her accident, and after seeing the lady herself, her size, that you determined that *so far as* *your judgment was concerned,* you would have used traction on the break? A. Yes. * * * Q. You don't practice any place else but down at your hospital at Arbuckle? A. That's all. Q. Do you know any doctors up here? A. I know one. Q. Who do you know? A. Dr. Reese. Q. Dr. Reese is an osteopath. He was formerly down there with you wasn't he? A. Yes. Q. You have never associated yourself with any of the other doctors up here in performing the reduction of any fractures? A. No. Q. You don't know if in the judgment of Dr. Brown of Orland, or Dr. Doffey of Orland, they would have used weights? A. No, I don't know if they would or not but I feel they should. Q. Your judgment tells you that is the proper thing to do, but *you don't know what any of the rest of them do or have done in the past, in circumstances of like kind, or in like circumstances, do you?* A. No. * * *"

"Q. Do you know of any case other than in your own hospital, or take in Glenn County, where any doctor practicing here has used the traction method in setting that kind of fracture? A. I couldn't say that, *I havn't been around to see that from my own personal knowledge.* Q. Do you know of any cases up here of fractures of the tibia where doctors have used the plaster cast method without traction? A. *I couldn't say I know it from my own knowledge.* * * * Q. Assuming further that within less than three weeks after this leg had been put into a cast, a measurement showed that the legs were of equal length, the straight edge showed it was straight; that the cast was taken off; that manipulation indicated that the bones were in apposition; that further measurements were taken with a tape line and straight edge, would you say whether Dr. Lawson, under those circumstances, was justified in believing at that time that the fracture had been reduced? * * * A. Yes, I think that he was. He had set the bones in that way and figured it was right or he wouldn't have left it in that position. Without a doubt he was justified in feeling that it was all right. Q. If the condition you saw in your X-ray taken December 19th, existed on November 11th, at the time that he changed that cast, that condition would be apparent to the touch wouldn't it? A. Yes, it would. Q. And you wouldn't need an X-ray to discover it would you? A. No, you didn't need an X-ray to see there was something wrong with that leg at any time."

[6] At the close of plaintiffs' evidence the defendant moved to strike out the testimony of Dr. Harlan, on the ground that it affirmatively appears that he was not qualified to testify as a medical expert in this malpractice case. That motion was properly granted, and his evidence was stricken from the record. Clearly Dr. Harlan based his conclusions regarding the necessity of using the X-ray pictures and in employing the tension method of reducing a fractured limb upon his own judgment and not upon the customary practice of other skilled physicians in the locality of Willows or elsewhere. He conceded that he did not know what the practice of other physicians in that locality is in that regard. His evidence was therefore incompetent and it was properly stricken from the record.

[7] The rule is thoroughly established in California that to qualify a medical expert witness to testify to the negligent reduction and treatment of a fractured limb by another physician in a suit for malpractice it must first appear that the witness possesses the required professional knowledge, learning and skill to express his opinion with due authority, but he must also be familiar with the method of treatment of similar ailments and with knowledge and skill required therein by other physicians in that locality. McGuire v. Baird, 9 Cal. 2d 353, 356, 70 P.2d 915; Arais v. Kalensnikoff, supra; Hiraide v. Cochran, 109 Cal.App. 377, 381, 293 P. 165; Rasmussen v. Shickle, 4 Cal.App.2d 426, 430, 41 P.2d 184; Taylor v. Fishbaugh, Cal.App., 79 P. 2d 174; 3 Wharton & Stille's Medical Jur. p. 465, sec. 476.

[8] We are of the opinion the objection to the hypothetical question propounded to Dr. Gambell by the plaintiffs was properly sustained for the reason that it did not contain all of the essential circumstances incident to the setting of the limb and to the treatment thereof disclosed by the evidence upon which a fair and intelligent opinion could be expressed. It was therefore incompetent and misleading. The doctor was qualified to testify as a medical expert, but he did not render to the patient professional service. All the knowledge he possessed of the condition of the fractured limb and of the services rendered by the defendant was acquired from the

facts related to him in the hypothetical question and from an examination of the X-ray pictures which were subsequently taken. The question was too incomplete, considering the technical nature of the operation and the extended treatment of the patient, to enable a physician to acquire the necessary information upon which he could fairly and intelligently express an opinion regarding the alleged malpractice. Several important details of the operation disclosed by the evidence are omitted. Few of the details of actually reducing the fracture are related. In propounding that hypothetical question, the plaintiffs did not rely on the defendant's failure to use X-ray pictures. That fact was not stated. They seem to have depended chiefly on a failure to use "traction" in adjusting the broken bones. The question concludes with this request of the witness:

> "Will you state whether or not in your opinion such method of reduction *without traction* * * * and such * * * after treatment was the type of ordinary, skillful, or careful surgical treatment common in this vicinity?"

The record clearly indicates that while there was an oblique fracture of the bones, they were not shattered but remained in good apposition, which was apparent from observation, careful manipulation and feeling of the injured limb by the surgeon. It was not a complicated fracture. The tibia, or shinbone, lies close to the surface and is often readily felt and adjusted in an ordinary fracture thereof by manipulation with the hands. The tibia and fibula bones articulate together. It is apparent there was a simple fracture of these bones without complications. Under such circumstances they may be properly set without artificial traction or the use of X-ray pictures. The facts of this case indicate without conflict that the bones were not overlapping or out of proper adjustment. Dr. Lawson testified that he had no trouble in determining that fact. There is no evidence of undue tension of the muscles. There is no evidence the bones were ever out of proper alignment or apposition. The X-ray pictures taken by Dr. Brown two months after the accident occurred disclosed the fact that the bones were in "nice position". There is no evidence to the contrary. Those facts have an important bearing on the question as to whether artificial traction of the limb was necessary under the circumstances of this case. Yet those essential facts were not included in the hypothetical question. Some of the details of the setting of the limb were omitted, such as the fact that the defendant adjusted a stockinet and treated the patient's leg for blisters which appeared thereon, that he changed the cast and relieved pressure from time to time in an almost daily examination of the patient for a period of nearly three weeks after the operation, and that he furnished her with calcium tablets to aid nature in producing a normal supply of callus, as well as a number of other important details of the setting of the limb and the treatment of the injury. It appears that the patient had an inherent tendency toward unusually brittle bones or what is commonly termed "fragilitis ossium". She had previously suffered three or four other fractures of bones. Evidently her constitutional condition lacked the normal deposits which contribute to speedy and natural uniting of broken bones. That fact was not mentioned in relating the course of the treatment which she received. Moreover, the husband of the patient testified that Dr. Lawson did apply traction to the limb in setting the bones. He said:

> "He took hold of the bottom of the foot, on the heel, and pulled on it and run his fingers along the top of it where the break was. I suppose in his judgment he was satisfied where it was, for all I know."

Both the patient's husband and a trained nurse assisted the doctor in setting the limb. Those facts were not included in the hypothetical question. We think the question was incomplete and misleading, and that the objection thereto was properly sustained.

[9-11] Where the facts related in the hypothetical question omit material undisputed evidence necessary to a fair, intelligent and sound opinion of the witness regarding the problem to be determined, it is not error for the court to sustain an objection thereto. The chief test of the competency of a hypothetical question which seeks to elicit the professional opinion of a physician regarding the treatment of a patient is whether it is a full and fair recital of all the essential evidence disclosed by the record on the particular issue which is involved. Where the question assumes facts in direct conflict with the undisputed evidence, or omits material facts upon which a determination of the problem depends, the hypothetical question becomes

misleading and it is then likely to lead the witness to a false conclusion, and should be rejected. Johnson v. Clarke, 98 Cal. App. 358, 363, 276 P. 1052; Estate of Gould, 188 Cal. 353, 205 P. 457; Graves v. Union Oil Co. of Calif., 36 Cal.App. 766, 173 P. 618; 3 Jones Comm. on Evidence, 2d Ed., p. 2427, sec. 1327. In the Graves Case it is further said (page 619):

"The trial judge is in a position to have the circumstances far more clearly before him than the appellate court can have them. *A large discretion relating to the form of the question must necessarily rest with the judge.*"

[12-14] We are of the opinion defendant's objections to certain questions which were propounded to Dr. Gambell and Dr. Lund regarding the customary use of X-ray pictures, tension on the limb and the usual treatment of physicians in the vicinity of Willows in the reduction of a fractured tibia and fibula, should have been overruled, but that the sustaining of those objections is not reversible error under the circumstances of this case. Those physicians duly qualified themselves to testify regarding the customary practice in reducing and treating similar fractures in that vicinity. That evidence was competent. However, the evidence shows without conflict that the bones were set in "nice position" and alignment in the present case, and that they did not overlap or slip from normal position even without the use of X-ray pictures and without artificial tension. They were in that proper position December 20th and as long as the patient was under the care of the defendant. There is no evidence to the contrary. The excluded questions do not indicate that the use of X-ray pictures or tension on the limb would have improved the adjustment of the bones or the possibility of a better union of the fractured portions thereof. There was no offer to prove any such condition. Since the reduction of the fracture was properly made without the use of X-ray pictures and without artificial tension of the limb there was no prejudicial error in excluding expert testimony that such means were ordinarily employed by other physicians in the treatment of similar fractures in that vicinity. The omission of an accepted method of treating an ailment does not constitute actionable negligence unless it substantially contributes to the injury as a result thereof. In the case of Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654, respecting the duty which a physician owes to his patient, the court said (page 655):

"'Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning *to accomplish the purpose for which he was employed.* He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge.' Pike v. Honsinger, 155 N.Y. [201], 209, 49 N.E. [760], 762, 63 Am.St.Rep. 655. 'The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances.' Zoterell v. Repp, 187 Mich. [319], 330, 153 N.W. [692], 695. 'It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible.' Leighton v. Sargent, 27 N.H. [460], 474, 59 Am.Dec. 388."

There is no evidence in this case, and there was no offer to prove that the earlier use of X-ray pictures would have disclosed the absence of a normal accumulation of callus so as to have aided a more speedy union of the bones. We assume the manner of setting the bones without the use of X-ray pictures and without artificial tension had nothing to do with the lack of the development of callus which undoubtedly resulted from the physical condition of the patient. The appellants have not contended the alleged negligence of the defendant in setting the limb contributed to the lack of callus.

[15] From a careful reading of the entire record we are convinced that the only omission of which the plaintiffs may reasonably complain is a failure to use X-ray pictures after the reducing of the fracture, at an earlier date, with the possibility that the defendant might have thus discovered the lack of callus and that he would then have advised his patient to consult a bone specialist. But the defendant

testified that he had no intimation of that lack of callus until the X-ray picture was taken December 20th. That omission, if it may be said to have contributed to the injury of the patient, was a mere error in judgment which does not constitute actionable malpractice.

We are therefore of the opinion the rejected evidence complained of does not constitute reversible error. There was not a miscarriage of justice in this case. It seems apparent that with the most favorable responses of the expert witnesses to the questions propounded to them which could be anticipated this case would not support a judgment against the defendant for malpractice, under the circumstances disclosed.

The court therefore properly directed a verdict in favor of the defendant.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

27 Cal.App.2d 360

PASSOW v. BELL.

Civ. 10705.

District Court of Appeal, First District, Division 2, California.

June 29, 1938.

Hearing Denied by Supreme Court Aug. 25, 1938.

1. Execution 🔑73

Where police officer successfully resisted levy of execution for satisfaction of $1,000 judgment against him on ground that only income was from salary and government pension, which was necessary for support, and five years later it appeared on administration of wife's estate that community property and savings totaled $7,500 and that officer had been deliberately deceiving judgment creditor, creditor was entitled to writ of execution. Code Civ.Proc. §§ 685, 710.

2. Exceptions, bill of 🔑51

After a proposed bill of exceptions has been duly filed with the clerk and delivered to the judge, no duty is imposed upon the appellant to compel the judge to act. Code Civ.Proc. § 650.

3. Appeal and error 🔑112

Where respondent consented in writing to settlement of bill of exceptions but, before trial judge acted, respondent appeared before judge of another department who had no knowledge of proceedings for settlement and obtained order terminating proceedings on ground that no proposed bill was pending, and trial judge, without knowledge of order, settled the bill and bill was duly certified, order of termination was a nullity and appeal was properly taken from prior order, as against contention that appeal should first have been taken from the order of termination. Code Civ.Proc. § 650.

4. Exceptions, bill of 🔑49

Where respondent consented in writing to settlement of bill of exceptions, but, before trial judge acted, respondent appeared before judge of another department who had no knowledge of proceedings for settlement and obtained order terminating the proceedings on ground that no proposed bill was pending, and trial judge, without knowledge of the order, settled the bill and bill was duly certified, respondent's express consent to the settlement could not be deemed waived so as to defeat appeal. Code Civ. Proc. § 650.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Henry E. Passow against John Bell. Judgment for plaintiff, and, from an order denying plaintiff's motion to issue execution, plaintiff appeals.

Reversed and motion to dismiss appeal denied.

Robert E. Hatch, of San Francisco, for appellant.

Samuel G. Holcenberg and Jerome L. Schiller, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

This matter is before us on an appeal from an order denying plaintiff's motion to issue execution under section 685 of the Code of Civil Procedure, and on a motion to dismiss the appeal.

In February, 1928, plaintiff had judgment against defendant in the sum of $1,000. Repeated efforts to make collection under the judgment failed. The defendant was a police officer of the city and county of San

Francisco, and successfully resisted levy under the provisions of section 710 of the Code of Civil Procedure. In April, 1928, upon motion of the defendant, the trial court ordered defendant's salary released from the effects of the judgment upon the ground that his entire income was necessary for the support of himself and wife. This was done on defendant's showing that he had no income other than his salary of $200 a month, a pension from the federal government of $25 a month, and a small equity in his home which he was purchasing under an instalment contract. In November, 1936, defendant's wife died. In his petition for letters of administration the defendant averred that he and deceased owned community real property of the value of $5,000, community personal property, an automobile valued at $900, and cash in savings accounts of $1,600. During the period mentioned defendant had no visible income other than the $225 a month which he received in salary and pension, and, during the five years following the entry of the judgment, defendant's counsel informed plaintiff that there was no use in attempting to enforce the judgment.

All these facts appear in the affidavit of plaintiff's counsel filed in support of his motion for leave to issue execution. They are not controverted in any material respect. There was no showing by the defendant that the delay in seeking execution had caused him any prejudice or harm. To the contrary, the evidence is that it was of material and substantial benefit to him. The whole case before the trial court was that the defendant, relying upon his official position, had, either through trickery or false swearing, or both, deliberately deceived the plaintiff as to his financial condition and thus escaped the penalties of the judgment.

[1] On such a case the legal discretion lodged with the trial judge demands the issuance of the writ prayed for. This principle is clearly pronounced in McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225, where numerous cases to the same effect are cited with approval. We are in entire accord with the doctrine of these cases and with the statement in the McClelland opinion in reference to the dissenting opinion of Mr. Justice Houser in Williams v. Goodin, 17 Cal.App.2d 62, 61 P.2d 507.

The motion to dismiss the appeal presents a peculiar set of circumstances. After the order appealed from was entered, the appellant in due time presented and filed his proposed bill of exceptions. Thereafter the respondent consented in writing to the settlement of the bill. Before the trial judge had acted, and while the proposed bill was on his desk for settlement, the respondent appeared before the judge of another department and moved that the proceedings to settle the bill be terminated on the ground that no proposed bill was *pending*. The judge of that department, without knowledge of these proceedings, granted the order. Thereafter the trial judge, without knowledge of the latter order, settled the bill. This was duly certified by the trial judge and by the clerk. The motion to dismiss is made on the ground that the bill of exceptions was "inadvertently" settled by the trial judge because of the proceedings in the other department above noted.

[2, 3] A duly certified copy of the bill of exceptions is now a part of the records of this court, and we also have on file the written stipulation or consent of the respondent notifying the trial judge that he might settle the bill just as it has been settled and certified, except as to a minor typographical error. A previous motion to dismiss the appeal was made upon the same grounds, and denied by this court without opinion. Our reasons for the former order were that after a proposed bill has been duly filed with the clerk and delivered to the judge, no duty is imposed upon the appellant to compel the judge to act. Section 650 of the Code of Civil Procedure clearly provides that: "When received from the clerk, the judge ***must*** designate the time at which he will settle the bill, and the clerk ***must*** immediately notify the parties of the time so designated. At the time designated the judge ***must*** settle the bill, which must thereupon be engrossed. Within ten (10) days *after the settlement* the party who filed the bill must present it to the judge to be certified." (Emphasis added.) It will be noted that the section does not specify the time within which the trial judge must fix the date for settlement of the bill, that the duty of the trial judge is made mandatory, and that no provision of the Code authorizes or recognizes a termination of these proceedings while the matter is so pending. The order made by another department of the court attempting to terminate these proceedings while the proposed bill was on the desk of the trial judge was but an idle act, finding no judicial au-

thority in either the statutes or the rules. Hence, unless the trial judge dismisses the proceedings for settlement for some cause other than his own failure to act, the rights of the parties are defined by the code section.

[4] Respondent now argues that appellant's only remedy is by appeal from the order terminating the proceedings and that, so long as that order stands, the settlement and certification by the trial judge must be deemed "inadvertent". As we have said, the trial judge merely performed the duty enjoined upon him by the code section and such action cannot be termed "inadvertence". The appeal from the order of termination can result only in a reversal. Then the cause would come to us again on the merits. There is no justification for such delay when we have a complete record now before us upon which the entire cause can be determined. The respondent does not attack this record as incomplete or incorrect in any particular. There is no merit in the position assumed by the respondent that his former express consent to the settlement should now be deemed waived.

The motion to dismiss the appeal is denied. The order appealed from is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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27 Cal.App.2d 269

MOORE et al. v. HOAR et al.

Civ. 1900.

District Court of Appeal, Fourth District, California.

June 23, 1938.

Hearing Denied by Supreme Court Aug. 22, 1938.

1. Mines and minerals 🔑55(2)

An instrument reciting that certain parties had "remised, released and forever quitclaimed, and by these presents do remise, release and forever quitclaim, unto the said party of the second part * * * and to * * * heirs and assigns" certain mining claims was a quitclaim deed, and conveyed whatever title or interest in land the grantors had.

2. Quieting title 🔑44(2)

In suit to determine title to mining claims, where grantor through whom certain defendants claimed title had executed quitclaim deed absolute on its face, deed from grantee, who in fact took title as trustee, conveying legal title back to grantor, was admissible as part of such defendants' chain of title.

3. Evidence 🔑143, 148

In tracing a chain of title, all instruments affecting the record title are material and competent.

4. Frauds, statute of 🔑102

Where principal's authority to agent to execute deed could only be conferred by written instrument, ratification of agent's execution of deed without written authority was required to be in writing. Civ.Code, §§ 1091, 2307, 2309, 2310.

5. Frauds, statute of 🔑102

In suit to determine title to mining claims, evidence that one joint owner, through whom certain defendants claimed, executed deed to trustee as agent of second owner, through whom other defendants claimed, that trustee reconveyed, that second deed was executed to trustee by first owner as agent of second owner, and by first owner's wife, and that owners and trustee executed agreement reciting that owners "admit and acknowledge" that trustee held record title through conveyance executed by first owner as agent, and his wife, sufficiently established second owner's ratification of second deed to authorize its admission. Civ. Code, §§ 1091, 2307, 2309, 2310.

6. Trusts 🔑31

Where one of two joint owners of mining claims executed absolute and unconditional deed to third party remising, releasing, and forever quitclaiming such claims, second owner, who ratified such execution, received a right, title, and interest in claims under subsequent agreement whereby grantee acknowledged that he held title as trustee for owners, as respects whether assignee under second owner's subsequent assignment of his right, title, and interest in and to agreement received any interest in claims.

7. Trusts 🔑147(1)

An assignment providing that "I hereby assign, transfer and set over" all "right, title and interest" in and to prior agreement whereby holder of record title to mining claims had acknowledged that he held title as trustee for assignor and another, "said agreement relating to those certain mining claims," followed by designation of claims, did not convey merely the document bearing the agreement, but conveyed assignor's interest in claims, especially under evidence indicating that such was assignor's intention. Civ.Code, § 1643.

8. Attorney and client 🔑123(1)

Transactions between attorney and client are presumptively invalid, and attorney has burden of showing that transaction with client was fair and equitable, that no advantage was taken by attorney, and that client was fully informed as to all matters relating to transaction and was placed in a position to act understandingly and to deal with attorney at arm's length. Civ.Code, § 2235.

9. Trusts 🔑147(1)

In suit to determine title to mining claims, group of defendants who claimed through assignment of certain former owner's interest under agreement whereby record owner acknowledged that he held title as trustee for assignor and another made prima facie case, as against second group of defendants who claimed through assignor's will, by showing execution of assignment and transfer thereof to first group of defendants by assignee.

10. Attorney and client 🔑123(2)

In suit to determine title to mining claims, wherein group of defendants claimed under certain assignment and second group of defendants claimed under assignor's will, second group of defendants had burden of proving existence of attorney and client relationship between assignee and assignor so as to raise presumption of invalidity of assignment. Civ.Code, § 2235.

11. Attorney and client 🔑123(2)

In suit to determine title to mining claims, wherein group of defendants claimed under certain assignment and second group of defendants claimed under assignor's will, under evidence establishing existence of attorney and client relationship between assignee and assignor, first group of defendants would have burden of showing that assignment was fair and equitable and that assignee, the attorney, secured no advantage by its execution. Civ.Code, § 2235.

12. Attorney and client 🔑123(2)

In suit to determine title to mining claims wherein group of defendants claimed under certain assignment and second group of defendants claimed under assignor's will, evidence supported finding that relationship of attorney and client did not exist between assignee and assignor so as to raise presumption of invalidity of assignment. Civ. Code, § 2235.

13. Evidence 🔑590

The trial court was entitled to consider the interest of a witness in appraising credibility of witnesses and assessing weight of evidence.

14. Appeal and error 🔑994(3), 1012(1)

It is the responsibility of the trial court to determine weight which should be given a witness' testimony and the credit to which the testimony is entitled.

15. Mines and minerals 🔑49

In suit to determine title to mining claims, defendants who relied on adverse possession had burden of proving all the essential elements thereof.

16. Adverse possession 🔑13

The elements necessary to make out an "adverse possession" are possession by actual occupation, open and notorious, possession hostile to true owner's title, possession held under claim of title, exclusive of any other right, possession continuous and uninterrupted for 5 years prior to assertion of claim, and a showing that claimant has paid all taxes levied or assessed on land during his possession.

[Ed. Note.—For other definitions of "Adverse Possession," see Words & Phrases.]

17. Appeal and error 🔑1071(6)
Mines and minerals 🔑49

In suit to determine title to mining claims, evidence did not establish defense of "adverse possession" which was advanced by part of defendants, and hence such defendants could not complain of lack of finding as to adverse possession.

18. Appeal and error 🔑1071(6)

Where a finding, if made, of necessity would have been against appellants, they cannot complain of the lack of such finding.

◆

Appeal from Superior Court, Kern County; Frank Lamberson, Judge.

Suit by Charles C. Moore and others against Frederick E. Hoar and others to determine title to mining claims, wherein a cross-complaint was filed, and wherein A. Homer Black intervened. From an adverse judgment, Joe Smith, as executor of the last will and testament of Gus Colberg, and others appeal.

Affirmed.

John W. Preston, of San Francisco, and Claflin & Dorsey, of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, and Louis G. Campbell, of Los Angeles, for plaintiffs, cross-defendants and respondents Charles C. Moore and others.

Siemon, Claflin & Maas and Borton, Petrini & Conron, all of Bakersfield, for cross-defendants and respondents Charles W. Townsend and others.

C. W. Hobson, of Los Angeles, for cross-defendant and respondent Golden Queen Mining Co.

PER CURIAM.

The following opinion was prepared by the late Mr. Justice JENNINGS and is adopted and published as the opinion of this court.

The appeal herein has been taken by the defendants Joe Smith as executor of the will of Gus Colberg, deceased, Mary A. O'Donnell, and Joe Smith individually from the portion of the judgment entered in this action which decreed that these defendants have no valid right or interest in a group of five mining claims located in the Mojave Mining District of Kern county. The controversy which gave rise to the appeal was between the above-mentioned defendants and certain other defendants who will hereafter, for the sake of brevity, be designated "The Townsend Group". Both groups of defendants, admitting that plaintiffs are the rightful owners of an undivided half interest in said mining claims, set up conflicting claims to the remaining undivided half interest in the property. The trial court determined that the claim asserted by the Townsend group was entitled to prevail and by its judgment so decreed. The present appeal was thereupon perfected. Certain undisputed facts which form the background against which the controversy between the rival groups of defendants is projected may properly be stated.

At some time prior to September 23, 1925, Gus Colberg and C. C. Moore were jointly in possession of the aforesaid unpatented mining claims. On the above-mentioned date C. C. Moore, as attorney in fact for Colberg, executed a quit-claim deed conveying the five claims to C. L. Moore "trustee". C. L. Moore is the son of C. C. Moore. The deed contains no reference to any trust, and so far as appears on its face constituted an absolute conveyance of whatever right, title, or interest Colberg had in the property. However, C. L. Moore testified that the deed was made for the purpose of facilitating the obtaining of a patent to the claims from the U. S. Government and that he held the record title for his father and Colberg without any claim of ownership in himself. On February 14, 1927, C. L. Moore as trustee executed a deed whereby he reconveyed to Gus Colberg all estate and interest in the five claims which he had acquired by the former deed. On February 23, 1927, a quitclaim deed was executed by C. C. Moore and wife and by C. C. Moore as attorney in fact of Gus Colberg conveying the property to C. L. Moore. This instrument was absolute on its face. On May 28, 1928, a written agreement respecting the five claims was entered into between Gus Colberg, as party of the first part, C. L. Moore and wife, as parties of the second part, and C. C. Moore and wife as parties of the third part. This instrument has very considerable importance in the controversy between the two groups of claimants and will hereafter receive more detailed attention. On August 8, 1929, Gus Colberg executed a written instrument which may at this time be termed an assignment. Frederick E. Hoar was named therein as assignee. This instrument likewise has much importance in the controversy and will hereafter be considered. It may be remarked in passing that the Townsend group of defendants derived whatever right and interest they have in the property from the two last-mentioned instruments. On July 30, 1930, Gus Colberg made his will wherein he designated Dr. Joe Smith and Mary A. O'Donnell as sole beneficiaries and appointed the former to be executor of the will. This testamentary instrument is the source of whatever claim the defendants Smith and O'Donnell have in the property. Gus Colberg died on October 3, 1930. In the month of November, 1931, patents were granted by the United States which covered four of the five mining claims to which reference has heretofore been made. Charles L. Moore was named in these documents as patentee or grantee of the property. During the month of April, 1934, various assignments and deeds were executed, the effect of which was to convey to the Townsend group of defendants whatever right, title, and interest in the mining property Frederick E. Hoar obtained through the instrument of August 8, 1929, heretofore termed an assignment. Letters testamentary in the estate of Gus Colberg, deceased, appointing Joe Smith as executor of Colberg's will issued on December 20, 1934.

The agreement of May 28, 1928, recites that whereas C. L. Moore holds the record title to the five mining claims which all parties to the agreement acknowledge is held by him as trustee for the sole purpose of procuring a patent and that the equitable title in said claims is in Colberg as to an undivided half interest and in C. C. Moore and wife as to the remaining half interest and that it is the desire of the parties to the instrument to agree upon their respective interests in the property and to provide for proper distribution of whatever consideration may be received from a sale of the claims and to provide for securing a patent if possible, and whereas C. C. Moore claims that he has made advancements in connection with patent proceedings and is willing to make further advancements for the same purpose. Subject to provisions for repayment set out in the instrument the parties make certain covenants and agreements. The two first paragraphs of that part of the instrument which contains the covenants of the parties provide, first, that C. L. Moore in performing any service under the agreement is acting as trustee for Colberg and C. C. Moore without compensation; second, that C. L. Moore will proceed immediately and with all possible diligence to secure the issuance of a patent to the claims. It is then next provided that C. C. Moore will advance all proper costs and expenses which may be required to be expended in connection with procuring a patent and upon issuance of the patent will tender to Colberg an itemized statement of such costs and expenses. A detailed description of a plan for determining the propriety of expenses claimed to have been incurred in connection with obtaining the patent then follows. It is next provided that upon issuance of a patent the parties shall diligently endeavor to negotiate a sale of the property at a price agreeable to them and it is expressly stipulated that the patentee as trustee shall not alienate or encumber the title to the property unless both Colberg and C. C. Moore shall authorize the sale or encumbrance or alienation. The two provisions immediately following state that from the proceeds derived from a sale of all or any part of the claims there shall first be deducted and repaid to C. C. Moore all expenditures made by him in connection with obtaining a patent and the remainder shall be divided equally between Colberg and C. C. Moore. It is then stipulated that either of the parties to the agreement who shall secure a purchaser of the property shall be deemed to have done so for the joint benefit of all parties and shall not be entitled to receive any compensation for his services and that the trustee upon demand shall divulge to Colberg and C. C. Moore the name of any actual or prospective purchaser and the amount offered or received for the property. It is then expressly provided that at any time subsequent to the obtaining of a patent Colberg shall be entitled to a deed conveying to him an undivided one-half interest in the property upon payment by him of one-half of the expenses paid out in procuring the patent. It is next agreed that if it should become necessary to perform assessment work on the claims for the current year because of an expressed possible delay in connection with the patent proceedings, the amount required to be expended for doing such work shall be paid and deducted in the same manner provided for the payment of expenses incurred in procuring a patent. The final provision of the agreement deals with the possibility of the attempt to secure a patent being unsuccessful. It is there expressly stipulated that in such event Colberg shall not be chargeable with any expenses incurred or expended and that such charges and expenses shall not constitute a lien on his equitable one-half interest in the property.

The written instrument executed by Colberg on August 8, 1929, is in the following language: "For value received, I hereby assign, transfer and set over unto Frederick E. Hoar, all of my right, title and interest in and to the agreement dated May 28, 1928, by and between Gus Golberg, first party, C. L. Moore and Marie Moore, husband and wife, second parties, and C. C. Moore and N. F. Moore, third parties, said agreement relating to those certain mining claims situate in the Mojave Mining District, Kern County, California, known and designated as Grand Prize, Ben Hur, Sailor Girl, Sailor Boy, and Silver Coin."

This instrument was acknowledged by Colberg on the date of its execution and was recorded at the request of Hoar on December 10, 1931.

An inspection of the findings made by the trial court discloses that the court construed the last-mentioned instrument as an assignment and sale by Colberg, for good and sufficient consideration, of all rights which he had under the agreement of May 28, 1928, and as a conveyance by Colberg to Hoar of all of the former's right, title and interest in the property. It is also evident from an examination of the findings that the court construed the agreement of May 28, 1928, as a written agreement made for the purpose of defining the rights and obligations of the parties relating to the mining claims, that the reason for its execution arose from the conveyance made to C. L. Moore on February 23, 1927, and that the agreement substantially expressed the rights and obligations of the parties with reference to the claims as such rights and obligations had previously existed in parol. The construction thus placed upon the two instruments by the trial court furnishes the basis for the numerous contentions advanced by appellants on this appeal.

It is first urged that the instrument of August 8, 1929, shows on its face that it was nothing more than an assignment of the agreement of May 28, 1928, and that Colberg did not intend thereby to convey to Hoar any interest in the mining claims. Closely associated with this contention is another which relates to the written agreement of May 28, 1928. It is said that the undisputed evidence shows that prior to the execution of the last-mentioned agreement, Colberg was the equitable owner of an undivided half interest in the property, the bare legal title being in C. L. Moore as trustee for the sole purpose of facilitating the procurement of a patent, that the written agreement gave him nothing which he did not already have since it expressly recognizes his equitable ownership of a half interest in the property and shows on its face that the only reason for its execution was to enable the trustee, C. L. Moore, to obtain a patent which he would then hold as trustee for Colberg and C. C. Moore, the real owners of the property. The next step in the line of reasoning presented by appellants in this connection is that since the agreement of May 28, 1928, did not confer any title upon Colberg or give him any right or interest in the property which he did not theretofore have, the assignment by Colberg of "all my right, title and interest in and to the agreement dated May 28, 1928", could not operate as a transfer or conveyance of any right or title or interest in the property, particularly since it was by its very terms limited to an assignment of the writing alone. The conclusion attained by this argument is that Hoar took nothing by the assignment and that respondents as his successors are in the same position and are consequently entitled to no right or interest in the claims.

[1, 2] In giving consideration to the argument thus advanced it may be well to examine first the agreement of May 28, 1928. In so doing the condition of the record title to the mining claims may properly be noted. As heretofore observed an instrument affecting the legal title to the five mining claims was executed by C. C. Moore and wife and by C. C. Moore as attorney in fact for Gus Colberg on February 23, 1927. This instrument recites that Gus Colberg, a single man, and C. C. Moore and N. F. Moore, husband and wife, as parties of the first part "have remised, released and forever quitclaimed, and by these presents do remise, release and forever quitclaim, unto the said party of the second part", who is stated in the preamble of the document to be C. L. Moore, "and to * * * heirs and assigns, all those certain lots, pieces, or parcels of land, situate, lying and being in the Mojave Mining District, County of Kern, State of California, and bounded and particularly described as follows, to wit: The Sailor Boy Mining Claim, Ben Hur Mining Claim, Grand Prize Mining Claim, Silver Coin Mining Claim and Sailor Girl Mining Claim". This instrument was undoubtedly a quitclaim deed (Lawrence v. Ballou, 37 Cal. 518; Rego v. Van Pelt, 65 Cal. 254, 3 P. 867; Wholey v. Cavanaugh, 88 Cal. 132, 25 P. 1112) and operated to convey whatever title or interest in the land the grantors had (Wholey v. Cavanaugh, supra; Taylor v. Opperman, 79 Cal. 468, 21 P. 869; Myers v. City of Oceanside, 7 Cal.App. 87, 93, 93 P. 686; Towne v. City of Los Angeles, 4 Cal.App.2d 418, 420, 41 P.2d 363). So far as the record indicates this deed was the last instrument which in any way affected the title to the mining claims that appeared of record prior to the execution of the agreement of May 28, 1928. The instrument is absolute on its face and contains no language which purports to limit or qualify the title conveyed. On May 28, 1928, therefore, whatever right,

title, or interest C. C. Moore and Gus Colberg owned in the property had been transferred by them and stood in the name of C. L. Moore. Appellants do not question the effect of the deed. The transcript shows, however, that when the deed was offered in evidence they objected to its admission and they now complain of its reception on the ground that no authorization by Colberg to C. C. Moore to execute the deed as the former's attorney in fact was proved and it is therefore contended that the document was erroneously admitted. However, the record shows that appellants themselves offered a deed executed on September 23, 1925, which was likewise a quitclaim deed executed by C. C. Moore as attorney in fact for Gus Colberg conveying title to the five claims to C. L. Moore, trustee. It also appears that on February 14, 1927, C. L. Moore, as trustee, executed a deed reconveying to Gus Colberg all estate and interest in the mining claims which the former had derived by the deed of September 23, 1925. Objection was interposed to the admission of the last-mentioned deed by appellants and it was received over their objection. No point is, however, made of the admission of the deed of reconveyance on this appeal and no reason is apparent for declaring that the trial court erred in receiving it.

Having in mind the condition in which the title stood after the execution of the deed of September 23, 1925, and the deed of reconveyance of February 14, 1927, we entertain the opinion that no error was committed in admitting the deed of February 23, 1927. Appellants have made it abundantly clear that they place much reliance on the deed of September 23, 1925, and that they consider it the one instrument of the three discussed affecting the title to the property which was properly admitted. The reason for their expressed opinion in this matter is apparent. This instrument purported to convey title to C. L. Moore "Trustee". The use of the word "Trustee", they contend, corroborates the testimony of C. L. Moore, who testified positively that the property was conveyed to him by the deed of September 23, 1925, for the purpose of facilitating the issuance of a patent, that the owners of the property were C. C. Moore and Gus Colberg, that the witness made no claim of ownership in the property, and that there was no change in the purpose for which he held the record title at any time up to and including the date when patents were finally issued.

[3] The argument thus made is proper so far as it goes but it has no efficacy other than furnishing support for the introduction of the deed of September 23, 1925, which was received without objection and which requires no support. The testimony of C. L. Moore to the effect that this deed conveyed record title to him as trustee for C. C. Moore and Colberg for the stated purpose stands uncontradicted. However, this action is one in which the record title is a matter of some importance. In tracing the chain of title all instruments affecting the record title are material and competent. The deed executed by C. L. Moore on February 14, 1927, which expressly reconveyed to Colberg all estate and interest in the property which had been derived under the former deed of September 23, 1925, was certainly competent in an investigation of the record title since it purported to convey "all the estate and interest derived to said party of the first part (C. L. Moore) by or through that certain deed dated September 23, 1925 * * * in the mining claims therein described" naming the five claims. The effect of this deed was to place the record title to the entire property in Colberg.

The deed of February 23, 1927, was properly admitted. The agreement of May 28, 1928, which is manifestly important since out of it arose whatever right or interest the respondents acquired, makes reference to it in the following language: "Whereas, C. L. Moore and the other parties hereto admit and acknowledge that said C. L. Moore holds the record title of said claims as a trustee for the purpose of procuring patent only, and that the equitable title in and to said claims stands an undivided one-half interest in the first party, and an undivided one-half interest in the third parties, the said record title having been acquired by second party C. L. Moore by reason of conveyance from third party C. C. Moore acting under and by virtue of power of attorney granted by Gus Colberg, and C. C. Moore and N. F. Moore as individuals. * * *"

The language "the said record title having been acquired by second party C. L. Moore by reason of conveyance from third party C. C. Moore acting under and by virtue of power of attorney granted by Gus Colberg, and C. C. Moore and N. F. Moore as individuals" fully answers the suggestion of appellants that it was the deed of September 23, 1925, to which the agreement referred. The earlier deed was executed by C. C. Moore as attorney in fact for Gus Colberg. The name of N. F. Moore does not appear at any place in this instrument and it was not executed by her. The later deed contains her name in the opening paragraph and the instrument shows on its face that it was signed and acknowledged by her. Appellants suggest that there is no showing that Colberg knew of the existence of the later deed whereas it appears from C. L. Moore's testimony that he did know of the earlier deed, hence it is argued that the agreement of May 28, 1928, must have referred to the earlier deed and the trial court erred in determining otherwise. On the contrary, since it is obvious that the quoted language refers to the later deed and to it alone the trial court was entitled to assume that Colberg, who signed the agreement, was familiar with its contents and fully understood that it was the later and not the earlier deed to which reference was made.

[4] The contention of appellants that the deed of February 23, 1927, was improperly admitted because no showing was made that Colberg had given C. C. Moore authority in writing to execute such an instrument is based on the familiar principle that the authority of an agent to enter into a contract, required by law to be in writing, can only be given by an instrument in writing. It is so declared in section 2309 of the Civil Code. Section 1091 of the same code is more explicit and more to the point in the present instance. It is there provided that an estate in real property, other than an estate at will or for a term, not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, "or by his agents thereunto authorized by writing". The deed under discussion purported to convey "all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity" of the grantors "in or to the said premises, and every part and parcel thereof, with the appurtenances" to the grantee "and to * * * heirs and assigns forever". The estate thereby conveyed was therefore of the character which by statutory enactment could only be transferred by an instrument in writing subscribed by the party disposing of the same or by his agent authorized so to do by written instrument. However, it is expressly provided in section 2307 of the Civil Code that an authority may be conferred either by precedent authorization or by subsequent ratification. Section 2310 of the same code qualifies the very general language of section 2307 and makes it clear that ratification of an agent's act can be accomplished only in the manner that would have been necessary to confer an original authority to perform the act ratified. Since original authority to execute the deed of February 23, 1927, for Colberg could only have been conferred by written instrument it follows that if ratification rather than precedent authorization is relied upon to establish the authority of C. C. Moore to execute the deed in Colberg's name such ratification must have been made in writing. The record is barren of any showing that C. C. Moore was originally authorized in writing to execute the deed in question for Colberg. It remains to discover whether or not the record discloses the presence of evidence sufficient to establish the necessary fact of subsequent ratification in the manner required by the plain language of the statute.

[5] Such ratification is, in our opinion, found in the second paragraph following the preamble of the written agreement of May 28, 1928, which was signed and duly acknowledged by Gus Colberg. It is there stated that C. L. Moore and the other parties to the agreement "admit and acknowledge" that C. L. Moore holds the record title to the claims as trustee for a specified purpose, such record title having been acquired by the trustee through a conveyance executed by C. C. Moore "acting under and by virtue of power of attorney granted by Gus Colberg" and by C. C. Moore and N. F. Moore as individuals. As heretofore pointed out the "conveyance" there mentioned undoubtedly refers to the deed of February 23, 1927. We have then an express admission in writing by Colberg that C. C. Moore in executing this deed did so under authorization granted by Colberg. Such evidence was ample to establish the necessary fact of ratification in writing and justified the admission of the deed over the objection urged by appellants.

We may next proceed to a consideration of the agreement of May 28, 1928, with particular reference to the strenuous contention of appellants that by its terms Colberg acquired no rights or benefits and no title or interest in the mining claims which he did not possess prior to the execution of the agreement and that consequently the assignment by Colberg to Hoar on August 8, 1929, of "all my right, title and interest in and to the agreement dated May 28, 1928", was an idle act. In this connection it is said that the sole purpose of the agreement manifest on its face was to enable C. L. Moore to procure a patent to the claims from the U. S. Government. Such a statement is not strictly accurate for it is evident from a most casual inspection of the document that Colberg and C. C. Moore were desirous of making a sale of the property and that C. L. Moore, who was a party to it, was expressly empowered, under specified limitations, to effect a sale. It is also apparent that, prior to the date of the agreement, C. C. Moore had made some expenditures and that he expressly bound himself to make further advancements of money which would be required to be paid by way of costs and charges incidental to the procuring of a patent. It is also evident that in so doing he did not propose to act gratuitously without expectation of reimbursement as it is made abundantly clear that he should be entitled to have repaid to him one-half of the amount which he might advance and Colberg, after the issuance of a patent, would be entitled to a deed conveying to him an undivided half interest in the property only upon payment by him of one-half of the amount expended by C. C. Moore. The various purposes of the agreement as expressed therein are not, however, of special importance in giving consideration to the claim that Colberg received nothing under the agreement which he did not already have and that therefore giving full effect to the instrument of August 8, 1929, as an assignment the person named therein as assignee took nothing thereby.

[6] The contention of appellants that under the agreement of May 28, 1928, Colberg acquired no title or interest in the property which he did not have at the time the agreement was executed suggests a reference to the state of the title on the date the agreement was made. As heretofore observed a quitclaim deed had been executed by C. C. Moore and wife and by C. C. Moore as Colberg's attorney in fact on February 23, 1927. This instrument was acknowledged by the attorney in fact on the date of its execution and was placed of record on the following day. So far as appears no other instrument which purported in any way to affect the title to the property was executed from February 23, 1927, until the agreement of May 28, 1928, was made. The deed of February 23, 1927, was absolute on its face. It purported to convey to C. L. Moore the five mining claims "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversions, remainder and remainders, rents, issues and profits, thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, in or to the said premises, and every part and parcel thereof, with the appurtenances." The deed contains no intimation that the estate conveyed was limited or qualified in any respect. The comprehensive language employed in the instrument indicates an absolute, unqualified transfer of whatever right, title, or interest, both legal and equitable, the grantors had in the property and this was undoubtedly the effect of it. Stanway v. Rubio, 51 Cal. 41; Mowry v. Heney, 86 Cal. 471, 475, 25 P. 17; Faivre v. Daley, 93 Cal. 664, 669, 29 P. 256. The operative words "remise, release, and forever quitclaim * * * all those certain lots, pieces, or parcels of land, * * * and also all the estate, right, title, interest * * * claim and demand whatsoever, as well in law as in equity * * * in or to the said premises" are the most apt that could have been selected to convey to the grantee both the legal and the equitable interest of the grantors in the five claims. MacFarland v. Walker, 40 Cal.App. 508, 511, 181 P. 248. Certainly by this instrument duly executed and recorded Colberg had effectually divested himself of every shred of record title, legal and equitable, which he had in the property and up to the time when the agreement of May 28, 1928, was made he had no record interest or right in the premises. During this period C. L. Moore could have executed a deed which would have conveyed the entire interest transferred to him to an innocent purchaser without notice for value and Colberg's claim that he was in fact the real owner of an undivided half interest in the claims would have been unavailing. Such then was the situation on May 28, 1928, when the agreement was executed. This

latter instrument which was duly acknowledged changed the picture completely, for in it there is an express admission by the only three persons who ever appeared to have any interest in the claims that C. L. Moore, the grantee named in the unqualified deed of February 23, 1927, is not the true owner of the property but that he holds the record title merely as trustee for a designated purpose and that the real, the equitable title, is in Colberg and C. C. Moore. Here then is a written instrument which completely clarifies the situation and which discloses that C. L. Moore who is the record owner of whatever title and interest C. C. Moore and Gus Colberg have in the property is not in fact the true owner but holds the bare legal title as a mere trustee for the true owners who are C. C. Moore and Gus Colberg. When therefore the entire background of the matter is considered with particular reference to the state of the record title it is apparent that the contention of appellants to the effect that Gus Colberg acquired no right or interest in the property by virtue of the agreement which he did not already have and derived no benefit therefrom is specious but unsound. Colberg did in fact derive a very distinct benefit and an interest in the property which he did not possess prior to the execution of the agreement. He had parted with his entire interest, equitable as well as legal, in the claims. So far as the record showed he had no interest, no right, no claim of title of any sort in the property. The agreement being a declaration in writing by the record owner that he was a mere trustee established the true state of the title and furnished most convenient and cogent evidence of that important fact.

Having arrived at the conclusion that Colberg did in fact derive a real benefit and a right, title, and interest in the property by virtue of the terms of the agreement we may next properly proceed to a consideration of the contention of appellants that Frederick E. Hoar acquired no interest in the property by the so-called assignment of August 8, 1929. This contention is based on the peculiar language of the instrument now under consideration. This language is "I hereby assign, transfer and set over unto Frederick E. Hoar, all of my right, title and interest in and to the agreement dated May 28, 1928." The primary argument relative to this phase of the case is that an assignment of right, title and interest "in and to the agreement" is nothing more than an assignment of the very document to which reference is made and that it did not effect a transfer of any right, title or interest possessed by the assignor in the mining claims. As heretofore observed the trial court made an express finding contrary to the contention of appellants by construing the instrument as an assignment and sale by Colberg of all rights which he had under the agreement of May 28, 1928, and as a conveyance to Hoar of all right, title, and interest which Colberg had in the property.

[7] The construction placed upon the language of the instrument by the trial court was, in our opinion, entirely reasonable and proper. Appellants apparently maintain that the use of the words "in and to the agreement" indicates an intent on the part of the assignor, Colberg, to transfer to the assignee, Hoar, nothing more than physical possession of the document which consisted of several pages of written matter. The argument thus made demanding so strict a construction of the language is not impressive. It is contrary to a cardinal rule of construction which requires the language of a contract to be so interpreted as to make the contract capable of being carried into effect if it can be done without violating the intention of the parties. Civ.Code, sec. 1643. The contention of appellants, if upheld, would make the signing and acknowledgment of the instrument utterly useless and meaningless. It would import to Colberg an intention to perform a purely idle act. Moreover, there is certain other language contained in the instrument which is not consistent with so strained a construction as that for which appellants contend. After the agreement is identified by the date of its execution and still further identified by reference to the names of the various parties to it, the following significant language appears: "said agreement relating to those certain mining claims situate in the Mojave Mining District, Kern County, California, known and designated as Grand Prize, Ben Hur, Sailor Girl, Sailor Boy, and Silver Coin." The use of the language last quoted is strongly indicative of an intention to accomplish something more than a mere transfer of a written document which so far as appears could have been more certainly effectuated by handing over the document itself. Finally, the use of the words "assign, transfer and set

over" in conjunction with the significant verbiage "all of my right, title and interest in and to the agreement" is illuminating on the important question of Colberg's intent in executing the instrument. The words "assign and transfer" are words which are usually employed for the purpose of conveying a present interest in property of the character of the agreement to which they are applied in the instrument under consideration. In re Estate of Beffa, 54 Cal.App. 186, 201 P. 616. The use of the words "all of my right, title and interest" is likewise significant. If Colberg intended to do no more than execute a transfer in technical language of the agreement, the employment of the last-quoted words is most peculiar. Such an intent might perhaps have been manifested by elimination of the last-quoted words and the words "in and to" immediately following thereafter so that the language would have been "I hereby assign * * * unto Frederick E. Hoar the agreement, etc." It might then have been contended with more hope of success that the language indicated an intent merely to transfer the agreement itself. The employment of the verbiage "all of my right, title and interest" is inconsistent with such an intent. The phraseology is unnecessary and from a legal viewpoint meaningless. Legally there is no such thing as "right, title, and interest" in a document of such character as that now under consideration. The document itself was no more than a written memorial of the agreement entered into between the parties. Except for affording convenient, necessary and proper evidence of the contract the document itself had no intrinsic value and it is incongruous to speak of Colberg having "title" to it or of his having a right or interest in it. Such expressions are not used with reference to a paper of this character. Finally, it must be observed that evidence was produced which showed that Colberg, in executing the instrument of August 8, 1929, intended to and thought that he had assigned and transferred to Hoar all title and interest that he had in the five claims.

Appellants further contend that if it be concluded, as we do, that the trial court's construction of the instrument of August 8, 1929, is correct and that it amounted to an assignment by Colberg of whatever right, title or interest he had acquired or derived under and by virtue of the terms of the agreement of May 28, 1928, such assignment nevertheless did not and could not operate as a transfer of any right or title or interest in the mining claims. The argument presented in connection with this contention is that the agreement of May 28, 1928, is a trust agreement which because of the fact it was reduced to written form could have been enforced by Colberg as an express trust but that Colberg's assignment of his interest in the agreement being unaccompanied by any conveyance of his interest in the property itself could not operate to transfer the right to enforce the trust of which Colberg was a beneficiary. It is apparent that the fundamental premise upon which this line of reasoning is based is that Colberg acquired no title or interest in the mining claims under the agreement of May 28, 1928, which he did not have at the time the agreement was executed. In this connection it is declared that the only right or benefit with respect to the property which Colberg actually secured under the agreement was the right to demand a deed conveying to him the legal title to an undivided half interest in the five claims upon payment by him of one half of the money expended by C. C. Moore in procuring the issuance of a patent. The agreement, it is said, therefore, gave him no real interest or right in the property. He had the equitable title to an undivided half interest in the property which the agreement simply recognized making it clear that C. L. Moore, the record owner, was in reality the holder of the bare legal title merely as trustee for a specified purpose.

The contention that Colberg actually acquired no right, title or interest in the property through the execution of the agreement of May 28, 1928, has heretofore received adequate consideration and the conclusion reached with reference to it is sufficient to demonstrate the incorrectness of the basic premise above stated. A number of authorities are cited by appellants wherein the general principle is announced that it is essential for a party complaining in equity to have some substantial interest in the subject-matter of the suit to entitle him to equitable relief. It may be conceded that, if in fact Colberg acquired nothing more under the trust agreement than the right to have a conveyance of the bare legal title upon performance by him of the stipulated condition precedent, his bare assignment of all the right, title and interest which he had under the trust agreement would not entitle his assignee to the equitable relief demanded. This is obviously true because a court of equity upon discovering that the entire equitable title in the property existed apart from the trust agreement and was unaffected by it would withhold its aid in the enforcement of the only right which, it is said, is provided by the agreement. It is indeed obvious that if it must be declared that Colberg acquired no greater interest in the property than the right above mentioned, respondents as successors of Colberg's assignee, Hoar, are, in any event, restricted to such right and irrespective of whether or not they may successfully invoke the aid of equity to enforce it, they are not interested in so useless a conclusion. The transfer to respondents of nothing more than the naked legal title to an undivided half interest in the property is not of any practical value. Respondents assert that they are entitled, by virtue of the assignment to Hoar, to whatever title or interest Colberg had in the property at the time the assignment was made. The court so construed the assignment and in our opinion acted properly in so doing.

Appellants particularly complain of the trial court's finding that at the time the assignment from Colberg to Hoar was made the relation of attorney and client did not exist between the two, that the assignment was supported by adequate consideration, that the transaction was fair, just and equitable and did not operate to the disadvantage or damage of Colberg. The ground of complaint in this connection is the familiar one of evidentiary insufficiency. It may properly be noted with regard to the contention thus advanced that Frederick E. Hoar testified that the sole consideration for the assignment was an unpaid balance of between two hundred and three hundred dollars due him for professional services rendered in Colberg's behalf prior to the date of the assignment. This witness also testified that he suggested to Colberg that the latter should give him an assignment of his interest in the agreement of May 28, 1928, for the attorney's fees which had accumulated, that Colberg assented, that the witness prepared the instrument of assignment, that Colberg consulted with no other person with reference to making the assignment and it was not suggested to him by the witness that he should seek independent advice prior to executing the assignment. Since it also appeared that prior to the institution of the present action the five mining claims were sold for an amount of approximately $200,000 it is apparent that the question of whether or not the relation of attorney and client existed between the two men on the date of the assignment was one of considerable importance.

[8] It is firmly established that transactions between attorney and client are presumptively invalid (Civ.Code, sec. 2235; Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265; Clark v. Millsap, 197 Cal. 765, 783, 242 P. 918; In re Estate of Witt, 198 Cal. 407, 419, 245 P. 197; Carlson v. Lantz, 208 Cal. 134, 138, 280 P. 531) and that the burden rests upon the attorney to show that the transaction between him and his client was fair and equitable and no advantage was taken by the attorney and that the client was fully informed as to all matters relating to the transaction and was placed in a position to act understandingly and to deal with the attorney at arm's length (Magee v. Brenneman, 188 Cal. 562, 567, 206 P. 37; Thornley v. Jones, 96 Cal.App. 219, 227, 274 P. 93; Brydonjack v. Rieck, 5 Cal.App.2d 219, 223, 42 P.2d 336).

[9-11] However, it must be conceded that upon appellants rested the burden of showing that at the time the assignment was made the relation of attorney and client existed between Hoar and Colberg. The assignment was valid on its face and imported the existence of sufficient consideration to support it. Respondents, as Hoar's assignees and successors in interest, were required to do no more than show Colberg's execution of the assignment to Hoar and the transfer of the assignment by Hoar to them. Upon establishing these facts a prima facie case in their behalf was made out. Appellants, in order to avoid the effect of the apparently valid assignment from Colberg to Hoar, asserted that at the time it was made the fiduciary relationship of attorney and client existed between the two parties to the assignment from which the presumption of invalidity would attach to the assignment. If appellants had succeeded in their effort to prove the existence of the relationship the burden of showing that the assignment was fair and equitable and that Hoar secured no advantage by reason of its execution would have rested upon respondents.

[12, 13] In support of their contention of evidentiary insufficiency to sustain the finding negativing the existence of the relationship of attorney and client, appellants rely particularly upon the testimony of Frederick E. Hoar and the witnesses, O'Donnell and Whitmore. The record shows that Hoar was called by the intervener,

who is not a party to this appeal, as a witness under section 2055 of the Code of Civil Procedure and that counsel for appellants then stated that his testimony might be introduced "as also coming from the cross complainants" who are the appellants on this appeal. We deem it unnecessary to encumber this opinion with any extended reference to the testimony of the two witnesses other than Frederick E. Hoar. It may, however, be remarked in passing that the testimony of those witnesses upon which particular reliance is placed by appellants on the phase of the case now under consideration related to the time when they testified that in company with Colberg they called at the office of Hoar. These witnesses stated that the visit occurred at some time during the month of July or in the latter part of August or in the month of September, 1929, at which time Hoar said that he had no interest in the mining claims, that he was Colberg's attorney and was protecting Colberg's interest in the property. The date of the alleged visit in conjunction with the claimed admission of Hoar manifestly had a bearing on the question of whether or not the relationship of attorney and client existed between Hoar and Colberg at the time the assignment was executed. If the alleged visit occurred subsequent to the date of the assignment there was evidence that Hoar made the admission against interest to which reference has been made at a time when it is now claimed he had succeeded to all of Colberg's interest in the property and had ceased to be Colberg's attorney. The witness Whitmore testified that the visit probably occurred in 1930 either in the month of July or August, that the date of the visit was a long time before Colberg's death and that long afterward Colberg was sent to the hospital. The witness, Jack O'Donnell, was more definite as to the date of the alleged visit and stated that it occurred during the latter part of August or early in September, 1929. The witness Frederick E. Hoar testified that he did not remember any occasion when Colberg, Whitmore and O'Donnell together called upon him. On this state of the evidence appellants urge that it was conclusively established that Hoar admitted he was Colberg's attorney after the assignment was executed. Analysis of the testimony of the witnesses Whitmore and O'Donnell fails, however, to produce such conviction of certainty respecting the date of the alleged visit to Hoar's office that a declaration of absolute proof is warranted. Whitmore, so far as appears, was a disinterested witness but his testimony regarding the date was vague and indefinite. O'Donnell's testimony on the point was much more definite as he fixed the date during the latter part of August or early in September, 1929. However, it must not be overlooked that O'Donnell was very materially interested in the outcome of the action in which he testified. He was a party to the suit and is the husband of appellant, Mary A. O'Donnell, who, as one of the two beneficiaries named in the will of Gus Colberg, is most vitally interested in the final disposition of the present litigation. This fact is here mentioned since it is an important element which the trial judge was entitled to take into consideration in appraising the credibility of witnesses and assessing the weight of evidence. This fact alone without reference to the poor quality of the testimony of a witness plainly interested in the outcome of the trial may well have impelled the trier of facts to reject the testimony of the witness as to the date of the alleged visit.

[14] Upon the question of whether or not the relation of attorney and client existed on the date of the assignment the only direct evidence produced consisted of the testimony of Frederick E. Hoar. Appellants place very considerable reliance on portions of the testimony given by this witness and attack his statement that he was not Colberg's attorney on August 8, 1929, on the ground that it was a pure conclusion contrary to other testimony educed from the witness. No useful purpose would be served by indulging in a protracted analysis of the evidence now under consideration. Careful reading of Hoar's testimony impels the admission that, presented in the form of cold type, it is far from satisfactory. Nevertheless, it may not be declared that the evidence established the fact—highly important to appellants—of the existence of the relationship of attorney and client on the date the assignment was made. The trial judge had the opportunity of hearing Hoar's testimony at first hand and of observing the manner in which the witness testified. It was the trial court's responsibility to determine the weight which should be given his testimony and the credit to which it was entitled. Evidently the court accepted the statement of the witness that the relationship did not exist on August 8, 1929. It must be conceded that the court was entitled so to do. It may not therefore be declared,

as appellants contend, that the finding negativing the existence of the fiduciary relationship on the date mentioned is so lacking in evidentiary support that it must be set aside.

The final contention advanced by appellants is that the issues of adverse possession and the bar of the statute of limitations against the claims of respondents in the property were raised by implied replication to the answer filed by respondents to appellants' cross complaint, that evidence bearing on these issues was produced during the trial of the action, and that consequently the trial court erred in failing to make findings upon such issues which findings if made would necessarily have been favorable to appellants. It is evident from a reading of the record herein that the case was tried upon the theory that the above-mentioned issues were before the court by virtue of the provisions of section 462 of the Code of Civil Procedure which declares that any new matter in the answer of a defendant in avoidance or constituting a defense or counterclaim must be deemed denied. It is also clear that the two issues to which reference has been made are so interrelated that a determination of the contention as to one of them will be conclusive as to both. Since it is apparent from the record that considerable evidence was received on the issue of adverse possession by appellants the contention with respect to such issue will be considered.

As we understand appellants' contention in this regard it is not merely that the trial court should have made a finding upon the issue of adverse possession but also that the only finding which would have found support in the evidence is a finding sustaining appellants' claim that they had acquired title as against respondents by adverse possession of the property.

[15] In giving consideration to the contention thus advanced it may be remarked at the outset that since appellants were relying upon adverse possession the burden of proving all the essential elements thereof rested upon them. 1 Cal.Jur. p. 636; Allen v. Allen, 159 Cal. 197, 113 P. 160; San Francisco Credit C. House v. Wells, 196 Cal. 701, 705, 239 P. 319.

[16-18] Examination of the record impels the conclusion that the burden thus imposed upon appellants was not sustained by them. The five elements required to make out an adverse possession are: first, possession by actual occupation, open and notorious; second, a possession hostile to the true owner's title; third, a possession held under claim of title, exclusive of any other right; fourth, a possession continuous and uninterrupted for a period of five years prior to the assertion of the claim; fifth, it must appear that the claimant has paid all taxes levied or assessed upon the land during the period of his possession. 1 Cal.Jur. p. 522. The evidence produced by appellants failed to sustain certain of these elements necessary to successfully establish the defense of adverse possession. As appellants failed to sustain the burden which the law placed upon them of establishing each element of an affirmative defense upon which they relied, it is obvious that had the trial court found on this question such finding of necessity would have been against them and their contention. When a finding, if made, of necessity would have been against appellants they cannot complain of the lack of such finding. Consolidated Irr. Dist. v. Crawshaw, 130 Cal.App. 455, 20 P.2d 119; 24 Cal.Jur. 944; 10 Cal.Jur., Ten Year Supp., 740 and cases cited.

The judgment is affirmed.

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27 Cal.App.2d 464

BRERETON et al. v. BURTON et ux.

Civ. 5988.

District Court of Appeal, Third District, California.

July 7, 1938.

1. **Deeds** 🔑58(1)

A valid delivery of a deed to realty may be accomplished by handing the deed to a third party when it satisfactorily appears that both the grantor and grantee intended such delivery to result in a present transfer of title to the grantee.

2. **Deeds** 🔑66

In suit to determine priority between plaintiffs' judgment lien and defendants' mortgage lien which was prior in time, question whether deed which was subsequently executed to defendants and which, if delivered, would have subordinated mortgage lien to judgment lien, was delivered and accepted, was for jury.

3. Deeds ⚷=200

In suit to have plaintiffs' judgment lien declared superior to defendants' mortgage lien which was prior in time, on ground that a deed which was executed by owner of the realty, and which by its terms would have rendered defendants' lien subordinate to plaintiffs' lien, was unqualifiedly delivered to defendants, evidence that defendants voluntarily accepted benefits flowing from the transaction by collecting rents from the realty would be competent to show delivery and acceptance of the deed.

4. Deeds ⚷=200

In suit to have plaintiffs' judgment lien declared superior to defendants' mortgage lien which was prior in time, on ground that a deed which was executed by owner of the realty, and which by its terms would render defendants' lien subordinate to plaintiffs' lien, was unqualifiedly delivered to defendants, all of the circumstances of the transaction were to be considered in determining intention of the parties to the deed, to ascertain whether there was delivery.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Suit by W. E. Brereton and E. J. Kovats against J. W. Burton and wife to determine priority between plaintiffs' judgment lien and defendants' mortgage lien. From a judgment in favor of defendants, plaintiffs appeal.

Affirmed.

Donald B. Fowler, of Turlock, for appellants.

Wilcox & Rodin, of Turlock, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

From a decree declaring that plaintiffs' judgment lien against certain lots in Turlock is subordinate to a mortgage lien held by the defendants the plaintiffs have appealed.

This is a suit for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure. The facts are not disputed. Most of the essential facts were contained in a written stipulation which was received in evidence. It includes the following facts: Prior to March 27, 1925, Helen Frances Rowe, a widow, owned the north half of lot 8 and lots 9 and 10, block 323, of the city of Turlock, county of Stanislaus. March 9, 1925, to secure a loan procured from the defendants, Mrs. Rowe executed and delivered to the defendants her promissory note for the sum of $2,200 secured by a trust deed of even date therewith upon the lots above described. The trust deed was duly recorded March 27, 1925. January 7, 1926, the plaintiffs recovered judgment against Mrs. Rowe for the sum of $911.59. January 7, 1931, the plaintiffs commenced an action against Mrs. Rowe to renew the last-mentioned judgment. Judgment was rendered for the plaintiffs in that action September 25, 1935, for the amount of the original judgment together with interest and costs aggregating the sum of $1,545.42. Neither the trust deed nor the said judgment was satisfied, except that Mrs. Rowe paid defendants $200 on account of her indebtedness to them. To renew her former note and trust deed in favor of the defendants, Mrs. Rowe executed and delivered to them her promissory note February 12, 1932, for the sum of $2000 secured by her trust deed upon the above-described lots, which deed was also duly recorded.

The evidence discloses the following facts: Mrs. Rowe was never able to make any payments whatever on her indebtedness to the defendants represented by her note for $2,000 and trust deed upon the lots in question. The defendants were not aware of the judgment lien which the plaintiffs claimed against the property. An attorney by the name of Cornell represented Mrs. Rowe. The defendants interviewed Mrs. Rowe in the spring of 1936, seeking to obtain a settlement of her indebtedness to them. She told them she was not able to pay them a cent of the indebtedness. She advised the defendants to see her attorney, Mr. Cornell, who might arrange to refinance the loan. They subsequently talked with Cornell, who confirmed his client's statement that she was unable to pay any part of the debt, but he suggested that she might be persuaded to deed to them the property in question, in settlement of her debt. The defendants told Cornell the property was not worth more than the indebtedness, and that they did not want it, but that if that was the best they could do, they might accept a deed to the property *provided it was clear of all other encumbrances.* April 20, 1936, pursuant to the last-mentioned conversation, Mr. Cornell sent to Mr. Wilcox, attorney for the defendants, a grant, bargain and sale deed to the lots in question, duly executed by Mrs. Rowe to the defendants. That deed contains the following clause:

> "It is understood and agreed that this deed is given and received in consideration of the cancellation by the grantees of that certain debt or obligation to secure which the grantor did execute a certain deed of trust bearing date March 9, 1932."

It is conceded the trust deed referred to in the last-quoted paragraph was the one given by Mrs. Rowe February 12, 1932, to secure the renewal of her previous $2,000 indebtedness. The grant deed was neither delivered to nor accepted by the defendants. The evidence is uncontradicted that they specifically authorize their attorney to accept the deed only *provided it conveyed to them a clear title to the lots unincumbered by any other liens.* The deed in question was never recorded. Defendants' attorney, Mr. Wilcox, forwarded it to the Modesto Title Company for a search of the records and a report on the title to the lots. After considerable lapse of time the title company reported that the lots were subject not only to the trust deed held by the defendants, but also to a judgment lien for $1,545.42 in favor of the plaintiffs. Neither Mrs. Rowe nor her attorney was ever notified that the deed had been accepted by the defendants. In the meantime the property had been rented by Mrs. Rowe, who finally moved away, leaving the beneficiaries under the trust deed to look after the property. Pending the time defendants were waiting for a report on the property from the title company, they collected five months' rental therefrom, but applied all of those collections to the payment of taxes and necessary repairs against the property. The defendants received absolutely no personal benefit from any rentals collected from the property.

Learning of the transaction pending between the defendants and Mrs. Rowe, the plaintiffs contended that the defendants by their conduct duly accepted delivery of the grant deed from Mrs. Rowe, which equitably required them to cancel their trust deed of February 12, 1932, leaving plaintiffs' judgment a prior lien against the property. A controversy arose between the parties to this suit regarding their respective rights under their several instruments affecting the title to the property. This suit was thereupon commenced, seeking declaratory relief under section 1060 of the Code of Civil Procedure. The court adopted findings to the effect that the grant deed, dated April 20, 1936, from Mrs. Rowe to the defendants was never delivered or accepted by the grantees, and that it is therefore void. The court then found that the defendants hold a valid first lien and senior mortgage against the lots in question by virtue of their deed of trust thereon, dated February 12, 1932, to secure the indebtedness of Mrs. Rowe to them of the sum of $2,000 and accrued interest and costs, and that the plaintiffs' judgment lien was junior and subject to the defendants' said lien. Judgment was rendered accordingly. From that judgment the plaintiffs have appealed.

[1] It is true that a valid and binding delivery of a deed of conveyance of real property may be accomplished by handing it to a third party when it satisfactorily appears that both the grantor and the grantee intended that such delivery of the instrument would result in a present transfer of title to the grantee. Stone v. Daily, 181 Cal. 571, 185 P. 665; 9 Cal.Jur. 172, sec. 65. The intention of the parties to a grant deed with respect to the actual passing of title by transferring the custody of the instrument to a third party, and the acceptance thereof by the grantee as a conveyance of title, are always essential questions to be determined. Kenney v. Parks, 137 Cal. 527, 70 P. 556; Neely v. Buster, 50 Cal.App. 695, 195 P. 736; 9 Cal.Jur. 155, sec. 52.

[2] In the present case there is ample evidence to support the findings that the deed was transported to the attorney of the defendants conditionally without the intention of thereby conveying title to the land unless it developed that the grantor thereby conveyed clear title thereto free of all encumbrances other than the lien held by the grantees, and that the grantees did not thereby accept unqualified delivery of the deed. It appears the title was not clear and upon the contrary that it was then subject to the judgment lien.

[3, 4] It is also true that a voluntary acceptance of the benefits of a transaction accompanying the conveyance of real property is competent evidence tending to show a delivery and acceptance of the deed thereto. Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am.Rep. 726; 9 Cal.Jur. 187, secs. 75 and 76. The circumstances of placing the deed in escrow for a proposed exchange of properties conditioned upon the existence of a clear title to the land and the collection by the grantees of rental from the property and the application thereof to the payment of

taxes and necessary improvements thereon do not constitute conclusive evidence of an acceptance of the conveyance. In determining the legal effect of sending the grant deed to the attorney of the grantees and their conditional acceptance thereof as a valid binding conveyance of the property, all of the circumstances of the transaction should be considered with the object of ascertaining therefrom the intention of the parties to the deed. In the present case there is ample evidence to support the finding of the court that there was not a valid or binding delivery or acceptance of the deed as an absolute conveyance of the title to the land for the reasons that the grantees held a trust deed on the land to secure their previous loan and the grantor had rented the house and left it for the grantees to collect the rent and care for the property, and it became necessary for them to pay the taxes and make necessary repairs thereon to protect their lien. The grantees did not personally profit by the manner in which they handled the property except to protect their lien thereon. The circumstances of this case are not in conflict with the finding that the manner in which the grantees handled the property does not show, as a matter of law, that the deed was delivered with the intention of thereby absolutely conveying title or that the grantees thereby accepted unconditional delivery of the instrument.

The judgment is affirmed.

I concur: PULLEN, P. J.

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27 Cal.App.2d 249

PEOPLE v. GARRETT.

Cr. 1605.

District Court of Appeal, Third District, California.

June 23, 1938.

Rehearing Denied July 7, 1938.

1. Criminal law 🔑785(6)

Although it is not prejudicial error to refuse an instruction cautioning the jury to scan the testimony of the prosecuting witness very carefully, where there is corroborative evidence, it is not improper to give such an instruction when an offense such as is prohibited by statute relating to crimes against children is involved. Pen. Code, § 288.

2. Criminal law 🔑1186(4)

In prosecution for a crime against a 10 year old child, who admitted that she was coached as to her testimony, which was uncorroborated, the refusal of an instruction cautioning the jury to scan the testimony of the child very carefully before finding accused guilty was reversible error. Pen. Code, § 288; Const. art. 6, § 4½.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Joseph Garrett was convicted of a crime punishable by the Penal Code, § 288, relating to crimes against children, and from a judgment of conviction, and an order denying his motion for a new trial, he appeals.

Order and judgment reversed.

James F. Gaffney, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant in this action was tried upon an information containing two counts. Count 1 charged the commission of an offense prohibited by section 288 of the Penal Code. Count 2 charged the commission of an offense described in section 288a of the Penal Code.

The defendant was convicted upon count 1, and found not guilty on count 2. From the order of the court denying his motion for new trial as to count 1, and the judgment of conviction entered on the verdict of guilty of said count, this appeal is prosecuted.

During the course of the trial the defendant submitted to the court ten different proposals of instructions, only one of which was given. The prosecution submitted some fifteen or seventeen proposed instructions, which were given by the court. We have carefully examined the instructions, both given and refused, and with the exception of proposed instruction No. 4, presented by the defendant, we are of the opinion that the instructions given at the request of the People properly presented to the jury all of the directions necessary for their guidance in considering the testimony in the case. Proposed instruction No. 4, submitted by the defendant, was and is what is called a "cautionary" instruction. Nothing of the kind was given in this case. The child involved in this action was only ten years of age. The offense is alleged to have been committed in broad daylight, in a room where the doors were open, and in a house occupied by other people. All the testimony in the transcript has been carefully read and there is not a scintilla of corroborative evidence contained therein. There is considerable testimony indicating the previous good character of the defendant, some testimony indicating that the child in question was not wholly reliable.

During the course of the trial the child was placed on the stand in the forenoon and denied the commission of any offense prohibited by section 288, supra. After the noon adjournment the child was again placed upon the stand, and the following testimony was submitted:

"Q. Now, Yvonne, you testified this morning concerning the time that you were in Mr. Garrett's room after June 11th, the day school was out. A. Yes.

"Q. Do you remember that? A. Yes.

"Q. Now, I want you to think of that time right now, and I will ask you this question: Did Mr. Garrett ever place his hands upon you at that time? A. Yes.

"Q. And where? A. In his room.

"Q. And where on you? A. My private parts.

"Q. And what did he do? * * *

"Q. Now, what did he do with his hands? A. Just rubbed me.

"Q. Just rubbed you, did he? And this was at that time in his room, is that correct? A. Yes.

"Q. Now, you didn't testify that this morning, did you? A. No.

"Q. And why was that? A. Well, I guess I was scared because I thought my father and mother would be here, and they weren't.

"Q. You thought your father and mother would be here, is that right? A. Yes."

Cross-Examination:

"Q. Who have you talked to about this matter, Yvonne? A. Nobody.

"Q. Since you testified this morning? A. Mr. Lawrence and my mother and father.

"Q. Did any one of those remind you of something you had forgotten? A. Yes.

"Q. Before the trial today, who have you talked to about this? A. Nobody.

"Q. Nobody? Talk to Mr. Lawrence in the District Attorney's office? A. Oh, what do you mean, before the trial or—.

"Q. Yes. * * * Any time at all. Who have you talked to about it? A. Just Mr. Lawrence before this morning, and my mother and father.

"Q. And your mother and father? A. My mother and father.

"Q. Anybody tell you what to say? A. No.

"Q. You are sure of that? A. They just mentioned it to me, to say a few things; I don't remember what they were.

"Q. Well, then, they have told you what—what to testify to? A. Yes.

"Q. Who told you that, Yvonne? A. My mother and father, and Mr. Lawrence."

As justifying the refusal of the court to give a cautionary instruction, the People rely principally upon the case of People v. Anthony, 185 Cal. 152, 196 P. 47. While it is held in that case that error could not be predicated upon refusal to give the instruction involved in that case, an examination of the record shows that the cause was reversed for other reasons, and that the instruction asked for in the Anthony Case went much farther than simply cautioning the jury to scan the testimony of the prosecuting witness very carefully. Likewise, in the Anthony Case there was testimony as to the bad character of the defendant and his lascivious conduct in other instances, which constituted corroborative testimony as to the disposition of the defendant. This case finds support in the opinion in the case of People v. Agullana, 4 Cal.App.2d 34, 40 P.2d 848. However, in the opinion in that case it is stated that there was sufficient corroboration of the testimony of the prosecuting witness.

As opposed to the cases just cited, which were based upon circumstances showing additional reasons for the verdict of the jury, the defendant calls our attention to the case of People v. Vaughan, 131 Cal. App. 265, 21 P.2d 438. In the Vaughan Case two errors, however, were committed:

First: In limiting the cross-examination of the prosecuting witness; second: Refusal to give a cautionary instruction. This case is especially well reasoned and sets forth the circumstances and conditions under which a cautionary instruction should be given.

[1,2] A careful reading of the cases which we have just mentioned leads to the conclusion that where there is corroborative evidence, it is not prejudicial error for the court to refuse to give a cautionary instruction; while at the same time the courts are practically unanimous in holding that it is not improper to give a cautionary instruction when offenses such as that prohibited by section 288, supra, are involved. The similarity between the Vaughan Case and the case at bar consists in this: In the Vaughan Case the cross-examination was improperly limited. In the present case we have the testimony of a child showing that she was coached a very short time before going on the stand and giving her testimony at the afternoon session of the court. Under these circumstances we think that the holding of the court in the Vaughan Case as to failure to give a cautionary instruction is applicable here. To use stronger language, it seems contrary to one's sense of justice that a defendant should be convicted upon the uncorroborated testimony of a ten-year-old child who admits that she has been told what to say, that is, that she was coached as to her testimony. The question immediately arises: Was the defendant convicted upon the testimony of the child, or was he convicted upon the testimony of what the father and mother told her to say?

Under the circumstances disclosed herein, we think that section 4½ of article 6 of the Constitution does not come to the aid of the prosecution, or justify us in holding that prejudicial error has not been committed. With the testimony in the record showing that the prosecuting witness was coached, we cannot hold that the defendant has had a fair and impartial trial. The jury should have been cautioned to scan such testimony carefully before finding the defendant guilty upon the testimony of a witness who had been told what to say.

The order and judgment are reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

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27 Cal.App.2d 353

PEOPLE v. McNEIL.

Cr. 3095.

District Court of Appeal, Second District, Division 2, California.

June 28, 1938.

1. Criminal law ⚷1144(13)

On defendant's appeal from judgments convicting him for grand theft, the District Court of Appeals viewed the evidence most favorably to the people.

2. Larceny ⚷65

Evidence warranted conviction for grand theft.

3. Criminal law ⚷1186(4)

The admission of testimony and exhibits not material to any issue before court would be disregarded by District Court of Appeals where defendant appealing from judgment of conviction failed to point out wherein he was prejudiced by such evidence. Const. art. 6, § 4½.

4. Criminal law ⚷678(2)

Under statutes, a district attorney prosecuting a defendant for grand theft is not required in advance of proof to elect whether he will proceed upon the theory of larceny, embezzlement or obtaining money under false pretenses. Pen.Code, §§ 484, 490a, 952.

5. Larceny ⚷40(6)

The proof of receipt of a check sufficiently supports allegation that defendant accused of grand theft, obtained money, in the absence of evidence that the check was not cashed.

6. Criminal law ⚷1023(10)

An appeal does not lie from a sentence.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William McNeil was convicted for grand theft, and he appeals.

Affirmed.

William J. Clark and Edward Linder, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., by Eugene M. Elson, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., by Jere J. Sullivan and H. L. Arterberry, Deputy Dist. Attys., all of Los Angeles, for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury on seven counts of grand theft. This appeal is from the judgments. There is also a purported appeal from the sentences.

[1] Viewing the evidence most favorable to the people (respondent), the facts are:

(a) November 9, 1933, defendant met Mrs. Bovell at a metaphysical meeting in Hollywood, California. He thereafter stated to her that, if she would let him have her money, he would double her interest and give her good security. She thereupon gave defendant $75,000 and subsequently thereto additional amounts, making a total of $155,000.

March 1, 1934, defendant signed and delivered to Mrs. Bovell a document in which he acknowledged receipt of $155,000 from her and as security for this sum he gave her the following:

(1) A trust deed note in the sum of $25,000 secured by a trust deed on certain real property;

(2) A promissory note in the sum of $75,000 executed by the Mojave Smelting Co. secured by a chattel mortgage;

(3) A promissory note in the sum of $15,000 executed by the Light Conservation Bureau of California;

(4) 300 shares of stock in the Light Conservation Bureau of California;

(5) 2,125 shares of stock in the Mojave Smelting Co.

November 10, 1934, defendant told Mrs. Bovell that he had sold the smelter of the Mojave Smelting Co., and that if she would release the security he had given her he would return her money in three or four days. In reliance upon defendant's statement she returned to him all of the above-described securities which she had received from him and took in lieu thereof defendant's unsecured note in the sum of $155,000. Mrs. Bovell received $4,238 from defendant June 21, 1935, and gave him an additional credit for $16,000 for a ranch in Merced county which she received from him.

Aside from these two items defendant did not return to Mrs. Bovell the money he had obtained from her or any portion thereof, nor did he return to her all or any of the securities mentioned above and which he had at one time given her as security for the money he had obtained from her.

(b) December 4, 1936, Miss Almand delivered to defendant two checks, one in the sum of $735.80 and the other in the sum of $1,100 to be used by him for the purpose of making certain improvements on real property which she owned in the city of Los Angeles. Defendant neither made the improvements nor returned the checks or any portion of the sum represented by them to Miss Almand.

(c) February 23, 1937, defendant received from Miss Almand three checks, one in the sum of $200, the other two each in the sum of $50, for the purpose of purchasing some real property for her. Defendant neither purchased the real property nor returned the checks or any portion of the sum they represented.

(d) February 1, 1937, Miss Almand gave defendant four checks, one in the sum of $1,000, one in the sum of $700, and two for $50 each, for the purpose of buying certain real property for her and erecting houses thereon. Defendant neither purchased the property nor returned the checks or the sums they represented.

(e) February 2, 1937, Miss Almand gave to defendant a draft in the sum of $1,556.24 for the purpose of building certain houses for her. Defendant did not build the houses or return to Miss Almand any of the above-mentioned sum excepting $520.24.

(f) April 28, 1937, Miss Almand gave to defendant two checks drawn on a bank in Mesa, Arizona, for the purpose of transferring the same to her account in Los Angeles. One of the checks was in the sum of $2,000 and the other in the sum of $290. Defendant never deposited any amount in any bank to the credit of Miss Almand nor did he ever return either of the above checks or the sum represented thereby to her.

(g) March 12, 1937, a check in the sum of $2,747 payable to Miss Almand was by her endorsed to defendant for the purpose of his building certain houses in Los Angeles for her. Defendant did not build the houses nor return the check or any of the money represented thereby to her.

Defendant relies for reversal of the judgment on the following propositions:

First: There was no substantial evidence to sustain the findings of fact upon which the verdicts of the jury were necessarily predicated.

Second: The trial judge committed prejudicial error in (a) permitting the jury to *hear certain evidence which was not material to any of the offenses with which defendant was charged; and (b) in denying defendant's motion to strike from the evidence certain exhibits.*

Third: Since the charges against defendant were grand thefts, it was prejudicially erroneous for the trial judge not to require the district attorney to elect the specific offenses, that is, larceny, embezzlement, obtaining money under false pretenses, etc., upon which he intended to proceed against defendant.

Fourth: There was a fatal variance between the pleading and proof in that the evidence disclosed that defendant received certain checks from the complaining witness Almand but did not show that defendant had cashed the checks and received money therefor.

[2] As to defendant's first proposition, we have examined the record and find there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the facts set forth above and each and every material finding of fact upon which the jury's verdicts were necessarily predicated. Further discussion of the evidence is unnecessary, Thatch v. Livingston, 13 Cal.App.2d 202, 56 P.2d 549; People v. Groves, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[3] Defendant's second proposition is without merit. An examination of the record discloses that there was received during the course of the trial certain testimony and exhibits, which evidence was not material to any issue before the court. However, defendant has failed to point out to this court wherein the defendant was in any way prejudiced by this evidence. Therefore, since a judgment will not be set aside for an error in the admission of evidence unless, after an examination of the entire cause, this court is of the opinion that the error complained of has resulted in a miscarriage of justice, Art. 6, sec. 4½, Const. of the State of Calif., the theoretical error pointed out by defendant must be disregarded by us.

[4] Defendant's third proposition is untenable. The law is settled that under sections 484, 490a, and 952 of the Penal Code, where defendant is charged with grand theft the district attorney is not required in advance of the proof to elect upon what theory the prosecution is to proceed, that is, whether it will be larceny, embezzlement, obtaining money under false pretenses, etc. People v. Fewkes, 214 Cal. 142, 149, 4 P.2d 538.

[5] Defendant's final proposition is untenable. Proof of receipt of a check sufficiently supports a finding that defendant obtained money, in the absence of evidence that the check was not cashed. People v. Rabe (1927) 202 Cal. 409, 422, 261 P. 303.

The case last cited clearly disapproves the dictum to the contrary in People v. Whalen (1908) 154 Cal. 472, 473, 98 P. 194. There is no evidence in the instant case that the checks received by defendant were not cashed.

[6] An appeal does not lie from the sentence. People v. Avanzi, Cal.App., 77 P.2d 237. Therefore the purported appeals from the sentences are dismissed.

The judgments are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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27 Cal.App.2d 452

ETIENNE et al. v. MILLBRAE GOLF & COUNTRY CLUB.

Civ. 10738.

District Court of Appeal, First District, Division 2, California.

July 6, 1938.

1. Fixtures ⚷35(2)

Evidence that special room was built adjoining clubhouse for the purpose of housing refrigerating plant, that motors and equipment were fastened to floor in concrete, that compression units were connected by union joints to water supply of building and to electrical energy system by means of copper wire through conduits, and that refrigerating boxes were bolted to wall so that equipment could not be removed without damaging building, sustained finding that refrigerating plant was a permanent fixture necessary to the operation of the building and could not be removed by party seeking to repossess refrigerating plant under alleged conditional sales contract.

2. Fixtures ⚿35(2)

In suit to recover possession of refrigerating plant installed in clubhouse prior to purchase of clubhouse by corporation, evidence sustained finding that corporation's officers at time of purchase of property had no knowledge or information of existence of conditional sales contract under which plaintiff claimed plant and precluded removal of refrigerating plant under alleged conditional sales contract.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by J. M. Etienne and others, doing business under the firm name and style of Cyclops Iron Works, a trust, against the Millbrae Golf & Country Club, a corporation, to recover possession of a refrigerating plant or the value thereof. From a judgment for the defendant, plaintiffs appeal.

Affirmed.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellants.

Jesse H. Miller, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiffs sued to recover possession of a refrigerating plant or the value thereof. The cause was tried before the court sitting without a jury and from a judgment in favor of defendant, plaintiffs appeal.

Said refrigerating plant was installed in the clubhouse of the Union League Golf and Country Club at the time the building was constructed in 1930. Said last-named club became financially involved and the real property of the club was sold on foreclosure to the West Coast Life Insurance Company in 1933. All of the furniture had been removed from the clubhouse at the time of the foreclosure. The defendant purchased the real property in 1933 from the West Coast Life Insurance Company for $132,000 "free and clear of all liens and encumbrances". The refrigerating plant remained at all times in the building and attached thereto. No demand of any kind was made upon defendant with respect thereto until August 28, 1935, at which time plaintiff claimed title thereto under a conditional sales contract with the Union League Golf and Country Club, upon which contract it claimed that nothing had been paid at any time.

The trial court found that said refrigerating plant "was installed by affixing the same to the said real property so that the same became, was and is a permanent fixture in said premises and is absolutely necessary to the operation of said clubhouse and cannot be removed without damage thereto". It further found, "That upon the purchase of said real property with the said fixtures attached thereto * * * defendant had no knowledge or information of the existence of the contract between plaintiffs and the Union League Golf and Country Club * * *." Further findings were made showing that the first knowledge which defendant had of the contract or the claim of plaintiffs was obtained when plaintiffs made their claim on August 28, 1935.

[1] Appellants do not question the sufficiency of the findings to support the judgment (Dauch v. Ginsburg, 214 Cal. 540, 6 P.2d 952), but they apparently contend that the evidence was insufficient to support said findings. We find no merit in said contention. The evidence showed that a special room was built in the building at the time of its construction for the purpose of housing the refrigerating plant; that there were three compression units consisting of motors and the equipment connecting the same, which motors were fastened to the floor in concrete; that the compression units were connected by union joints to the water supply of the building and to the electrical energy system by means of copper wire through conduits; that these in turn were connected to the control board, which control board was attached to the building by means of bolts and screws; that the three refrigerating boxes were bolted on the wall and that the equipment could not be removed without damaging the building to which it had been affixed. This evidence was quite similar to that found in Broadway Improvement, etc., Co. v. Tumansky, 2 Cal.2d 465, 41 P.2d 553 (see, also, Frick v. Frigidaire Corporation, 119 Cal.App. 707, 7 P.2d 321), and there was certainly nothing in the evidence concerning the manner of installation or the circumstances surrounding the sale which, in the language of the authority relied upon by appellants (Marker v. Williams, 39 Cal.App. 674, 179 P. 735) would give the purchaser "notice which suggested that this machinery was not what it appeared to be—an integral part of the real property * * *." (page 736.) In this connection it may be stated

that it was stipulated at the trial that no conditional sales contract had ever been recorded.

[2] In attacking the findings relating to lack of knowledge on the part of the respondent corporation concerning the conditional sales contract, appellants state the issue as follows: "Did the officers of the defendant club have knowledge of the conditional sales contract?" The evidence showed that the directors of respondent at the time of the purchase were three in number, namely James W. Corson, Vincent I. Compagno and Kingsley W. Cannon. Mr. Cannon died prior to the trial and there was no testimony to show that he had any knowledge of said contract. Mr. Corson and Mr. Compagno both testified that they had no knowledge of the contract or of any claim of appellants at the time of the purchase. The only direct evidence on the subject was therefore all to the effect that said directors had no knowledge of the contract. Appellants take the position, however, that "the testimony upon which the findings were based is characterized by such inherent weakness as to justify the conclusion that it is insufficient to uphold the findings". We do not believe this position tenable. While it appeared that said directors had previously been members of the Union League Golf and Country Club and that Mr. Corson was at one time the president thereof, we find no such inherent weakness in the testimony of said directors as to warrant this court in setting aside the findings based upon such testimony.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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27 Cal.App.2d 450

Ex parte GREEN.

Cr. 2020.

District Court of Appeal, First District, Division 2, California.

July 6, 1938.

Pardon 🔑10

Where Board of Prison Terms and Paroles entered resolution on minutes allowing prisoner to go on parole during last 2½ years of prison term unless board should "hereafter otherwise determine" and clerk, though not required to do so, gave prisoner written notice of action without stating qualifying clause, and board thereafter without notice and hearing rescinded its resolution before prisoner's release, rescission of resolution was proper. Penal Code, § 1168.

Proceedings in the matter of the application of Harmon B. Green for a writ of habeas corpus. From an order releasing petitioner upon hearing on writ of habeas corpus, the State appeals.

Reversed and petitioner remanded to custody.

Harmon B. Green, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

This is an appeal by the state from an order of the superior court releasing a prisoner on hearing upon a writ of habeas corpus.

On August 12, 1936, the petitioner was received at San Quentin prison upon commitment on twelve separate counts of grand theft, sentences for which ran concurrently. On August 10, 1937, the board of prison terms and paroles fixed his term at five years. At the same time the board caused to be entered in its minutes a resolution allowing the prisoner to go on parole during the last two and one-half years of his term "unless the said Board shall hereafter otherwise determine". The clerk of the board gave written notice to the prisoner of this action, but omitted the clause just quoted. Thereafter, and before the prisoner was released from the prison, the board rescinded its resolution, and he is still confined in that institution.

Relying upon the notice given him by the clerk, he now argues that he is illegally restrained of his liberty—that the board's power was limited by section 1168 of the Penal Code to a "revocation" of his parole, and that this could be done only after notice and hearing, and that the cause thereof should be stated in the order. The contentions of petitioner are not sound, and the order of discharge must be reversed.

The action of the board is to be determined by the minutes of the proceedings and not by the notice which the clerk gave to the prisoner. The minutes are conceded to be a correct statement of what occurred at the meeting. That determination cannot be affected by any action of the clerk in his communications with the prisoner. The statute does not require such notice, and the prisoner may not predicate any legal right to release upon this error, or omission, of the clerk. Thus the board expressly reserved the right to rescind its resolution and, because of this rescission, no parole is in effect, and the prisoner is legally retained in custody.

All other points argued by the respondent are covered in the opinion filed this day in the Matter of Allen, Cal.App., 81 P.2d 168, and the reasons there given are controlling here.

The order is reversed, and the petitioner is remanded to the custody of the warden.

We concur: STURTEVANT, J.; SPENCE, J.

27 Cal.App.2d 440

PEOPLE v. HALL.

Cr. 1960.

District Court of Appeal, First District, Division 1, California.

July 6, 1938.

1. Homicide 🔑166(1)

The presence or absence of motive to kill is material in homicide case, whether the killing is admitted or denied, and evidence having a direct tendency, in view of surrounding circumstances, to prove motive of defendant to commit a homicide, and thus solve a doubt either as to his guilt or degree of crime, is admissible, even though it may show him to be guilty of other crimes, particularly where the killing is claimed to have been done in self-defense or upon a sudden quarrel or heat of passion.

2. Criminal law 🔑342

Facts tending legitimately and fairly, according to the ordinary operations of the human mind and the ordinary principles of human conduct, to show motive may properly be given in evidence in proof of any assumed motive for the commission of a crime.

3. Homicide 🔑166(1)

The voluntary declarations of defendant, accused of manslaughter, disclosing prior homosexual relationship between defendant and deceased, was competent evidence to prove motive and to refute defendant's claim of self-defense, and was an important factor to be considered by jury, if self-defense plea should be rejected, in determining whether killing was accompanied by malice and was therefore murder, or was committed upon a sudden quarrel or heat of passion and hence amounted only to manslaughter, notwithstanding that such declarations reflected prejudicially upon defendant's moral character.

4. Criminal law 🔑789(9)

In homicide prosecution, instruction that it was duty of jury to find defendant not guilty if jury was satisfied to a moral certainty and beyond all reasonable doubt that the evidence did not establish the guilt of defendant was not error as requiring jury to be satisfied of defendant's innocence to a moral certainty beyond a reasonable doubt, and was not misleading where jury was clearly instructed to acquit defendant if it entertained any reasonable doubt as to defendant's guilt.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Lewis J. Hall was convicted of manslaughter, and he appeals.

Affirmed.

Nathan C. Coghlan, James B. Boland, and Walter C. Frame, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The defendant was charged with the murder of one Clyde E. Badgley, and a jury found him guilty of manslaughter. Following the denial of motions for a new trial and in arrest of judgment he was sentenced to imprisonment in the state prison; and from the judgment of conviction and the order denying the motion for new trial, he has appealed.

The admitted facts are that appellant shot Badgley with an automatic pistol while they were alone in appellant's living apartment on Grove street, in San Francisco, the bullet having entered Badgley's abdomen and causing death a few days later. At the time of the homicide Badgley was an enlisted soldier, twenty or twenty-one years old. He had been in the service less than seven months. Appellant was forty-eight years old, and for several years had been in the employ of the Market Street Railroad. Shortly after the shooting occurred Badgley made a brief oral statement, according to which he was shot intentionally and without provocation. Appellant also made certain statements as to the circumstances attending the shooting, but they were sharply conflicting. He claimed first that it was purely accidental, but afterwards insisted it was done in self-defense during a quarrel. The statements were made by him at the scene of the shooting soon after it happened, following which he was taken to police headquarters where, in the presence of an army officer and the inspectors of police, the substance of his final oral statement was reduced to writing and signed by him. Summarized, his final version was that continuously for more than five years immediately preceding the shooting Badgley had been carrying on with him a degenerate relationship for which he had been paying Badgley money; that on the afternoon of the shooting Badgley demanded more money, which he was unwilling or unable to pay; that thereupon a quarrel took place which ended in the fatal shooting. All of the statements so made were received in evidence, and appellant now contends that there was no causal connection between the immoral relationship and the killing, and that therefore the trial court erred in not excluding his declarations relating thereto. There is no merit in the contention.

The record shows that when first questioned by the police appellant made no disclosure whatever of the existence of the immoral relations, nor did he indicate there had been any quarrel. Quite to the contrary he claimed, as stated, that the shooting was purely accidental. His story was that he picked up his pistol to examine it, and that Badgley asked to see it; that he declined to let him have it, saying, "Don't monkey with that gun"; that nevertheless Badgley grabbed for it and during the scuffle the pistol was accidentally discharged. But when asked by the inspector of police in charge of the case to demonstrate just how the shooting took place, he attempted to do so and failed. The inspector then told him he did not believe the story and in effect accused him of having maintained immoral relations with Badgley; whereupon appellant began to cry and said he would tell "the true story". He then went on to tell of the immoral relations that had been carried on between Badgley and himself for the past five years or more, and the payment to Badgley of much money during that period of time; also what he claimed were the circumstances leading up to and surrounding the shooting. In this latter respect he stated that on the day preceding the shooting he drove to Watsonville with Badgley and another soldier named Hutchins, in the latter's automobile, to visit some friend of Badgley's, but they were unable to find him, so they stayed there overnight and returned to San Francisco the next day, reaching his apartments about noon, where all three ate lunch; that as soon as they finished eating lunch Badgley began demanding money and he replied he had only ninety cents; that Badgley persisted in his demands, saying he had to have some cash, that he was going to meet someone in Golden Gate Park that night, and that appellant had plenty of money in the bank which he could withdraw; that thereupon all three drove downtown to appellant's bank and appellant went inside; that upon returning to the automobile he told Badgley he had no more money in the bank; and all three then drove to the car barns out of which appellant worked and from there to appellant's apartment. He claimed that they returned to his apartment for the purpose of getting some tape with which to repair a cracked curtain on the automobile. Continuing, he stated that Hutchins waited outside in the automobile while he and Badgley entered the apartment to get the tape, which he kept in a table drawer, wherein he also kept his loaded pistol; that upon opening the drawer to get the tape Badgley renewed his demands for money and a quarrel started over his inability or refusal to pay the same; that he told Badgley that he had been giving him money, clothes and shoes for the past four or five years and that he had no more money left; that the quarrel grew bitter and they began calling each other vile names; that finally Badgley called him in effect a "lousy" degenerate; that he denied being such and replied that Badgley was the degenerate; that Badgley then arose from the couch on which he was seated and moved toward the open drawer of the table containing the pistol; and that believing Badgley was about to seize the pistol he "beat him to it", and grabbed the pistol himself; that as he did so Badgley "made a lunge" at him; that he stepped back and pulled the trigger twice; that the pistol did not fire the first time but did the second time, and Badgley staggered into the next room and fell on the floor; that he followed him into the room and opened his shirt, but could find no wound, so after giving Badgley a drink of water he went downstairs and Hutchins drove him to the emergency hospital to get an ambulance. After having given his final version of the shooting appellant was taken, as above stated, to the police station where the substance of his final oral statement was reduced to writing and signed by him.

At the trial appellant repeated the story of the trip to Watsonville, and of Badgley's demand for money upon their return; also of their visit to the bank and of the quarrel that took place in his apartment when Badgley renewed his demands for money. Furthermore he told of the vile names they called each other; but his testimony as to the circumstances attending the shooting was considerably at variance with both of his previous accounts thereof. There he claimed that as soon as the quarrel started over the demand for money and they began calling each other vile names, they grappled and wrestled around the room for eight or ten minutes before the shooting took place; that during the struggle they neared the open drawer where the pistol was exposed and he grabbed the pistol to prevent Badgley from getting it; that finally, as the struggle continued the pistol was in some way discharged, and Badgley staggered into the next room and fell.

Badgley's statement describing the manner in which he was shot was flatly contradictory to any of the versions given by appellant. It was related at the trial by the prosecution's witnesses without any objections being made by appellant to its introduction. In this regard it appears from the record that at first Badgley declined to make any statement or answer any questions concerning the shooting; but a few minutes afterwards upon realizing his critical condition he not only declared that appellant had shot him, but told the circumstances thereof. In this connection he stated that appellant came into the room, pointed the pistol at him, and pulled the trigger; that it clicked twice; that the first time it did not fire, but the second time it did and he was shot. He declined to say, however, why appellant shot him, and when asked to give his reason for so declining he merely said he "was ashamed of something". Hutchins disappeared prior to the trial, which did not take place until a year after the shooting. Therefore his testimony was not available.

[1] It is well settled that in cases of homicide the presence or absence of motive to kill is alway material whether the killing is admitted or denied, and that therefore evidence having a direct tendency, in view of surrounding circumstances, to prove motive on the part of a person to commit a homicide, and thus solve a doubt either as to his guilt or innocence or as to the degree of crime committed, is always admissible, however discreditably it may reflect upon the defendant, and even though it may show him to be guilty of other crimes. People v. Cook, 148 Cal. 334, 83 P. 43; People v. Hendrix, 192 Cal. 441, 221 P. 349; People v. Godsen, 6 Cal.2d 14, 56 P.2d 211; People v. Bowers, 1 Cal.App. 501, 82 P. 553; People v. Young, 102 Cal. 411, 36 P. 770; 13 Cal.Jur., pp. 686, 687. And especially is such evidence admissible where as here the killing is claimed to have been done in self-defense (People v. Walters, 98 Cal. 138, 32 P. 864) or upon a sudden quarrel or heat of passion (People v. Cook, supra, overruling a contrary holding in People v. Gress, 107 Cal. 461, 463, 40 P. 752, cited by appellant).

[2, 3] In the present case, as will be seen, appellant himself, in giving his oral and written statements on the day of the shooting, assigned the immoral relationship as the direct and sole cause of the altercation which resulted in the killing; but he claimed the killing was done in necessary self-defense, which if true exculpated him from criminal responsibility; whereas, on the other hand, the prosecution at all times challenged the truth of his story of self-defense, and from the beginning claimed that the killing was premeditated and accompanied with malice, and therefore was murder, the theory advanced in support of such claim, stated generally, being that appellant shot Badgley in a fit of jealousy arising out of their immoral relations and to put an end for all time to Badgley's constant demands for money and to prevent any possible future exposure by Badgley of their prior immoral relations. And in view of the conflicting stories told by appellant as to the

circumstances of the shooting, all of which were in substance contradicted by the statement made by Badgley, it would seem that no discussion is required to point out that there is ample evidentiary justification for the prosecution's theory. As said in People v. Brown, 130 Cal. 591, 62 P. 1072, facts tending legitimately and fairly according to the ordinary operations of the human mind and the ordinary principles of human conduct to show motive may properly be given in evidence in proof of any assumed motive for the commission of the crime. It is our conclusion, therefore, that under the doctrine of the cases above cited appellant's voluntary declarations disclosing the prior immoral relationship not only served as competent evidence tending directly to prove motive and thus to refute his claim of self-defense, but that the matter of said immoral relationship became an important factor in the case to be considered by the jury in determining, in case it rejected the self-defense plea, whether the killing was accompanied by malice and therefore murder, or was committed upon a sudden quarrel or heat of passion and hence amounted only to manslaughter; and that being admissible for the purposes mentioned, the fact that said evidence reflected prejudicially upon appellant's moral character did not, under the authorities cited, constitute legal grounds for its exclusion.

In the cases cited by appellant involving the question of the admissibility of evidence of extrinsic facts tending to show a meretricious or illicit relationship on the part of the accused, it was clearly pointed out that such relationship had no logical or causal connection with the crime for which the accused was on trial, and therefore had no bearing whatever upon the question of motive. Here, as shown, the factual situation is different. For that reason we do not deem the cases cited by appellant in point.

[4] The trial court's charge to the jury was quite lengthy. It covers twenty-four solid pages of the typewritten transcript. One of the numerous instructions given related to the legal effect generally of the testimony of character witnesses; and appellant complains of the concluding sentence thereof, wherein the jury was advised that if it was satisfied to a moral certainty and beyond all reasonable doubt that the evidence did not establish the guilt of appellant it was the duty of the jury to find him not guilty. No doubt that part of the instruction was given inadvertently. However, construed literally, it cannot be said to misstate a principle of law because, as will be noted, the court does not say, as appellant seems to contend, that before he could be found not guilty the jury must be satisfied of his innocence to a moral certainty and beyond a reasonable doubt. And it would seem obvious that the jury was not misled by the peculiar wording of the sentence in question for the reason that in several other portions of the charge it was correctly and clearly instructed to the effect that if it entertained any reasonable doubt as to appellant's guilt he was entitled to an acquittal.

After reviewing the entire record, including the evidence, we find no such error as would call for a reversal, nor do we believe the verdict of the jury has resulted in a miscarriage of justice. The judgment and order from which the appeal was taken are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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27 Cal.App.2d 460

PEOPLE v. TERKANIAN.

Cr. 433.

District Court of Appeal, Fourth District, California.

July 6, 1938.

1. Factors 🔑**2**

Evidence warranted conviction for acting as a farm produce dealer without first obtaining license from director of agriculture. St.1937, pp. 715, 716, 720, §§ 1261(f), 1263, 1273.

2. Criminal law 🔑**304(2)**

It is common knowledge in the citrus districts that citrus packing houses sell wholesale and distribute citrus fruits to dealers and in no manner resemble the places of business of retail merchants.

3. Witnesses 🔑**370(3)**

In prosecution for acting as a farm produce dealer without first obtaining license from director of agriculture, sustaining of objection to question whether prosecuting witness had instituted civil action against accused to collect the balance due for grapefruit which accused bought without having necessary license was not error. St. 1937, pp. 715, 716, 720, §§ 1261(f), 1263, 1273.

4. Factors ⟹2

The statute, prohibiting any person from acting as a dealer in farm produce without first obtaining a license from the director of agriculture except where possession or control of farm produce is obtained by payment to the producer at the time of obtaining such possession of full agreed price of the commodity, is not invalid as prohibiting anyone from purchasing without a license produce which is not immediately paid for, since statute is confined to dealers which excludes persons making a single or casual purchase of a farm product not in the usual course of business of the purchaser. St.1937, pp. 715, 716, 720, §§ 1261(f), 1263, 1273.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Leo Terkanian, sometimes known as Leo Tucker, was convicted of assuming and attempting to act and acting without a license as a dealer as defined in the Agricultural Code, St.1937, pp. 715, 716, 720, §§ 1261(f), 1263, 1273, and he appeals.

Affirmed.

R. E. Parsons and Wm. M. Anderson, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with the crime of assuming and attempting to act and acting, without a license, as a "dealer" as defined in subdivision (f) of section 1261 of the Agricultural Code, St.1933, p. 274, as amended by St.1937, p. 715. He was found guilty and sentenced to serve six months in the county jail. He has appealed from the judgment.

Defendant urges three grounds for reversal: (1) That the evidence is not sufficient to support the verdict and judgment; (2) alleged error in sustaining an objection of the district attorney to a question asked by counsel for defendant on cross-examination of L. O. Whitmer, the complaining witness; (3) that subdivision (f) of section 1261 of the Agricultural Code is unconstitutional.

In our statement of facts we will confine ourselves to a summary of those facts supporting the judgment. Many of these facts were denied by defendant. The jury accepted those which we will detail as true and disbelieved the testimony of defendant. As we cannot reverse a judgment merely because of conflicts in the evidence, we will disregard such conflicts here.

L. O. Whitmer was a grapefruit grower in Imperial county. Among others, he had two groves, one of fifty-five acres and another of ten acres. His crops had been badly damaged by frost in 1937.

In March, 1937, defendant purchased the crop on the fifty-five acre grove for $6.50 per ton on the trees. By mutual agreement the contract was changed to a stated purchase price of $400. Defendant picked and removed this crop and paid $350 on account of the purchase price. The balance of $50 remains unpaid.

Shortly after the first contract was made defendant purchased the fruit on the ten acre grove for $6.50 per ton. He picked and removed the fruit and has paid nothing for it.

Defendant was not licensed under the provisions of division six, chapter six of the Agricultural Code, St.1933, p. 274, § 1261 et seq., as amended. Section 1263 of that code, St.1933, p. 276, as amended by St.1937, p. 716, prohibits any person from acting as a dealer without first obtaining a license from the director of agriculture. Section 1273, St.1933, p. 286, as amended by St.1937, p. 720, provides the penalty for persons who assume or attempt to act as dealers without first obtaining licenses.

Subdivision (f) of section 1261 of the Agricultural Code thus defines a dealer:

"(f) [Dealer.] The term 'dealer' means any person other than a commission merchant who contracts for or obtains from the producer thereof possession or control of any farm product except by payment to the producer, at the time of obtaining such possession or control, of the full agreed price of such commodity in lawful money of the United States; provided, that any person licensed as a slaughterer under the provisions of Article 3 of Chapter 1 of Division III of this code shall not be required to obtain a license as a dealer under this chapter, and provided that the term 'dealer' as herein defined shall not include retail merchants having a fixed or established place of business in this State."

Defendant bases his attack on the sufficiency of the evidence to support the judgment on two grounds: First, that he paid cash for the grapefruit before he obtained possession of it, and, second, that it was proved that he had a fixed place of business and that the evidence failed to show that this fixed place of business was not the place of business of a retail merchant.

[1] The evidence we have summarized disposes of the first contention. It shows that he took possession of the two lots of grapefruit and that there remains unpaid fifty dollars on the purchase price of the fruit from the fifty-five acre orchard, and all of the purchase price of that taken from the ten acre orchard. He, therefore, had not paid the full purchase price of the fruit at the time he obtained possession of it as required by the statute.

[2] The evidence shows that defendant was having the grapefruit prepared for market in a packing house in Los Angeles. He testified that he did not own this packing house. A citrus packing house is a place where citrus fruits are packed and otherwise prepared for market and from which they are sold. It is common knowledge in the citrus districts that these packing houses sell wholesale and distribute citrus fruits to dealers and in no manner resemble the places of business of "retail merchants".

[3] On cross-examination of L. O. Whitmer, counsel for defendant asked him if he had instituted a civil action against defendant to collect the balance due for the grapefruit. An objection to this question was sustained which ruling is assigned as error. A similar question was before the court in People v. Murray, 87 Cal.App. 145, 261 P. 740, where a similar ruling was made. It was there held that there was no prejudicial error in the ruling.

[4] Lastly, defendant asserts that subdivision (f) of section 1261 of the Agricultural Code is unconstitutional because there would come within its prohibition a single purchase of a farm product made by a tourist at a roadside stand when the purchase price was not immediately paid in lawful money of the United States.

We do not so construe the statute. It is fundamental that we should give effect to a reasonable interpretation of the language of a statute. In so doing we must consider and give effect to all of the enactment under attack and construe it according to the generally accepted and commonly understood meaning of the words used, unless it appears that the legislature intended to place upon them a special significance.

The use of the word "dealer", of itself, negatives this contention of defendant. It has a well defined and commonly understood meaning. In Re Hemming, D.C., 51 F.2d 850, it is said (page 851):

"The words 'dealer' and 'trader' are synonyms. 'A dealer is one whose business it is to buy and sell as a merchant, shopkeeper, or broker—a trader. Century Dictionary. A trader is one who makes it his business to buy merchandise, goods, or chattels to sell the same at a profit. 2 Bouv. Law Dict. Rawle's Third Revision, p. 3305.' State v. Rosenbaum, 80 Conn. 327, 68 A. 250, 251, 15 L.R.A., N.S., 288, 125 Am.St.Rep. 121. 'A dealer, in the popular, and therefore in the statutory, sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again.' Norris Brothers v. Commonwealth, 27 Pa. 494. 'Dealers are the middlemen between the manufacturer or producer and the consumer.' Commonwealth v. Campbell, 33 Pa. 380; Commonwealth v. Vetterlein, 214 Pa. 21, 63 A. 192, 193."

The legislature was defining the word "dealer" which in itself implies one engaged in the business of buying and selling. In using that word as the one to be defined, the definition in the statute relates to the activities of one engaged in such business to the exclusion of another not engaged in such business. This would exclude from the effect of the section a person making a single or casual purchase of a farm product not in the usual course of the business of the purchaser.

Judgment affirmed.

We concur: BARNARD, P. J., HAINES, Justice pro tem.

27 Cal.App.2d 433

HALLINAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10871.

District Court of Appeal, First District, Division 2, California.

July 5, 1938.

Rehearing Denied Aug. 4, 1938.

1. **Contempt 🔑10**

An affidavit setting forth disqualification of a judge of department of superior court in which action was to be tried should have been presented to that judge, and plaintiff's attorney in presenting affidavit in department of presiding judge, reading it, and publishing it acted solely at his peril. Code Civ.Proc. § 170, as amended by St. 1933, p. 1828.

2. **Courts 🔑50**

All actions commenced in superior court of city and county of San Francisco are in first instance within jurisdiction of presiding judge and remain there until business is by him distributed among judges of court.

3. **Contempt 🔑7**

Where all actions commenced in superior court were within jurisdiction of presiding judge until distributed among judges of the several departments, affidavit filed by attorney for plaintiff in action in superior court stating that fair trial could not be had before judge of one of departments, to whom action had been assigned, and that defendants with assistance of secretary of court jockeyed difficult cases against them into that department, constituted an attempt to interrupt and interfere with administration of justice by having presiding judge recall assignment and change judges without complying with statute. Code Civ.Proc. § 170, as amended by St.1933, p. 1828.

4. **Contempt 🔑10**

Where actions commenced in superior court were within jurisdiction of presiding judge until distributed among other judges, language of affidavit filed by attorney for plaintiff immediately after presiding judge had assigned plaintiff's action to one of departments, that defendants with the assistance of secretary of court jockeyed difficult cases against them into that department was contemptuous as to presiding judge, and attorney in filing petition was guilty of contempt.

5. **Contempt 🔑52**

An order adjudging an attorney guilty of contempt for presenting to presiding judge of superior court affidavit containing contemptuous language was not void because attorney had been given no trial on issue of truth of charges and his good faith in making them.

Petition by Vincent W. Hallinan against the Superior Court of the State of California in and for the City and County of San Francisco and another for a writ of review for the purpose of having annuled an order made by the Superior Court adjudging the petitioner guilty of contempt of court.

Order affirmed.

William F. Herron and Carey Van Fleet, both of San Francisco, for petitioner.

Bartley C. Crum, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner applied for a writ of review for the purpose of having annulled an order made by the superior court, Honorable Louis H. Ward presiding judge thereof, adjudging the petitioner guilty of contempt of court. On reading and filing the petition this court made an order setting the hearing of the application for June 17, 1938 at two p. m., and directed that notice in writing of said hearing be given to the respondents prior to five o'clock on June 14, 1938, the date the application was filed. The notice was served on the same date. On the return date the respondents served and filed, pursuant to stipulation with counsel, a copy of the record in the court below, together with a certified transcript of the reporter's notes. Both parties assuming that the copy of the record was true and correct, the hearing in this court was had thereon.

On the 13th day of June, 1938, Honorable Louis H. Ward, one of the judges of the Superior Court of the City and County of San Francisco, was the presiding judge thereof and acting as such; shortly after ten o'clock in the forenoon of said date he was holding court in room 457 on the fourth floor of the city hall in the city and county of San Francisco; said room was the room ordinarily used for the purpose of calling the title of and assigning cases to the respective trial departments; that among other cases to be called and assigned was action number 272,742, records of said superior court and entitled Thorwald Thompson, Plaintiff, v. Market Street Railway Company, a Corporation, et al., Defendants; at said time and place many persons were present, among others the jurors who were to be directed to attend the department to which any of the jury cases were assigned for trial; that the attorneys for the plaintiff in said action were Emmet R. Burns, Esq., and Vincent W. Hallinan, Esq.; that the presiding judge called said action by its title and announced that the same was assigned to department eight, Honorable T. I. Fitzpatrick, judge thereof; when said announcement was made Emmet R. Burns, Esq., presented an affidavit and asked permission to file the same; said affidavit is and was in words and figures as follows, to-wit:

"Vincent W. Hallinan, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that a fair trial cannot be had of said action, or any action against the defendant Market Street Railway Company before Honorable T. I. Fitzpatrick, one of the judges of the above entitled court; that affiant has made a study of every case against said defendant tried in the department of said judge which has come to affiant's attention and that as far as affiant has been able to discover said judge has permitted only one verdict against said defendant to stand in a period of more than ten years; *that said defendants by and with the assistance of Thomas Mulvey, the Secretary of said Court, 'jockey' difficult cases against them into said judge's department;* that his rulings are always favorable to said defendant, and that if the plaintiff recovers a verdict and said defendant moves for a new trial, the said judge invariably grants its motion; that on Friday, June 10, 1938, two matters involving said Market Street Railway Company were decided in said department, in one of which a verdict in favor of said defendant was entered and in the other, where plaintiff had recovered a verdict, said judge granted a new trial; and affiant believes and therefore alleges that if this case is assigned to the department of said judge and a verdict recovered by the plaintiff, the same will share the fate of practically every other verdict recovered by the plaintiff in said department, and affiant believes and therefore alleges said judge is disqualified to try said cause by reason of a bias and prejudice existing in favor of said defendant, preventing plaintiffs in having a fair trial.

"Vincent Hallinan."

(Italics ours.)

That thereupon Honorable Louis H. Ward, said presiding judge, directed Mr. Burns to send for Mr. Hallinan; when Mr. Hallinan appeared the said judge informed him of Mr. Burns' offer to file said affidavit, of the judge's request that Mr. Hallinan be called, and thereupon said judge specifically called Mr. Hallinan's attention to the language which we have italicized and said: "The Court: Now, in reference to that matter this Court and the Presiding Judge thereof, if this affidavit is filed in its present form, in advance, I must tell you, will consider that language contemptuous of this Judge and this Court." After a colloquy between the court and the petitioner the latter stated: "Now I have read that affidavit, I prepared it, I dictated it, I signed it, and I stand upon it, and I don't think there is a word in it contemptuous of anybody. And I think the affidavit is perfectly fair and states the facts. * * * I will not withdraw any part of it. * * * I want it filed. * * * Well, at this time I offer in evidence, if the court please, an affidavit in the case of Thorwald Thompson v. Market Street Railway Company, on a motion to disqualify Judge Fitzpatrick, on the ground that a fair trial against that defendant cannot be obtained before that judge. * * * The Court: Let the record show that in his remarks this morning Mr. Hallinan said the secretary attempted to jockey cases into certain departments; let the record also show that, upon an affidavit and a motion to disqualify a judge, the affidavit sets forth that the said defendant, by and with the assistance of Timothy I. Fitzpatrick and the secretary of said court, jockeyed difficult cases against them into said judge's department; let the record show that the filing of such an affidavit is a reflection upon the honor and the integrity of the presiding judge of the superior court." To said statements of said court the petitioner made no reply. After further colloquy the said judge announced in open court his ruling as follows: "I am only interested in one thing, and that is the filing of an affidavit that is a reflection upon this court and the presiding judge of the court. The court at this time adjudges that the filing of such affidavit is contemptuous and that the party who filed it and signed it, Mr. Vincent Hallinan, is in contempt of court and I so adjudge you in contempt of court, and direct accordingly that you be confined in the county jail for a period of one day. Mr. Bailiff, take him into custody." Each and all of the foregoing matters appear in the commitment. It also appears that the judge found the facts to be and recited in the commitment, "That the filing of said affidavit interrupted the orderly conduct of the proceedings of the said court and interfered with the administration of justice; that the language, towit, that said defendants by and with the assistance of Thomas Mulvey, the secretary of said court, 'jockeyed' difficult cases against them into said judge's department; and the filing thereof was calculated to and was offensive and contemptuous, and said contemptuous conduct was committed in the immediate presence of the court."

Having disposed of the contempt proceeding Judge Ward called attention to the fact that the jurors had been in attendance, had heard all of the proceedings, and that it could not be said as a matter of law that they had not been prejudiced. Thereupon he ordered the Thompson case continued and took up the consideration of other matters pending before the court.

[1] The petitioner contends that he was within his rights in presenting the affidavit and that he was authorized to do so under and by virtue of the provisions of section 170 of the Code of Civil Procedure, as amended by St.1933, p. 1828. In so far as pertinent to the matter before us, said section provides: "§ 170. Actions [or proceedings] on which judge or justice may not sit or act: [Disqualification and proceedings thereon.] No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: * * * 5. When it is made to appear probable that, by reason of bias or prejudice of such justice, judge, or justice of the peace a fair and impartial trial cannot be had before him. * * * [Objection to trial before judge of court of record.] Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. * * *" That section is not helpful. It is addressed to the judge who is about to try an issue of fact or law. There is no claim that Judge Ward was about to try an issue of fact or law in the case of Thompson v. Market Street Railway Company. He was merely performing the duty of assigning cases. The petitioner disclaims that he was asserting the disqualification of Judge Ward and asserts that he was claiming the disqualification of Judge Fitzpatrick. Assuming that his claim is made in good faith, he was clearly out of order in presenting his affidavit to the presiding judge instead of to the judge of the department in which the action was to be tried. In presenting the affidavit in the department of the presiding judge, reading it, and publishing it, he acted solely at his peril. He did these things intentionally and wilfully because he was notified in advance, requested to strike out the objectionable material, and warned that he would be adjudged guilty of contempt if he neglected to do so. However, being informed of all of the facts, and no doubt knowing the law, he persisted in going forward. A similar situation was presented to the Criminal Court of Appeals of Oklahoma in the case entitled Ex parte Sullivan, 10 Okl.Cr. 465, 138 P. 815, Ann. Cas.1916A, 719. At page 819 that court said: "It goes without saying that when an attorney or party files a paper, reflecting upon the integrity, fairness, and impartiality of the court, except where the statute make it grounds for disqualifying the judge, or obtaining a new trial on account of alleged prejudice or bias, or for the purpose of change of venue, he thereby makes himself guilty of a criminal contempt."

[2] In what was said in the last paragraph it was assumed that the petitioner was in good faith addressing the affidavit to the disqualification of Judge T. I. Fitzpatrick. However, taking all of the circumstances it is perfectly obvious that such was not the intention of the petitioner, but that the intention of the petitioner was to besmirch the character of not only Judge Fitzpatrick but of Judge Ward also. Few laymen, and we assume no lawyer connected with the

bar in San Francisco, are ignorant of the fact that under the law all actions and proceedings commenced in the superior court are in the first instance within the jurisdiction of the presiding judge and remain there until said business is by him distributed among the judges of said court (213 Cal. XCIII–XCVI). The secretary may prepare lists, etc., but performs no function whatever in the assignment of cases. It follows that when the petitioner used the expression we have italicized it was clearly his intention to refer to the acts, at least in part, of the presiding judge. The portions of the colloquy quoted above clearly show Judge Ward understood such to be the fact and the record discloses no attempt whatever on the part of the petitioner to deny it.

[3] The petitioner asserts that there was nothing in the affidavit that was contemptuous. Judge Ward thought there was. Most assuredly we are unable to say there was no evidence thereof. Bearing in mind, as shown above, that there is nothing in section 170 of the Code of Civil Procedure which authorized the filing of the affidavit in the department presided over by Judge Ward, and bearing in mind that whether Judge Fitzpatrick was disqualified or otherwise, Judge Ward under the facts had no authority to hear and determine that issue, it is patent the affidavit was written with the object in view of showing contempt for the presiding judge and to interrupt and interfere with the administration of justice. Prior to going to court to hear the assignment of cases, Mr. Burns and Mr. Hallinan caused the affidavit to be prepared. Mr. Hallinan assumed the entire responsibility of the wording thereof. Considering those facts in connection with what subsequently occurred, we think it is obvious that it was intended to interrupt and interfere with the administration of justice and that, in the event the case should be assigned to department eight, Honorable T. I. Fitzpatrick, judge, the mere filing of the affidavit in the department of the presiding judge would cause the latter to recall the assignment and make a different assignment and thus obtain a change of judges without complying with the provisions of section 170 of the Code of Civil Procedure.

[4] The petitioner asserts that the affidavit hereinabove set forth does not contain any language that is contemptuous. He cites and relies on In re Lake, 65 Cal.App. 420, 224 P. 126; Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127; In re Cunha, 123 Cal.App. 625, 11 P.2d 902, 18 P.2d 979. The first case is in point, but is not helpful to the petitioner. Conceding that the petitioner was claiming an attempt to disqualify Judge Fitzpatrick, that part of the affidavit which we have italicized was not material as showing prejudice on the part of Judge Fitzpatrick but was "purposely and gratuitously offensive" to Judge Ward. In re Lake, supra, page 428, 224 P. 126. The other two cases involve constructive contempts, whereas in the instant case a direct contempt is involved.

[5] Finally, the petitioner contends that the order adjudging him guilty of contempt was void because the petitioner was given no trial on the issue of the truth of the charges and his good faith in making them. As the affidavit was presented in the presence of the court there is no merit whatever in the contention. Lamberson v. Superior Court, 151 Cal. 458, 460, 91 P. 100, 11 L.R.A.,N.S., 619; Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482; Ex parte Sullivan, 10 Okl.Cr. 465, 138 P. 815, 818, Ann.Cas.1916A, 719.

The order is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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27 Cal.App.2d 494

GRITSCH v. PICKWICK STAGES SYSTEM.

GRITSCH et al. v. SAME.

Civ. 10680.

District Court of Appeal, First District, Division 2, California.

July 11, 1938.

Hearing Denied by Supreme Court Sept. 8, 1938.

1. Pleading 🔑237(6)

In stage passengers' actions against stage company for injuries sustained in intersectional collision with automobile where there was ample proof of negligence of automobile driver which negligence was relied on to defeat recovery, permitting amendment to conform to proof by pleading concurrent negligence of automobile driver was not error.

2. Negligence ⚷15

A party may proceed, whether jointly or severally, against joint tort-feasors and, though a complaint may allege only joint negligence, it states a separate liability against each party sued.

3. Limitation of actions ⚷127(5)

In stage passengers' actions against stage company for injuries sustained in intersectional collision with automobile, permitting amendment of complaint to conform to proof and to plead the concurrent negligence of the automobile driver was not error as against contention that, automobile driver having not been sued originally and the action being barred as to him at the time of the amendment, amendment created as to stage company a new cause of action which was also barred by the statute of limitations.

4. Carriers ⚷317(1)

In stage passengers' actions against stage company for injuries sustained in intersectional collision with automobile, evidence as to speed of stage one mile from point of collision should have been excluded as being too remote.

5. Appeal and error ⚷1050(1)

In stage passengers' actions against stage company for injuries sustained in intersectional collision with automobile, admission of evidence of excessive speed of stage one mile from collision, where there was competent evidence to support implied finding that speed at time of collision was excessive, was not prejudicial error.

6. Appeal and error ⚷1097(1)

Where evidence on second trial was materially different on essential elements of the case, decision on first appeal could not be taken as the "law of the case."

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

7. Carriers ⚷321(1)

In stage passengers' actions against stage company for injuries sustained in collision with automobile at intersection, instruction that doctrine of imminent peril did not apply to a party who by reason of his own negligence created a sudden peril which confronted him was not error.

8. Trial ⚷260(1)

The refusal of proposed instruction, the subject matter of which was fully covered in instructions given, was not error.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Consolidated actions by Frank M. Gritsch and Helen C. Gritsch and another against the Pickwick Stages System, a corporation, for injuries incurred while passengers on one of defendant's stages. From judgments for the plaintiffs, defendant appeals.

Affirmed.

Bryce P. Gibbs, of Los Angeles, and Harry C. Lucas and J. D. Maatta, both of San Francisco, for appellant.

George K. Ford, of San Francisco, and Leonard B. Fowler, of Madera, for respondents.

NOURSE, Presiding Justice.

The defendant appeals from the judgments in favor of the plaintiffs in two cases consolidated for trial wherein they sought damages for injuries incurred while passengers on one of defendant's stages. The causes were tried before, and judgments for the plaintiffs were reversed because of erroneous instructions. 131 Cal. App. 774, 22 P.2d 554.

The facts are without substantial conflict if we eliminate the exaggerations and opinions of the interested parties. The stage was proceeding northerly on El Camino Real at about 11:30 p. m., when a Buick came into an intersection and struck the stage on the middle of its left side. This caused the driver of the stage to lose control, and the stage veered to the right, crossed the curb, and came to a stop in a private yard. The plaintiff Helen Gritsch was thrown to the floor of the stage and suffered some personal injuries which required hospitalization. The highway upon which the stage was traveling was a through boulevard fully protected by stop signs at each intersection. The driver of the Buick and those riding with him at the time all agreed that he failed to stop before entering the boulevard, that he was driving at an excessive speed, and that the Buick struck the stage to the rear of the driver's seat when the stage was more than half way through the intersection, and that the stage was being driven on the right or proper side of the boulevard and first entered the intersection. Other witnesses corroborated this testimony, and it was supported by physical tests and examination of the premises immediately following the collision. We disregard the testimony of one of the plaintiffs as to what, after the reversal on the former trial, she thought she had seen at the time of the accident, as such testimony is contrary to the physical facts and inherently improbable.

[1] The appellant specifies four grounds for reversal, which we will take in order. 1. That the trial court erred in permitting plaintiffs to amend their complaints "to conform to the proof" and plead the concurrent negligence of the driver of the Buick. The argument is that there was no proof of such negligence at the time the motion was made and granted, and that misrepresentations were made to the trial court in support of the motion. We may concede the merit of the argument, but do not discuss the question because we find no possible prejudice arising from the course taken. Ample proof was supplied later by both parties of the negligence of the driver of the Buick, and it was one of the main contentions of the defendant that this negligence alone caused the collision.

[2, 3] It is argued that, since the driver and owner of the Buick were not sued originally and the action was barred as to them at the time of the amendment, this amendment created a new cause of action as to the appellant which was also barred by the statute of limitations. It is settled that a party may proceed, whether jointly or severally, against joint tortfeasors and, though a complaint may allege only joint negligence, it states a separate liability against each party sued. Shea v. City of San Bernardino, 7 Cal.2d 688, 694, 62 P.2d 365.

[4, 5] 2. Complaint is made of the admission of the testimony of the plaintiffs as to the speed of the stage at points as remote as one mile south of the point of collision, and also of the location of certain speed zone signs over a mile from that point. We agree that this evidence was too remote and should not have been admitted. But again we are confronted with the question whether the error was prejudicial. The purpose of the evidence was to show that the stage had been running at an excessive speed for many miles prior to the collision, but it is difficult to perceive how the jury could have been influenced by such evidence. Competent evidence was given as to the speed at and immediately prior to the collision which was sufficient to support the implied finding that the speed at that time was excessive.

[6] 3. It is argued that the decision on the former appeal has become the law of the case. The former judgment was reversed because of the instruction covering the res ipsa loquitur doctrine which we held was not involved in a case of this character. On the second trial the plaintiffs did not request an instruction on that doctrine and none was given. We also held that in determining the rate of speed as evidence of the negligence of the defendant, the duty of the defendant was measured by the terms of section 113 of the California Vehicle Act, St.1923, p. 553, as amended by St.1927, p. 1436, as that section read at the time of the collision. The proof on the second trial was limited to this extent. Since the evidence on the second trial was materially different on these essential elements of the case, the decision on the first appeal cannot be taken as the law of the case upon these issues. Allen v. Bryant, 155 Cal. 256, 259, 100 P. 704; Erlin v. National Union Fire Ins. Co., 7 Cal.2d 547, 61 P.2d 756.

4. Error is assigned in the giving and refusing to give certain instructions. Three instructions, designated "A", "B" and "C" in the opening brief, are complained of as misleading, "that in effect they direct a verdict in favor of the plaintiffs in the event they found both drivers negligent, without reference to proximate cause". They were all confined to plaintiffs' theory of the case and correctly presented the issue of concurrent negligence. Other instructions given correctly presented defendant's theory that the negligence of the driver of the Buick was the sole proximate cause of the collision.

[7] Instruction designated number "E" is complained of as being in conflict with instruction designated number "F", given at the request of defendant and also as assuming negligence on the part of the defendant. Both instructions related to the question of imminent danger and the duty of the defendant under such circumstances. We find no material conflict and no error in that part of instruction number "E" reading: "You are further instructed that this doctrine of imminent peril does not apply to a party who by reason of his own negligence creates the sudden peril which confronts him."

[8] Complaint is made of the failure to give defendant's proposed instruction

designated number "H" covering the rate of speed which the stage was permitted to maintain in a "business or residential" district. The proposed instruction was faulty in many respects which do not need to be here noted. The subject-matter was fully and properly covered in instructions given upon request of both parties relating to the application of section 113 of the Vehicle Act.

We find no prejudicial error in the record.

The judgments are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

27 Cal.App.2d 455

GLASSER v. MUNICIPAL COURT OF CITY OF LOS ANGELES, LOS ANGELES COUNTY, et al.

Civ. 11444.

District Court of Appeal, Second District, Division 1, California.

July 6, 1938.

1. Courts 🔑207(5)

Three judges of superior court could hear and determine issues raised by alternative writ of prohibition and demur or answer thereto, notwithstanding that writ was returnable in the department of the superior court presided over by the three judges of the appellate department of such court, and that the appellate department as such was without jurisdiction to issue the alternative writ. Const. art. 6, § 5.

2. Prohibition 🔑3(2)

Jurisdiction to issue writ of prohibition is strictly confined to cases where there is no plain, speedy, and adequate remedy in the ordinary course of law, and the writ is not available if there is an adequate remedy by appeal or supersedeas, even though the inferior tribunal is proceeding in excess of jurisdiction.

3. Prohibition 🔑3(1)

The question whether there is a plain, speedy, and adequate remedy in the ordinary course of law, so as to make a writ of prohibition unavailable, is a question of fact, depending upon the circumstances of each particular case.

4. Prohibition 🔑4

Whether there is a plain, speedy, and adequate remedy in the ordinary course of law, so as to make the writ of prohibition unavailable, is a matter largely within the sound discretion of the court.

5. Prohibition 🔑3(5)

While a right to appeal presents no obstacle to the issuance of a writ of prohibition where the remedy of appeal under the circumstances of the particular case is not plain, speedy and adequate, there is no right to prohibition where an appeal affords a complete and adequate remedy and will accomplish the same ends.

6. Prohibition 🔑34

A reviewing court can examine into the merits of the original petition upon which an alternative writ of prohibition was based, even though on appeal no issue is raised by appellant as to sufficiency of original petition.

7. Appeal and error 🔑21

Neither the desire of the parties, nor the willingness of the lower court, can confer jurisdiction in the district court of appeal, nor be the test by which the jurisdiction of the district court of appeal is determined.

8. Prohibition 🔑20

The facts set forth in the petition for alternative writ of prohibition furnish the test, in either the superior court or the district court of appeal, upon which jurisdiction depends.

9. Courts 🔑39

If a question of jurisdiction is involved, it must appear that such question was presented to the court, the jurisdiction of which was questioned, especially where proceedings had been had in such court affording the opportunity to raise the question.

10. Prohibition 🔑20

Petition for an alternative writ of prohibition, filed in superior court by petitioner accused in the municipal court of soliciting bail bond business in county building in violation of Los Angeles county ordinance, was insufficient, and writ of prohibition should not have been issued, where petition did not show that the question of jurisdiction was raised by petitioner in municipal court, and that petitioner had no plain,

speedy, and adequate remedy at law, and record was silent as to proceedings before superior court at hearing on alternative writ.

◆

Prohibition proceeding by Louis Glasser against the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and others. From the judgment, the Municipal Court of the City of Los Angeles and others appeal.

Reversed with directions.

Ray L. Chesebro, City Atty., John L. Bland, Deputy City Atty., Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, all of Los Angeles, for appellants.

Richard H. Cantillon and John E. Glover, both of Los Angeles, for respondent.

DORAN, Justice.

In an ordinance adopted by the board of supervisors of Los Angeles county, it is declared to be a misdemeanor to solicit in any manner or for any purpose in any building owned or operated by the county of Los Angeles (sec. 1. ordinance No. 2292, N. S., county of Los Angeles), whether within the unincorporated or incorporated territory of said county.

In a complaint filed in the Municipal Court of the City of Los Angeles it was alleged that respondent Louis Glasser solicited "bail bond business" in the hall of justice, a building owned and operated by the county of Los Angeles and within the corporate limits of the city of Los Angeles, in violation of the above ordinance. A jury was unable to agree as to the guilt of the defendant, respondent herein, and the cause was set down for trial at a later date. Thereafter, and before the second trial of said action, defendant Glasser obtained an alternative writ of prohibition from the superior court of Los Angeles county. After a hearing on the return of the writ, said court entered its judgment declaring the above ordinance unconstitutional, from which judgment the Municipal Court of the City of Los Angeles prosecutes the appeal herein.

At the outset it should be noted that the Constitution provides that superior courts shall have appellate jurisdiction in such cases arising in municipal and justices' and other inferior courts in their respective counties as may be prescribed by law. The Constitution also provides for the creation of appellate departments of the superior court in any county wherein municipal courts are established. Art. 6, sec. 5, Constitution of California, Ann. [Mason 1933], p. 904. The county of Los Angeles has created such an appellate department of the superior court, and three judges of the superior court of said county have been designated according to law to preside over said appellate department.

[1] The alternative writ of prohibition was issued by one of the judges of the appellate department of said court, and the writ was made returnable in the department of the court presided over by the three judges of said appellate department. The judgment from which the appeal herein is taken was signed by the three judges as judges of the superior court; that is to say, that although the appellate department of said superior court, as such appellate department, was without jurisdiction to issue the alternative writ, nevertheless there is nothing in the law which prevents three judges of the superior court from hearing and determining issues raised by an alternative writ of prohibition and the demurrer or answer thereto. It should be noted, also, that had the defendant Glasser been convicted, and had he appealed to the appellate department of the superior court, the determination by that court of the questions raised on such appeal would be final. Thus, the same three judges of the superior court who preside over the appellate department of said superior court determined, in this instance, through the instrumentality of a proceeding in prohibition, the same question which could have been raised by an appeal from the judgment of the municipal court. The vital distinction between the two methods of procedure is obvious,—an appeal lies from the judgment of the superior court in the prohibition proceedings, whereas the judgment of the appellate department of the superior court would be final.

[2-5] With regard to the law applicable to the question herein involved, "It is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that jurisdiction to issue the writ is strictly confined to cases where there is no plain, speedy, and adequate remedy in the ordinary course of law. So, although an inferior tribunal is proceeding in excess of jurisdiction, the

writ is not available if there is a remedy by appeal or supersedeas, and such remedy is adequate. * * * The question whether there is a 'plain, speedy, and adequate remedy in the ordinary course of law', within the meaning of the statute, is one of fact, depending upon the circumstances of each particular case, and the determination of it is a matter largely within the sound discretion of the court. * * * While a right to appeal presents no obstacle to the issuance of a writ of prohibition where, under the circumstances of a particular case, the remedy is not plain, speedy and adequate, there is no right to prohibition when an appeal affords a complete and adequate remedy and will accomplish the same ends. This rule applies as well where there is a right of appeal to the superior court." 21 Cal. Jur., p. 584 et seq.

[6-9] Manifestly, a reviewing court may examine into the merits of the original petition upon which the alternative writ was based, even though on appeal no issue is raised by appellant as to its sufficiency. Otherwise, as to such question, the judgment and discretion of the court issuing the alternative writ would be conclusive and binding on the reviewing court. Although both appellant and respondent may desire to obtain a decision of the District Court of Appeal upon the issue involved, and the superior court as well may be willing, nevertheless neither the desire of the parties nor the willingness of the lower court can confer jurisdiction in the District Court of Appeal, nor can it be the test by which such jurisdiction is determined. For example, it would be a strange situation indeed if the District Court of Appeal, having original jurisdiction to issue the writ of prohibition and after having denied a petition for a writ upon the grounds of the insufficiency of the petition, would be bound to again entertain upon an appeal from a judgment of the superior court, a consideration of the same petition presented to the District Court of Appeal in the first instance. The facts set forth in the petition for the alternative writ furnish the test, in either court, upon which jurisdiction depends. From such petition it must appear that petitioner has no plain, speedy and adequate remedy at law. Simpson v. Police Court of Riverside, 160 Cal. 530, 117 P. 553. If a question of jurisdiction is involved, it must appear that such question was presented to the court, the jurisdiction of which was questioned. Sutter Butte Canal Co. v. Superior Court, 183 Cal. 321, 324, 191 P. 529. Especially is this true when proceedings have been had in such court affording the opportunity to raise the question.

[10] The petition upon which the alternative writ was issued falls far short of being sufficient in either of the abovementioned particulars. The petition merely alleges in that regard that petitioner moved said municipal court for its order dismissing the charges and that said motion was denied. It does not appear from said petition that the question of jurisdiction was raised by petitioner in the municipal court, nor does it appear from said petition that petitioner had no plain, speedy and adequate remedy at law. In that regard it is alleged merely that petitioner would be required to post bail pending appeal, prepare a statement and follow the usual procedure on appeal. Such petition is wholly insufficient, and the record is silent as to the proceedings before the superior court at the hearing on the alternative writ. Hence, there is no showing in the record on appeal either that the alternative writ should have issued or that the writ of prohibition was warranted. Incidentally, respondent observes that "the question involved, at least in so far as this respondent is concerned, has become moot. The legislature at its last session enacted a general law which prohibits the solicitation of bail bonds in any building where a court is situated."

For the reasons heretofore given, the judgment is reversed with directions to the lower court to dismiss the proceedings.

We concur: YORK, P. J., WHITE, J.

27 Cal.App.2d 505

BRADY v. KOBEY.

KOBEY et al. v. SANSUM CLINIC et al.

Civ. 11767.

District Court of Appeal, Second District, Division 2, California.

May 26, 1938.

On the Merits July 11, 1938.

1. Parties ⚷53

New or additional parties to an action may be included in a cross-complaint as defendants thereto only upon a valid order of the court permitting the inclusion of such parties.

2. Parties ⚷53

In action by physician's assignee to recover for medical services rendered to defendants' deceased father, where defendants sought to file cross-complaint in negligence against assignee and others to recover for father's death, and order of justice of the peace permitted filing of the cross-complaint, whereupon cause was transferred to superior court because amount of cross-complaint exceeded jurisdiction of justice of the peace, cross-complaint was properly stricken by superior court as bringing in new parties without such court's order, since order of justice of the peace was without justice's jurisdiction. Code Civ.Proc. § 396, as amended by St.1935, p. 1947.

3. Courts ⚷487(1)

The statutory requirement that, where an action is commenced in a court having jurisdiction thereof and a counterclaim therein will involve questions beyond court's jurisdiction, court must suspend all further proceedings and transfer the action to a court having jurisdiction, is mandatory, and orders of justice of the peace not in conformity therewith are void. Code Civ. Proc. § 396, as amended by St.1935, p. 1947.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Aileen Brady against Marvin D. Kobey, wherein defendant and others filed a cross-complaint against plaintiff and Sansum Clinic and others. From orders striking the cross-complaint, defendant and the other cross-complainants appeal.

Affirmed.

Jacob J. Lieberman, Arthur L. Green, and Frank A. Pettibone, all of Los Angles, for appellants.

Heaney, Price, Postel & Parma and Clarence A. Rogers, all of Santa Barbara, for respondents.

PER CURIAM.

The motion to dismiss appeal now under submission is denied. Respondent given 10 days within which to file brief. Case on merits to be submitted when briefs are on file.

McCOMB, Justice (dissenting).

I dissent from the order of the majority of the court denying the motions hereinafter mentioned:

There are presented motions to dismiss the appeals from orders granting (1) the motion of respondents, Sansum Clinic, W. D. Sansum, R. A. Hare, D. H. McNamara, H. I. Burtness, Alfred E. Koehler, B. S. Wyckoff, and Ruth Bowden, to strike out a cross-complaint filed in the above-entitled action; and (2) the motion of respondent Santa Barbara Cottage Hospital to strike out portions of the above-mentioned cross-complaint.

The essential facts are:

Aileen Brady, as assignee of a doctor, filed an action against appellant Kobey and others to recover a sum alleged to be due for medical services rendered. Thereafter defendant Kobey and others filed a cross-complaint naming plaintiff and rspondents as cross-defendants on a cause of action sounding in tort for the wrongful death of appellant's father.

The trial judge granted (1) the motion of respondents, Sansum Clinic, W. D. Sansum, R. A. Hare, D. H. McNamara, H. I. Burtness, Alfred E. Koehler, B. S. Wyckoff, and Ruth Bowden, to strike the cross-complaint, and (2) respondent Santa Barbara Cottage Hospital's motion to strike certain portions of the cross-complaint.

These are the questions to be determined:

First: Does an appeal lie from an order striking out a cross-complaint?

Second: Does an appeal lie from an order striking out portions of a cross-complaint?

The first question must be answered in the negative. The general rule is that an order striking out a cross-complaint is not appealable. Yandell v. City of Los Angeles, 214 Cal. 234, 235, 4 P.2d 947.

An exception to this rule is that, if the order striking out the cross-complaint will operate as a bar to plaintiff's cause of action against one or all of the cross-defendants, then such order is appealable. Howe v. Key System Transit Co., 198 Cal. 525, 529, 246 P. 39; Yandell v. City of Los Angeles, 214 Cal. 234, 237, 4 P.2d 947; Halterman v. Pacific Gas and Electric Co., 22 Cal.App.2d 592, 594, 71 P.2d 855.

The cause of action alleged in the complaint was ex contractu while that alleged in the cross-complaint was ex delicto. It is therefore obvious that they were independent causes of action and that the order striking out the cross-complaint did not constitute a bar to appellant's cause of action against respondents or any of them.

Therefore, the order under consideration in my opinion falls within the general rule above stated and the exception to the rule is here inapplicable.

The answer to the second question in the instant case must also be in the negative.

The law is settled that an order striking out portions of a pleading is nonappealable. Bryant v. Kelly, 203 Cal. 721, 722, 265 P. 817; see, also, cases cited in 2 Cal.Jur., [1921] 157, note 20.

For the foregoing reasons it appears to me that the motions should be granted and the appeals dismissed.

On the Merits.

McCOMB, Justice.

These are purported appeals from orders granting (1) the motion of respondents Sansum Clinic, W. D. Sansum, R. A. Hare, D. H. McNamara, H. I. Burtness, Alfred E. Koehler, B. S. Wyckoff, and Ruth Bowden, to strike out a cross-complaint filed in the above-entitled action; and (2) the motion of respondent Santa Barbara Cottage Hospital to strike from the cross-complaint references to its co-respondents.

The essential facts are:

September 24, 1936, Aileen Brady as assignee of Dr. Findlay filed an action in the justice court of the second judicial township, county of Santa Barbara, California, to recover a sum alleged to be due for medical services rendered the father of appellants. November 6, 1936, appellant Marvin D. Kobey filed an answer in the justice court denying the allegations of the complaint and also a counterclaim in which he alleged that Dr. Findlay had so negligently performed an operation upon his father that as a result thereof his father died. A recovery of $20,000 was sought on the alleged counterclaim. Appellants filed a cross-complaint against Aileen Brady and respondents alleging negligence of the respondents resulting in the death of appellants' father.

There was also filed with the purported cross-complaint a document reading as follows:

"In the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California.

"Aileen Brady, plaintiff and cross-defendant, vs. Marvin D. Kobey, defendant and cross-complainant, and John Doe Kobey, defendant.

"Marvin D. Kobey, Doris E. Horn, Thelma F. Kobey and Cyril H. Kobey, cross-complainants, vs. Aileen Brady, Francis M. Findlay, Santa Barbara Cottage Hospital, a corporation; Sansum Clinic, W. D. Sansum, P. A. Gray, R. A. Hare, D. H. McNamara, H. I. Burtness, Alfred E. Koehler, J. H. Childrey, B. S. Wyckoff, Ruth Bowden, Doe One, Doe Two, cross-defendants.

"Order

"Good cause therefor being shown, it is hereby ordered that the cross-complaint of Marvin D. Kobey et al. vs. Francis N. Findlay et al. may be filed in this action and that summons may issue thereon.

"Dated this 6th day of November, 1936.
"Ernest D. Wagner, Justice."

March 16, 1937, Justice of the Peace Wagner made an order transferring the action to the superior court of Santa Barbara county and on April 30, 1937, all pleadings in the action were transferred to the clerk of the superior court of Santa Barbara county. June 21, 1937, the orders granting the motions to strike, from which these purported appeals are taken, were made by the superior court of Santa Barbara county.

These are the questions presented for determination:

First: In the absence of an order of the court permitting the filing thereof is a cross-complaint valid which brings into the action new parties?

Second: Did the justice of the peace have jurisdiction to make the order set forth above which purported to permit the filing of the cross-complaint?

[1, 2] The first question must be answered in the negative. The law is es-

tablished in California that new or additional parties to an action may be included in a cross-complaint as defendants thereto only after a valid order of the court permitting the inclusion of said new or additional parties as defendants to the cross-complaint. Alpers v. Bliss, 145 Cal. 565, 570, 79 P. 171; Overell v. Overell, 18 Cal. App.2d 499, 502, 64 P.2d 483.

In Alpers v. Bliss, supra, our Supreme Court thus states the rule at page 570, 79 P. at page 173:

"The provision of section 442, Code Civ. Proc., giving to a defendant who may seek affirmative relief 'against any party' the right to file a cross-complaint at the same time that he files his answer, is limited to cases in which he seeks affirmative relief against a 'party' to the action. This section does not give him a right to file a cross-complaint for affirmative relief against one who is not already a party to the action, or bring new or additional parties into the action by including them in his cross-complaint as defendants thereto. He cannot bring a new party into the action without an order of the court therefor."

[3] The second question must likewise be answered in the negative. Section 396 of the Code of Civil Procedure, as amended by St.1935, p. 1947, reads in part as follows:

"If an action * * * is commenced in * * * a court which has jurisdiction of the subject matter thereof as determined by the complaint, * * * and it thereafter appears * * * that the determination of * * * a counterclaim arising out of the transaction set forth in the complaint * * * will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings therein and transfer the action or proceeding, and certify the pleadings * * and all papers and proceedings therein, to a court having jurisdiction thereof which may be agreed upon by the parties, or, if they do not agree, to a court having such jurisdiction which is designated by law as a proper court for the trial or determination thereof."

The requirements of this section are mandatory and orders of a justice's court not in conformity therewith are without jurisdiction and void. Stratton v. Superior Court, 2 Cal.2d 693, 698, 43 P.2d 539.

Applying the foregoing rules to the instant case, it appears that respondents were not parties to the original action, and when the defendant Kobey filed a counterclaim against the plaintiff asking for the sum of $20,000 the justice of the peace lost jurisdiction to do or make any orders other than to transfer the action to the superior court and to certify the pleadings before him to the clerk of the superior court.

It is thus evident that the purported order of the justice of the peace of November 6, 1936, permitting the filing of the cross-complaint was void and, as the cross-complaint brought in new and additional parties to the action without a valid court order permitting the filing of the same the trial court's rulings were correct.

For the foregoing reasons the orders appealed from, are and each is, affirmed.

We concur: CRAIL, P. J.; WOOD, J.

27 Cal.App.2d 469

KAGEE v. BENCICH.

Civ. 6008.

District Court of Appeal, Third District, California.

July 7, 1938.

1. Trover and conversion ⇨40(1)

Evidence that defendant's husband advanced amount necessary to redeem plaintiff's rings and then placed them in his safe-deposit box, that property in safe-deposit box was transferred to safe in his home, that contents thereof came into possession of defendant subsequent to husband's death and that defendant thereafter refused to discuss matter of redemption of rings, justified finding in action for conversion, that rings came into defendant's possession after her husband's death.

2. Executors and administrators ⇨431(2)

The plaintiff was not required to file a claim against estate which defendant was representing as prerequisite to maintenance of action for conversion of plaintiff's rings by defendant, since claim was one arising in tort.

3. Executors and administrators ⚷224

Presentation of claim against estate is necessary only where claimant is making some contractual claim against funds or property of estate.

4. Executors and administrators ⚷117

A claim for value of property converted by executor of an estate is not against estate but against executor personally.

5. Limitation of actions ⚷182(5)

An individual defendant waives statute of limitations by failure to plead it.

6. Trover and conversion ⚷9(12)

To constitute a conversion, the refusal to deliver must be absolute and amount to a positive denial of plaintiff's right to possession.

7. Limitation of actions ⚷55(1)

An action for conversion of rings brought within three years after defendant repudiated her relationship as pledgee thereof and stated that she did not have rings was not barred by statute of limitations.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Marcia Kagee against Charlotte Elizabeth Bencich, as executrix of the estate of Lottie Cecelia Walsh Jaquith, also known as Lottie Cecelia Walsh, substituted for Lottie Cecelia Jaquith, formerly Lottie Cecelia Walsh, by her guardian, Charlotte E. Bencich, for the conversion of diamond rings. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. J. Henderson, of Sacramento, for appellant.

Ralph H. Lewis, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

From a judgment in favor of plaintiff, defendant appeals. As grounds for such appeal defendant alleges that the court erred in holding that plaintiff was not required by law to file a claim against the estate as a prerequisite to maintain the action; secondly, that the findings and judgment are contrary to the evidence, and that the evidence is insufficient to sustain the findings in that there is no testimony that the diamonds hereinafter mentioned ever came into the possession of defendant, and thirdly, that the action is barred by the statute of limitations.

[1] From the record it appears that during the year 1931 respondent was the owner of five diamond rings, which she valued at the sum of $1,500. These rings at that time were pledged at Zemansky's Loan Office in Sacramento, as security for the repayment of the loan of $150.

During the summer of 1931, Ed. R. F. Walsh, now deceased, accompanied by his wife and Mrs. Kagee, the respondent, went to Zemansky's Loan Office, where Walsh redeemed the rings, he advancing the $150 necessary so to do. He thereupon took possession of all of the rings and agreed to hold them for an indefinite length of time, subject to redemption by respondent. Walsh, accompanied by respondent, thereupon went to the California National Bank, where he placed them in a safe deposit box which he had in that institution. Mrs. Lottie Cecelia Walsh, his wife, accompanied them to the loan office and to the California National Bank and was present during the transaction.

Walsh became seriously ill about the middle of October, 1931, and was thereafter confined to his home until his death in October, 1932. Prior to his illness respondent, about the 5th of October, 1931, paid $45 to Walsh on account, and on November 5, 1931, while decedent was sick in bed, she paid an additional $25 thereon. This later payment was made in cash to Lottie Cecelia Walsh at the home of appellant and decedent. At that time Mrs. Walsh, in her own handwriting, delivered a receipt to respondent, reading as follows:

"Nov. 5-1931

"Received of Marcia $25.00, part payment on loan on diamond rings.

"Mrs. Ed. Walsh."

Walsh's condition continued to grow worse after this last payment, and it is the testimony of respondent that thereafter she made several efforts to see him but was unable to do so. Appellant testified that prior to Walsh's illness all of the property in the safe deposit box in the bank was transferred to a safe in his home, where it remained, and the contents thereafter came into the possession of Mrs. Walsh immediately upon the death of Walsh.

It appears from the testimony of respondent, that upon several occasions between the date of Walsh's death and 1935, she discussed with Mrs. Walsh the matter of the redemption of the rings. Upon these occasions Mrs. Walsh refused to discuss the matter, saying that she was then too busy, but that at some other time she would discuss the matter. Mr. Williams, a corroborative witness, testified that on one occasion he took Mrs. Kagee, the respondent, to the home of Mrs. Walsh, and Mrs. Kagee approached Mrs. Walsh and said, "I would like to get my rings." Mrs. Walsh was just about to enter a taxicab, which had drawn up to her home, when she said that she couldn't be bothered, and drove away. At that time Williams testified that Mrs. Kagee had with her money with which to make a payment on the pledge, the amount of which, however, the witness did not know. In 1935 Mrs. Walsh finally told respondent that she did not have the rings. Mrs. Walsh was called as a witness in her own behalf, but her testimony was unsatisfactory and not convincing, as appears from the record, and apparently to the experienced trial judge who presided at the trial.

The foregoing evidence is entirely sufficient to justify the finding of the trial court that the rings came into the possession of Mrs. Walsh after the death of her husband.

[2-4] This is an action against Mrs. Walsh for conversion in her individual capacity; therefore the code section which requires the filing of a claim against the estate does not there apply. A claim is required to be presented against the estate only when the person presenting it is making some contractual claim against the funds or property of the estate. Where the thing claimed is the value of property of a third person which has been converted by the executor of the estate, the claim of such third person is not against the estate but against the executor personally.

The conversion constitutes a tort, and the only cases in which a claim is required to be filed are those arising upon contract. In Thompson v. Byers, 116 Cal.App. 214, 2 P.2d 496, the claim was one arising in tort. The court there held that the statute does not require the presentation of such a claim to the executor, relying upon the case of Millar v. Millar, 51 Cal.App. 718, 197 P. 811.

[5] Nor is the action barred by the statute of limitations for two reasons: First, this is an action against the defendant individually and not as a representative of the estate of the decedent, and the individual waives the statute by failure to plead it. Furthermore, the evidence discloses that it was not until 1935 that Mrs. Walsh repudiated her relationship as pledgee. Prior to that time, upon each occasion at which respondent asked her for the rings, appellant would reply that she could not at that time be bothered, or that she would come to a settlement later.

[6] To constitute a conversion, a refusal to deliver must be absolute and amount to a positive denial of plaintiff's right to possession. Martin v. Bank of America, 4 Cal.App.2d 431, 41 P.2d 200.

[7] The complaint here was filed in May, 1936, and the action having been commenced within three years of the commission of the tort, it is not barred by the statute of limitations.

For the foregoing reasons the judgment must be affirmed, and it is so ordered.

I concur: THOMPSON, J.

11 Cal.2d 430

WALLIS et al. v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

S. F. 16002.

Supreme Court of California.
July 18, 1938.

In Bank.

Dissenting opinion.

For majority opinion, see 80 P.2d 972.

Haas & Home, of Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., Leon T. David, Asst. City Atty., and John Beardsley, Deputy City Atty., all of Los Angeles, for respondent Board of Civil Service Com'rs of City of Los Angeles.

Arthur C. Fisher, of Los Angeles, for Civil Service Employees.

EDMONDS, Justice (dissenting).

I cannot agree with a decision which takes away the right of civil service employees in the department of water and power and allows them to be replaced by persons who worked for the Los Angeles Gas and Electric Corporation before its electrical distributing system was taken over by the city of Los Angeles. The result is that persons who have spent years in the city's service and have acquired civil service rights, with seniority and other privileges, may be ousted in favor of the private corporation's former employees. In my judgment, the provisions of the city charter expressly forbid such a conclusion, which is also contrary to all principles of civil service.

For many years the city has had exempt or noncivil service employees who constitute a special group of workers. The rule of the board of civil service commissioners, adopted pursuant to the provisions of the charter (sec. 125; Stats. 1933, p. 3146) gives civil service employees preference over the others. Under it "no Civil Service employee may be suspended until all such exempt persons are laid off". When the city was about to take over the distributing lines of the private corporation the question as to how it could man the property to be acquired was an important one. The persons who had been operating the private system were just as necessary, for the time being at least, as the physical property. Obviously for some time after the competing system was purchased the city would require the services of hundreds of persons not only skilled in various trades and occupations but also familiar with the electrical distributing system of the company by which they had been employed. The then existing charter provisions and regulations of the board of civil service commissioners did not give the necessary authority for bringing such a large group of new employees into the city's service as exempt employees, and presumably it would have been impractical to require civil service examinations.

The charter amendment approved by the voters of the city in 1935, St.1935, p. 2356, § 431, provided the solution for this difficulty. Under its terms persons employed in the operating service of the public utility which the city acquired "may be retained and employed * * * in their respective positions, as nearly as may be, and, so long as continuously so retained and employed in such positions, *shall be exempt from the civil service provisions of this charter* * * *." The purpose of this amendment is clear. Under its provisions the city was authorized to employ as persons "exempt from the civil service provisions of this charter" those who had formerly worked for the private corporation. But the board of water and power commissioners by taking over employees of the private corporation could not give them a civil service status. The new employees were not given any permanency of tenure, nor were they given the right to oust civil service workers. They came into the service of the city at a time when the charter specified that when a suspension for lack of work is to be made, and this is the situation which occasioned the present controversy, civil service employees are to be retained in preference to exempt persons. This policy is consistent with the purpose of civil service and protects seniority rights. Ford v. Department of Water and Power, 4 Cal.App.2d 526, 41 P.2d 188; Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 626, 57 P.2d 215.

The resolution of the board of water and power commissioners adopted prior to the election at which the question of the acquisition of the private utility system was to be voted upon could not modify or supplant the provisions of the city charter even though it was passed in aid of the campaign to purchase the private system. Moreover, nothing in this resolution assumes to do so. It merely recites that the board will carry out the provisions of the proposed charter amendment, allowing it to employ those in the service of the private corporation, at the date of the acquisition of its property, as exempt workers. Indeed, the resolution quotes the proposed charter amendment in full.

The petition should be denied.

27 Cal.App.2d 606

PEOPLE v. OWENS.

Cr. 434.

District Court of Appeal, Fourth District, California.

July 15, 1938.

1. Homicide 🔑14(2)

An appreciable time between formation of intention to kill and act of killing need not be shown to prove premeditation justifying conviction of first-degree murder; it being necessary only that killing be preceded by concurrence of slayer's will, deliberation, and premeditation.

2. Homicide 🔑253(3)

Evidence that defendant commenced his assault on his mistress in hotel bedroom, that they scuffled violently for several minutes, that mistress attempted to flee and was struck down in the hall, that mistress was wounded in the back, that mistress' outcries at time of killing were direct accusations of defendant and that his reply was an admission of guilt, and that defendant fled without attempting to administer to mistress or to call aid for her, justified such an inference of malice and a willful, deliberate, and premeditated intent to kill followed immediately by the blow that caused death as to warrant conviction for first-degree murder.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Homer V. Owens was convicted for murder in the first degree, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with murder in the first degree. He was found guilty and sentenced to life imprisonment in the state penitentiary. His sole ground for a reversal of the judgment is based on the contention that the evidence is not sufficient to support the verdict and judgment in that there was not sufficient proof of premeditation and intent to justify a conviction of murder in the first degree. We are asked to reduce the offense to murder in the second degree.

Defendant and Penny May Smith, the deceased, had been living together in the relation of husband and wife without the formality of marriage. On January 13, 1938, Miss Smith rented room 49 on the third floor of the Pacific Hotel in San Diego. Ray Roberts and Ceola Roberts, friends of defendant and deceased, occupied room 23 on the second floor of the same hotel and immediately below room 49.

On the morning of January 13, 1938, defendant informed Mr. and Mrs. Roberts that deceased had been out all night and that he wanted to find her as he was planning to go to Los Angeles. Mrs. Roberts told him she was at the Pacific Hotel and asked him "not to beat her". Defendant and Roberts went to room 49, where they saw deceased. They went back to room 23 and drank a small amount of wine. Defendant was in room 49 on one other occasion that morning and went to it again shortly before four o'clock in the afternoon of that day. Mr. and Mrs. Roberts were in their room. The windows of both rooms were open.

Roberts described what he heard as follows:

"Q. And then he went back up to Room 49? A. Well, he shaken my hands, that he was leaving town. I told him goodby and later I heard his voice up over my room. Q. How much later? A. Oh, I will say about three or four minutes. Q. About three or four minutes later—and do you remember what the conversation was that you heard coming from the other room? A. Yes, sir. Q. What was it? A.

'Come on and get your clothes on.' Q. That was the first thing that you heard? A. That was the first thing that I heard, yes sir. * * * Q. That you heard—and she says, 'No', and then what did he say? A. Then he says—let's see—he says, 'Who are you talking to?' And she says, 'You', and he says, 'Come on and let's go', and she says, 'I'm not going any place with you,' and he says, 'Who are you talking to?' and she says, 'You', and there was a scuffle. Q. Well, now is that all the conversation that you heard then? A. That is all. Q. Before you heard this scream? A. (continuing) that I remember that I heard. Q. Well, did you hear a conversation between Homer and your wife at that time? A. Well, she called up at the time of the scuffle. Q. What did she say? A. She says, 'Homer', and I forget the words, exactly the words that she said, but he talked calmly like everything was all right. * * * Q. You heard no conversation of any kind between Homer and Penny May Smith between Homer's conversation with your wife and the scream? A. No, just a noise, scuffling noise. Q. You did hear some scuffling around? A. Yes, sir. Q. Up in the room—Now how much time would you say passed during this conversation between Penny May Smith and the time of the scream, that is, how long was it after Homer left your room until you heard the scream? A. It was just a short time, I couldn't say the time. Q. Just a very few minutes? A. Yes, sir. Q. And likewise it was just a few seconds after the scream and the other remarks until you heard the noise of someone going downstairs? A. Well, I guess it was about two or three minutes, something like that."

Mrs. Roberts testified as follows:

"Q. Describe to the jury about how the noises sounded to you. A. Well, there seemed to have been an awful scuffle and a lot of bumping noises. Q. And you heard voices but you couldn't distinguish what was being said? A. No, sir, I couldn't. Q. What did you do, if anything, when you heard them? A. Why, I yelled out the window to Homer. Q. What did you say? A. I said, 'Homer'—I called him and he answered me, and I said, 'You told me you were not going to beat Monkey'. (Miss Smith) Q. What did he say? A. Well, I don't think he said anything, but he answered me when I called him. Q. Then what happened, after you told him that he said he was not going to beat her? A. Well, the scuffling continued. It stopped only for half a second and then continued to grow—worse than at first, and then I heard a loud scream from Monkey. Q. And you heard her scream? A. Yes, sir. Q. Did you recognize her voice? A. Yes, sir. Q. What did she say as she screamed? A. She said, 'Police, police', and then she said 'Mama, Mama'. Q. And who is 'Mama'? A. She was referring to the landlady of the Pacific Hotel. Q. And what, if anything, followed after you heard her say, 'Mama, Mama'? A. She said, 'Now you have killed me, you have cut my heart wide open.' Q. What did you hear—did you hear Homer Owens say anything at that time? A. Yes. Q. What did he say? A. Oh, he said 'I done killed my baby.' Q. Anything further that you heard him say? A. I heard him crying. Q. Then what did you hear next? A. I heard him run downstairs."

Mr. and Mrs. Roberts and the landlady went to the third floor and found deceased lying in a pool of blood in the hall outside room 49. There was no blood in room 49 except a few spots on the carpet near the door. Penny May Smith died shortly thereafter.

An autopsy surgeon decribed her wounds as follows: "We found the body of a female of the age of twenty-six years, approximately, height five feet five inches; probable weight a hundred and fifteen pounds. She had a tattoo with the letters 'H. V. O.' on her outer right arm above the wrist; a laceration just above the left clavicle. This laceration was three and three-quarters inches in length, which made a dip on the left and passed through the external jugular vein, the most shallow part being in the midline. There was also a puncture wound one-half inch in breadth at the level of the spine—of the left scapula or shoulder blade, one and one-half inches to the left of the midline. It varied in depth from one-half to three quarters of an inch. The laceration on the neck as formerly described had severed the external jugular vein. The opinion as to the cause of death was hemorrhage due to severage of the external jugular vein."

This witness elsewhere in his testimony described the wound in the back as a "stab wound" between one and one-half and one and three-quarters inches deep, explaining that after death the flesh had been compressed by the body lying on its back.

A pocket knife with an open blade was found on the floor of the hall near the body of the deceased.

Defendant explained the wound in the neck by saying that it was accidentally inflicted by Miss Smith in a friendly scuffle between the two. He could not explain the wound in the back.

Defendant ran from the Pacific Hotel and was arrested in another part of San Diego at about eight-thirty o'clock on that same night. The peace officers were called by Roberts immediately after Miss Smith was found in the hall.

Defendant urges that the foregoing evidence does not show a wilful, deliberate and premeditated intent to kill under the rule announced in People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, and People v. Connors, 124 Cal.App. 216, 12 P.2d 43.

[1] We believe those two cases are factually distinguishable from the instant case which falls under the rules of People v. Fleming, 218 Cal. 300, 23 P.2d 28, and People v. Campos, 10 Cal.App.2d 310, 52 P.2d 251. In the Fleming Case the Supreme Court said (page 32):

"But this court has said on innumerable occasions that in order to prove premeditation in one charged with murder it is not necessary to show that any appreciable space of time elapsed between the intention to kill and the act of killing. It is only necessary to quote from People v. Hunt, 59 Cal. 430, 435, the following statement of the law on this subject: 'There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.' * * * Where one assaults another violently with a deadly weapon and takes his life, the presumption is that the assailant intended death or great bodily harm. 13 Cal.Jur., p. 683. And where, as in this case, the assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take the life of the person assailed."

In the Campos Case this court said (page 253):

"It is argued that there was no proof of the necessary element of malice. Murder is defined in section 187 of the Penal Code as 'the unlawful killing of a human being, with malice aforethought.' Section 188 of the same Code declares that malice may be express or implied; that it is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and that it is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. It is settled that 'malice may always be inferred from the circumstances in the case—the evidence presented and considered by the jury.' People v. Glover, 141 Cal. 233, 243, 74 P. 745. * * * The circumstances that were shown to have surrounded the homicide, including the character of weapon used, the nature of the wound inflicted, the fact that the deceased displayed no weapon of any character and was unarmed, the acts and conduct of the accused, furnished ample justification for the indulgence by the jury in the inference that appellant entertained a deliberate purpose to kill the deceased. This properly supported inference warranted the return of a verdict convicting appellant of murder in the first degree. People v. Mahatch, [148 Cal. 200, 82 P. 779]; People v. Bennett [161 Cal. 214, 118 P. 710]; People v. Peete, 54 Cal.App. 333, 342, 202 P. 51."

[2] In the instant case the wound which caused death was made by a slash with the sharp blade of a pocket knife, a deadly weapon. The wound was sufficient to and did cause death. The wound in the back could hardly have been self-inflicted. Defendant and deceased scuffled violently for several minutes. Defendant said this scuffle commenced on the bed in room 49. There was no blood on or near the bed. The blood pool and spots indicated that the killing occurred in the doorway or in the hall. The jury could have reasonably inferred from the evidence that defendant commenced his assault in the bedroom; that deceased attempted to flee and was finally struck down in the hall. Defendant fled from the scene of his crime. He did not attempt to administer to his victim nor to call medical or any other aid for her. These facts afford persuasive evidence of a consciousness of guilt. The outcries of deceased at the time of the killing were direct accusa-

tions of defendant. His reply was an admission of guilt. These words spoken by the two thoroughly negative defendant's story of an accidental injury during a friendly struggle. The evidence fully justifies the inference of malice and a wilful, deliberate and premeditated intent to kill followed immediately by the blow that caused death.

Judgment affirmed.

We concur: BARNARD, P. J.; HAINES, Justice pro tem.

In re BENNETT'S ESTATE.*

SIEMON v. MORTGAGE INV. CO. OF LOS ANGELES.

Civ. 11574.

District Court of Appeal, Second District, Division 1, California.

July 15, 1938.

Rehearing Denied Aug. 8, 1938.

Hearing Granted by Supreme Court Sept. 17, 1938.

1. Executors and administrators 🔑91

The duties of executors are to preserve the estate, pay the indebtedness of the deceased and the charges of administration, and put the estate in such condition that distribution may be had to those entitled thereto.

2. Executors and administrators 🔑309

The action of an executor, in undertaking to make payments out of funds of estate on his own judgment as to who were entitled thereto and amounts thereof, was improper as outside his duties and an attempt to entrench on the exclusive jurisdiction of the court to determine such matters on distribution, and an infringement on the rights of persons interested in the estate to have such matters disposed of solely on distribution.

3. Executors and administrators 🔑309

The rights of devisees and legatees under will are fixed not by provisions of will, nor by the judgment of the executor but by the decree of distribution, and can only be determined on distribution.

4. Executors and administrators 🔑309

An executor, who undertakes to determine without court order amount due a residuary legatee and to pay such amount, does so at his peril and assumes the risk that such advancement on his part may be disallowed when he ignores the provisions of the statute.

5. Executors and administrators 🔑309

The action of an executor, in determining without court order amount due residuary legatee and paying such amount to legatee without compliance with statute under which judgment creditor of legatee was entitled to notice of hearing for ratable distribution with opportunity to object thereto, was illegal and void requiring account of executor to be charged therewith. Code Civ. Proc. § 561.

6. Executors and administrators 🔑199

An executor's account was required to be charged with amount of payments over and above sum allowed by court order for family allowance to widow of decedent.

7. Executors and administrators 🔑309

The account of an executor was not chargeable in full for advancement to residuary legatee without court order in absence of showing that any person's rights were affected, or injury sustained by or through such payments, where advancement was made in good faith and at solicitation of beneficiary.

8. Executors and administrators 🔑309

Where executor in good faith and at solicitation of residuary legatee made advancement to legatee without court order, probate court could adjust matter between legatees or distributees and executor on hearing for distribution in harmony with its general equitable powers.

9. Executors and administrators 🔑309

Where executor in good faith and at solicitation of residuary legatee made advancement to residuary legatee, without court order, executor was chargeable with amount paid in excess of amount to which residuary legatee was lawfully entitled, but account of executor was entitled to be credited with amount advanced to residuary legatee in accordance with provisions of will, without injury to rights of any interested party.

◆

Appeal from Superior Court, Los Angeles County; Florence Bischoff, Judge.

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*For subsequent opinion see 90 P.2d 84.

Proceeding in the matter of the estate of Will Wallace Bennett, also known as W. W. Bennett, deceased, wherein Alfred Siemon was appointed executor and filed a petition for a decree of settlement of account and final distribution to which the Mortgage Investment Company of Los Angeles filed objections. From an order and decree of settlement of account and final distribution, the executor appeals.

Reversed with directions.

Siemon & Claflin, of Bakersfield, for appellant.

Earle M. Daniels and Burdette J. Daniels, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by the executor of the last will of Will Wallace Bennett, also known as W. W. Bennett, from an order and decree of settlement of account and final distribution. The will designated Inez V. Siemon, wife of appellant herein, and daughter of decedent, and Edna M. Allen, another daughter of decedent, as residuary legatees.

The appellant, as executor, during the course of administration but without any order of court, made payments to the residuary legatees of their distributive shares, overpaying each in the sum of $57.83. Appellant as executor also made payment of $110 over and above the sum allowed by court order for family allowance to the widow of decedent.

Objections to the allowance of these particular payments were interposed by respondent Mortgage Investment Company of Los Angeles, a corporation, which was a judgment creditor of the residuary legatee Edna M. Allen under and by virtue of a judgment obtained by respondent mortgage company against said residuary legatee in the Superior Court of Los Angeles County. Generally speaking, the grounds of the objections were that in due course, during the progress of administration, said creditor regularly obtained a writ of execution upon its judgment, caused a copy thereof to be duly served upon appellant executor, and, in accordance with section 561 of the Code of Civil Procedure, filed a copy of the same in the office of the clerk of the court in which said estate was being administered. Also, that ratable or partial distribution was made to such residuary legatee without compliance with sections 1000 and 1001 of the Probate Code, which sections authorize the payment of a distributee's share only after due notice given and when the court shall order such distribution, after a determination that the same can be made without loss to the creditors or injury to the estate or any person interested therein. With reference to the overpayment of family allowance, objection was based upon the claim that the same was beyond the amount authorized in the court's order.

At the conclusion of the hearing on the settlement of this account and petition for distribution, the court made findings to the effect that said residuary legatees were each overpaid $57.83 on their distributive shares; that such distributions in their entirety were made without any order of court, as provided by section 1001 of the Probate Code, and "were illegal and void". The court further found that on September 15, 1931, judgment was entered against residuary legatee Edna M. Allen in favor of respondent Mortgage Investment Company in the sum of $5,628.52; that on or about September 26, 1934, a writ of execution was issued thereon, and the same was levied by the sheriff on the executor and appellant herein. The court also found that said writ of execution was served upon the clerk of the court in which administration of the estate was pending and was filed in said cause, in accordance with the provisions of section 561 of the Code of Civil Procedure. With reference to the family allowance, the court found that the executor had paid the sum of $110 over and above and beyond the sum allowed by the court in its order granting the family allowance. Based upon these findings, the court made and entered its order and decree of settlement, charging the account of said executor with the payments made to said residuary legatees and the overpayment made on account of the family allowance, and further directing that the executor pay to said residuary legatees the sum of $1,349.83 each, directing, however, in the case of the residuary legatee Edna M. Allen, that her share be paid by the executor to the Sheriff of Los Angeles County in accordance with law and subject to the rights of the parties.

It is urged on this appeal as grounds for reversal that said contested payments were properly made, should have been allowed, and that the refusal of the court to allow credit therefor was error, for the reason that in the case of residuary legatee Inez V. Siemon, no objection was made by any one interested therein to the advancement and that the receipt thereof was acknowledged by said legatee; that in the case of the legatee Edna M. Allen, the writ of execution was ineffectual because of failure to comply with the requirements of section 561 of the Code of Civil Procedure, while with reference to the overpayment on account of family allowance, that such payments were reasonable and actually required for the support and maintenance of the surviving wife.

[1-6] With reference to the advancement made to the residuary legatee Edna M. Allen, the claims of appellant cannot be sustained. The duties of executors are to preserve the estate, pay the indebtedness of the deceased and the charges of administration, and put the estate in such condition that distribution may be had to those entitled to it. In the case at bar, however, the executor undertook to make payments of the funds of the estate upon his own judgment as to who were entitled thereto and as to the amounts thereof. This was clearly outside of his duty and was an attempt to entrench upon the exclusive jurisdiction of the court to determine these matters on distribution, and an infringement upon the rights of persons interested in the estate to have these matters disposed of solely on distribution—partial or final. The rights of devisees and legatees are fixed, not by the provisions of the will nor the judgment of the executor, but by the decree of distribution (Toland v. Earl, 129 Cal. 148, 61 P. 914, 79 Am.St.Rep. 100), and can only be determined on distribution. When an executor, like the appellant here, undertakes to determine without court order the amount due a residuary legatee and to pay the same, he does so at his peril and assumes the risk that such advancements upon his part may be disallowed when, as in the instant case, he ignores the plain provisions of the Probate Code, which had he followed, would have resulted in respondent's having notice of the hearing for ratable distribution and having its day in court to object thereto. Had appellant followed the course of procedure required by sections 1000 and 1001 of the Probate Code, thereby giving respondent notice of his intention to make a ratable distribution to the residuary legatee who was a judgment debtor of respondent, the latter would have had an opportunity to assert its claims against the distributive share of said residuary legatee, and if respondent had not done so and the court had made an order authorizing appellant executor to make the distribution in question, he would have been protected. There is ample evidence in the record to sustain the findings of the trial court that the payment made to the residuary legatee Edna M. Allen was illegal and void, and that the sum of $110 over and above the amount authorized for family allowance was paid without legal warrant. The evidence also fully sustains the findings of the trial court that both of said residuary legatees were overpaid in the sum of $57.83. That portion of the order and decree which concerns the residuary legatee Edna M. Allen and the overpayment on the family allowance must be sustained.

[7-9] With reference to the payment made to the residuary legatee Inez Siemon, there are certain equities involved in this issue which require comment. It is conceded, and thoroughly established by the record in this case, that such residuary legatee was entitled to $1,349.83, while there is no showing that any person's rights were affected or injury sustained by or through the payment to said residuary legatee. Therefore the appellant executor should not be charged to account to the estate in full for this advancement as if he had diverted or misapplied the funds. If this advancement was made in good faith and at the solicitation of the beneficiary (and there is no evidence to the contrary), then the executor should be given credit therefor. Upon the hearing for distribution the court, in harmony with its general equitable powers, can adjust the matter between the legatees or distributees and the executor, and in conformity therewith should credit the latter with all advances made which the court finds were in proper amount, in accordance with the terms of the will, and without injury to the rights of any interested party. It necessarily follows, therefore, that the account of the executor herein should not have been charged with the full amount of $1,407.66 paid to the residuary legatee Inez V. Siemon, but only with the sum of $57.83, found to have been paid in excess of the amount to which said residuary legatee was lawfully entitled.

The court was correct in ordering and decreeing that the executor's account be charged with the full amount paid to the residuary legatee Edna M. Allen, and directing that appellant executor pay the amount of $1,349.83, to which said legatee was legally entitled, to the Sheriff of Los Angeles County subject to the rights of all parties interested therein. The executor's account was properly charged with the overpayment of $110 on account of the family allowance.

Though the appellant has not assigned any special error for the reversal of the order in so far as the residuary legatee Edna M. Allen or the overpayment on account of the family allowance is concerned, nevertheless the equities herein referred to, in the case of the residuary legatee Inez V. Siemon, impel a reversal so that all matters may be before the probate court for new proceedings consistent with the views herein expressed.

The order and decree appealed from is reversed.

We concur: YORK, P. J.; DORAN, J.

CITY OF LOS ANGELES v. STONE et al.*

Civ. 11710.

District Court of Appeal, Second District, Division 1, California.

July 15, 1938.

Hearing Granted by Supreme Court Sept. 12, 1938.

Corporations 🔑298(5)

Under corporation's by-laws providing that "Any document or resolution" signed by three-fourths of the trustees or by all members of any committee "will be as binding upon the institute as though passed at a regular meeting," three of corporation's four trustees had authority to move for substitution of attorneys and dismissal of appeal in condemnation proceeding against the corporation, irrespective of the nature of disagreement between such trustees and the fourth trustee who resisted their action.

Action by the City of Los Angeles against Edward Stone and others, for opening of street and condemnation of land. From an adverse judgment, defendant the Colburn Biological Institute appealed, and subsequently moved for a substitution of attorneys and dismissal of its appeal.

Motions granted and appeal dismissed.

H. F. Poyet, of Los Angeles, for Cecilia Oberdorfer and Dr. Alice M. Farwell, trustees of Colburn Biological Institute, in support of the motion.

John F. Poole, of Los Angeles, for Dr. Nora H. Bates, trustee of Colburn Biological Institute, in support of the motion.

Palmyra Pressly and Chas. M. Easton, both of Los Angeles, for Dr. Fannie Shaffer, trustee of Colburn Biological Institute, in opposition to the motion.

Ray L. Chesebro, City Atty., and Arthur Loveland, Deputy City Atty., both of Los Angeles, for respondent.

WHITE, Justice.

This is a motion by appellant, acting through three of its four trustees, for a substitution of attorneys and a dismissal of this appeal. For an understanding of the pending proceeding it will be necessary to set out some of the facts in connection with the litigation.

This action was commenced October 23, 1928, under the Street Opening Act of 1903 (Stats. 1903, p. 376), for the opening, widening, extending and laying out of Allesandro street from the Los Angeles river to Glendale boulevard. In November, 1929, to the end that some immediate improvement work might be done in Allesandro street to handle the volume of traffic, the Los Angeles city council ordered the board of public works to prepare plans and advertise for bids for the paving of that portion of Allesandro street then owned by the city. Subsequently, upon the petition of various organizations and citizens that a wider pavement be constructed, and upon certain property owners', including appellant herein, giving a written consent to the city to enter upon a portion of the land then being condemned in this action and construct thereon a concrete sidewalk, the city proceeded to construct the sidewalk in accordance with the terms of said agreement between such property owners and the city. Thereafter, an interlocutory judgment was entered in this cause, determining the amount of awards to be paid to each defendant therein, and assessments were spread under the provisions of the Street Opening Act of 1903 for the purpose of raising funds with which to pay these awards. Following this, the city council determined that the awards made were so excessive and the assessments spread against each property so high in proportion to the actual value of the property, that in the opinion of the city council the property in said assessment district could not bear the burden of such high assessments. As an example of the wisdom of the city council in thus determining, it might be said that the assessment against the property of appellant herein alone was in excess of $39,000, whereas its award in said action for land sought to be taken and severance damage was but $15,005.73. No public funds being available for contribution to the cost of the improvement for the purpose of reducing said assessments, the city council on December 18, 1935, adopted an ordinance abandoning said condemnation and said assessment proceedings. The city did not at any time take immediate possession of any of the land sought to be condemned in said action by virtue of said proceedings, or any possession other than that pursuant to the agreements aforesaid.

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*For subsequent opinion see 82 P. 939.

When in May, 1937, the city of Los Angeles made a motion to dismiss the action in the superior court, appellant herein, who was one of the defendants, filed written objections to the dismissal and made a motion for an order requiring the city to pay to said defendant institute the award theretofore rendered in its favor by the interlocutory judgment. When this last named motion was heard jointly with the city's motion for dismissal, the latter motion was granted, while the institute's motion for an order compelling the city to pay the award theretofore rendered in favor of the institute was denied. The defendant institute filed a memorandum of costs, including an item for attorney's fees. A motion to retax costs was made on behalf of plaintiff city, and defendant institute filed a motion for a writ of execution to be levied against the award found in favor of said institute in the interlocutory judgment, which last motion for a writ of execution was denied, and defendant institute's costs were taxed in the sum of $227.50, which amount the city paid into court for the benefit of defendant institute. Thereafter, defendant institute took an appeal from the judgment of dismissal and from the order of the superior court denying to it a writ of execution on the interlocutory judgment. These appeals are now pending before this court and are the appeals which are here sought to be dismissed.

Subsequent to the taking of said appeals, Colburn Biological Institute filed an action against the city of Los Angeles wherein it sought to recover damages from the city alleged to have arisen out of the abandonment of the condemnation proceedings, but not for the collection of the award made in said proceedings. Thereafter, under date of March 10, 1938, respondent's city attorney wrote a letter to the attorneys representing all four of the trustees of said Colburn Biological Institute, wherein it was stated that the city attorney would recommend to the city council a compromise of said appeals and claims in the sum of $3,500, if acceptable to the institute. Thereafter respondent city received a letter from the attorney representing trustee Dr. Shaffer, rejecting the offer of settlement; and approximately a month later respondent city received a joint letter from attorneys representing the remaining three trustees of the institute, Dr. Bates, Dr. Farwell and Miss Oberdorfer, agreeing to accept the sum of $3,500 in full settlement of said action for damages. The Los Angeles city council thereafter approved such settlement and directed that the sum of $3,500 be paid to Colburn Biological Institute in full settlement of its claim for damages against the city and for a dismissal of all actions and proceedings pending against the city arising out of the abandonment and dismissal of said condemnation proceedings and the taking of possession by the city of the real property belonging to said Colburn Biological Institute by virtue of the aforesaid written permit and agreement.

Three of the four trustees caused to be executed the necessary deed to the city, and the city is now ready and willing to deliver to Colburn Biological Institute the sum of $3,500 when said institute can give to the city proper dismissals of the appeals and actions for damages aforesaid.

One of the trustees, Dr. Shaffer, opposes the motion for substitution of attorneys on behalf of appellant institute on the ground that the other trustees are acting without authority and in violation of the by-laws of said corporation and in defiance of the best interests and welfare of the institute.

With the differences that apparently have arisen between one of the trustees and her three colleagues on the board, and which from the record appear to have been of long years' duration, we have no concern. The only questions before us, are, first, whether the three trustees who seek a substitution of attorneys and dismissal of the appeal are duly qualified and acting trustees of the appellant institute; and secondly, if they are duly qualified trustees, do they possess the power to substitute counsel and thereupon, as appellants, to dismiss their appeal?

The Supreme Court has settled the first question for us in the case of Colburn Biological Institute et al. v. De Bolt, 6 Cal.2d 631, 59 P.2d 108, wherein it affirmed a judgment of the Superior Court of Los Angeles County deciding that Dr. Nora H. Bates, Dr. Alice M. Farwell, C. Cecilia Oberdorfer and Dr. Fannie Shaffer (the latter of whom opposes the motion herein), constituted the board of trustees of Colburn Biological Institute. As to the authority of any three of the four trustees to act for and on behalf of appellant institute, we are directed to article XIII of the by-laws of Colburn Biological Institute, a corporation, which provides as follows: "Any document or resolution of the trustees or of any committee, if signed by three-fourths of the trustees or by all of the members of any committee, will be as binding upon the institute as though passed at a regular meeting of the committee or a special, stated, or annual meeting or adjourned meeting of the trustees."

It follows from the foregoing that the three trustees, constituting a majority and three-fourths of the board of trustees of appellant institute, are authorized by their by-laws to substitute counsel in the corporation's appeal herein.

It is therefore ordered that the motion to substitute attorneys be and the same is hereby granted. It is further ordered that appellant's motion to dismiss its appeal herein be and the same is granted, and the appeal is dismissed.

We concur: YORK, P. J.; DORAN, J.

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27 Cal.App.2d 545

PHIPPS v. PATTERSON et al.

Civ. 10747.

District Court of Appeal, First District, Division 2, California.

July 12, 1938.

Hearing Denied by Supreme Court Sept. 8, 1938.

1. New trial 🔑143(1)

The verdict of a jury may not be impeached by the affidavits of the jurors except where the affidavits show that the verdict was arrived at by a resort to the determination of chance which is prohibited by statute. Code Civ.Proc. § 657, subd. 2.

2. New trial 🔑143(1)

Where plaintiff, who had recovered judgment for $2,500 against each of two defendants, moved to correct verdicts and judgments by changing amount to $5,000 in each instance on ground that the corrections were necessary to correct mistake of the jury, and motions were based on affidavits of jurors, motions were properly denied as an attempt to impeach the verdicts by jurors' affidavits; the "verdict" being the answer of the jury given to the court. Code Civ.Proc. § 657, subd. 2.

[Ed. Note.—For other definitions of "Verdict," see Words & Phrases.]

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Athalie Phipps against Helen M. Patterson and another. Judgment for plaintiff against each defendant for $2,500, and from an order denying plaintiff's motions to correct the verdicts and judgments, plaintiff appeals.

Affirmed.

Philander B. Beadle, of San Francisco, for appellant.

Owen M. Gentry, of Oakland, for respondents.

SPENCE, Justice.

This is an appeal from an order denying plaintiff's "motions to correct verdicts and to correct judgments entered pursuant to verdicts".

Upon the trial, the jury returned two separate verdicts. In one, the jury found in favor of plaintiff and against defendant F. J. Patterson and assessed damages in the sum of $2,500. In the other, the jury found in favor of plaintiff and against defendant Helen M. Patterson and assessed damages in the sum of $2,500. Judgment was entered that plaintiff have and recover from defendant F. J. Patterson the sum of $2,500 and that plaintiff have and recover from defendant Helen M. Patterson the sum of $2,500.

The motion of plaintiff was for an order changing the figures "$2500" in each of said verdicts to read "$5000" and to change the figures in the judgment in like manner. Said motion was made upon the ground that said corrections were necessary to correct a mistake of the jury and was based upon the affidavits of the jurors. Defendants moved to strike the affidavits of the jurors upon the ground that said affidavits could not be received to impeach the verdict. No ruling was made on defendants' motion to strike but the trial court denied plaintiff's motion upon the ground stated in support of defendants' motion.

[1] Appellant contends that the trial court erred in denying appellant's motion but we find no merit in this contention. The rule is well settled in this jurisdiction that the verdict of a jury may not be impeached by the affidavits of the jurors except where the affidavits show that the verdict was arrived at by a resort of the determination of chance within the meaning of subdivision 2 of section 657 of the Code of Civil Procedure. Snoffer v. City of Los Angeles, 6 Cal.App.2d 14, 43 P.2d 852; Sherwood v. Jackson, 126 Cal.App. 441, 14 P.2d 861; City of Los Angeles v. Hall, 103 Cal.App. 460, 284 P. 707; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; Siemsen v. Oakland, S. L. & H. Electric Ry., 134 Cal. 494, 66 P. 672; Fredericks v. Judah, 73 Cal. 604, 15 P. 305. The rule is a salutary one based upon considerations of public policy which are well expressed in the authorities cited herein and need not be repeated here. We find no authority in this state making any exception to the general rule other than the single exception stated above which is expressly provided in the code section above mentioned.

[2] Appellant concedes the general rule, but takes the position that the affidavits here do not impeach the verdicts but, on the contrary, said affidavits "state what the verdicts really were. The affidavits merely show that, through mistake, the verdicts as returned do not reflect the true verdicts agreed upon by the jury." We do not believe this position tenable as it is based upon a misconception of what constitutes the verdict. The "verdict" is "the answer of a jury given to the court * * *". (24 Cal.Jur. 921; Webster's New International Dictionary, 2d. ed.) It was the answer of the jury given to the court that appellant was seeking to impeach and defeat by the affidavits of the jurors. The early case of Polhemus v. Heiman, 50 Cal. 438, is closely in point. The court there said, "In this State the affidavits of jurymen cannot be received to impeach or defeat their verdict. The prohibition extends beyond cases of willful misconduct on the part of jurors, and to every case in which the affidavits are attempted to be used as ground for setting aside a verdict because of a misunderstanding of its effect by some or all of the jurors who united in its rendition." See, also, Murphy v. Murphy, 1 S.D. 316, 47 N.W. 142, 9 L.R.A. 820. We are therefore of the opinion that it was proper for the trial court to deny the motions.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

PEOPLE v. ONE 1933 PLYMOUTH SEDAN DE LUXE AUTOMOBILE, ENGINE NO. PD165124.*

Civ. 10783.

District Court of Appeal, First District, Division 2, California.

July 12, 1938.

Rehearing Granted Aug. 11, 1938.

1. Poisons 🔑2

The State Narcotic Act creates a new right and provides an exclusive remedy for the enforcement thereof. St.1929, p. 380. as amended.

2. Forfeitures 🔑5

Provisions of State Narcotic Act for notice of seizure and intended forfeiture of automobile used in transporting enumerated narcotics, and for answers by persons interested, manifests legislative intent that pleading called "notice" should contain statement of such facts as would enable claimant to traverse them and the court to see that, if true, a violation of the statute exists, since it would not be presumed that answer would be required to something not alleged or that court would be required to hear evidence or issue not presented by pleadings. St.1935, p. 2210, § 15(b, c, e).

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*For subsequent opinion see 83 P.2d 957.

3. Forfeitures ⚿5

In proceeding by state to forfeit property of a citizen, the state must file a pleading stating fully its claims to forfeit such property.

4. Pleading ⚿48

A complaint in a civil case under ordinary rules should contain a statement of the facts constituting cause of action in ordinary and concise language. Code Civ. Proc. § 426.

5. Constitutional law ⚿278(1)

No person can be deprived of his property without due process of law.

6. Constitutional law ⚿306

A court cannot take property from the possession of any person without a hearing and compel him to prove title to regain it.

7. Forfeitures ⚿5

Every intendment and presumption is against person seeking to enforce statutory forfeiture.

8. Forfeitures ⚿5

The notice of intent of forfeiture of vehicle under provisions of State Narcotic Act should describe automobile, place and time of seizure by state officers, name of person operating automobile, nature of his authority, whether a permittee, agent, or employee of the registered and legal owner, and that person operating automobile had in his possession one or more of drugs enumerated in State Narcotic Act giving names of such drugs and approximate quantities. St.1935, p. 2210, § 15(b, c, e).

9. Forfeitures ⚿3

Automobile used by bailee of owner, with or without owner's knowledge, to transport one or more drugs mentioned in provision of State Narcotic Act for forfeiture of vehicle used in transporting enumerated narcotics, was subject to forfeiture. St. 1929, p. 380, as amended.

10. Forfeitures ⚿5

The state was not entitled to forfeiture of automobile used by person other than owner in transporting narcotics in violation of State Narcotic Act, where notice of forfeiture did not allege that automobile was used to transport prohibited drugs or that automobile was used with permission of the owner, express or implied. St.1935, p. 2204, § 1; p. 2210, § 15.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Proceeding by the People against one 1933 Plymouth sedan De Luxe automobile, engine No. PD165124 for forfeiture of such automobile. From a judgment refusing to declare the automobile forfeited to the state, the People appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Alfred J. Hennessy, of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment refusing to declare the above-mentioned automobile forfeited to the state, the plaintiff has appealed and has brought up the judgment roll only. The plaintiff makes the point that it is immaterial that the owner did not give permission to use her vehicle unlawfully and did not intend that it would be used unlawfully. Van Oster v. Kansas, 272 U.S. 465, 47 S. Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044. The owner contends that the point made by the plaintiff is not involved and that the sole question presented by the judgment roll is whether the plaintiff pleaded a cause of action.

The controversy involves a construction of the State Narcotic Act, Statutes of 1929, chapter 216, page 380, and the several acts amendatory thereof. That statute enumerates in section 1, as amended by St.1935, p. 2204, cocaine, opium, morphine, codeine, heroin, alpha eucaine, beta eucaine, flowering tops or leaves of hemp or loco weed, Indian hemp, extracts, tinctures, or other preparations of hemp or loco weed or Indian hemp, or chloral hydrate, or any of the salts, derivatives, or compounds of the foregoing substances, or any preparation or compound containing any of the foregoing substances or their salts, tinctures, or compounds, and then provides for the regulation of the sale, transportation, and possession thereof. Furthermore, it provides penalties for the violation of the statute. Among other penalties it provides for the forfeiture of vehicles "used to conceal, convey, carry, or transport" any of said narcotics. In the instant case we are primarily concerned with those portions of the statute dealing with said forfeitures. The plaintiff's pleading is as follows:

"Notice of Seizure and Intended Forfeiture Proceedings To: Caroline Sarubbi, 28 Genoa Place, San Francisco, Calif., the registered owner of the above named vehicle and Albert Pelizzari, 1105 Union Street, San Francisco, Calif., who may have an interest in the above named vehicle.

"Notice is Hereby Given (pursuant to Section 15(b) of the State Narcotic Act), that (the above named vehicle, to wit:) One 1933 Plymouth Sedan De Luxe, bearing motor number PD165124, and bearing 1937 license plates number 7E6894, was seized by the Division of Narcotic Enforcement of the State of California on or about the 12th day of August, 1937, (while said vehicle was being used to unlawfully conceal, convey, carry or transport narcotics contrary to the force and effect of section 15 of the State Narcotic Act, as amended,) in the City of San Francisco, County of San Francisco, State of California.

"Notice is Hereby Further Given, That it is the intention of the People of the State of California to forfeit any right, title or interest that you or any of you may have in the above named vehicle.

"(Pursuant to section 15(b) of the said act you have twenty days from the date of the mailing of this notice within which to file a verified answer 1, to the fact of the use of said vehicle or 2, to establish your claim as provided in subdivision (e) of Section 15.

"By Section 15(b) no extension of time can be granted for the purpose of making this verified answer.)

"U. S. Webb, Attorney General of the State of California,

"By Seibert L. Sefton, Deputy Attorney General, Attorneys for Plaintiff."

(All parentheses ours.)

Caroline Sarubbi filed a verified answer in which she alleged that she was the owner of said automobile; but denied that on August 12, 1937, the car was used to transport narcotics contrary to the provisions of the State Narcotic Act; and alleged that on August 12, 1937, said automobile was driven without her permission and alleged that said automobile was not used to transport any of the drugs mentioned in section 1 of said statute.

The trial court made findings that Caroline Sarubbi was the owner; that the car was used on August 12, 1937, to transport narcotics contrary to the provisions of section 15 of the State Narcotic Act, as amended by St.1935, p. 2210; and that the said Caroline Sarubbi consented to and gave permission to her son, William Sarubbi, to use said Plymouth sedan automobile on the 12th day of August, 1937, but that at said time she did not know that said automobile was to be used for the unlawful transportation of narcotics and did not give permission to her son, William Sarubbi, to use said automobile for said purpose, nor did she at the time that she gave permission to her son to use said car intend that it should be used to unlawfully transport narcotics.

In different places in her brief the owner claims there was no allegation in the charge that the "narcotics" transported were any of the drugs specified in section 1, that William Sarubbi did the transportation, or that the transportation was done by his authority, express or implied.

[1, 2] The absence of the allegations just mentioned are or are not material depending on the construction of the statute. The State Narcotic Act is a statute which clearly creates a new right and provides a remedy for the enforcement thereof. That remedy is exclusive. County of Alameda v. Freitas, 8 Cal.App.2d 653, 655, 48 P.2d 165. The statute provides no pleading on behalf of the plaintiff except the notice hereinabove mentioned. Section 15, subd. (b), as amended by St.1935, p. 2210. It does not provide in express terms the contents of said notice. The recital is "notice of seizure and intended forfeiture proceeding shall be filed with the county clerk * * *." If that recital could be held to be the full requirement of the contents of the notice it is clear that said document complied therewith. That is so because the recital just mentioned is set forth and numerous other recitals and conclusions are set forth. The latter we have indicated by the parenthesis we inserted in the notice. But the question arises, did the legislature mean that the full contents of the notice would be confined to a recital that a seizure had been had and forfeiture proceedings were intended? We think not. In the first division of subdivision (b) of section 15, it is provided that a notice should be served on all persons "having any right, title or interest", and such persons are later designated as "the owners". In the third division of subdivision (b) it is provided, "* * * owners * * * may make a verified answer to the fact of the use * * *." In no proper sense can it be said that an answer will be made

to something not alleged. That requirement then is a clear intimation that the plaintiff's pleading should contain an allegation "to the fact of the use". Subdivision (c) provides that if no answer is filed the court will hear evidence "upon the fact of the unlawful use * * *" and render judgment of forfeiture. In the absence of clear language it cannot be assumed that the legislature either authorized or required a court to hear evidence upon an issue that was not presented by a pleading. Under subdivision (e) the answers of those who claim any "lien, mortgage, or conditional sales contract" on the automobile may set forth the facts showing their investigation of the character of the owner of the car and that they had no knowledge that the car was used "for the purpose charged". Charged by whom? Manifestly by the plaintiff. These intimations are slight but nevertheless we think each indicates that the legislative intention was that the pleadings called "notice" should contain a statement of such facts as would "enable the claimant to traverse them, and the court to see that, if true, a violation of the statute exists".

[3, 4] Counsel have not called to our attention and we have found no line of authorities to the effect that in a proceeding brought by the state to forfeit the property of a citizen, the state may do less than file a pleading stating fully its claims to forfeit such property. Whether such pleading is called a declaration, complaint, information, or notice, would seem to be quite immaterial. A complaint in a civil case under ordinary rules should contain a statement of the facts constituting the cause of action in ordinary and concise language. Code Civ.Proc., § 426. A complaint to forfeit property is ordinarily called an information. 25 C.J. 1174. The rules governing the framing of such a pleading came before the Supreme Court of the United States many times during the early part of the last century. In the case entitled The Hoppet v. United States, 7 Cranch 389, 3 L.Ed. 380, there were two informations—one against the vessel and one against the cargo. Under a federal statute innocent property, a part of the cargo, could under certain circumstances be forfeited. Commencing on page 393 the court said: "The first question made for the consideration of the Court is this: Will this information support a sentence of condemnation pronounced against the vessel and the innocent part of the cargo? That the information states a case by which no forfeiture of the ship or the innocent part of the cargo has been incurred, unless its defectiveness be cured by the allegation that the act was done contrary to, and in violation of the provisions of the statute, has been already fully shown. It is not controverted that in all proceedings in Courts of common law, either against the person or the thing for penalties or forfeitures, the allegations that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the Court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offence. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offences against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession." In the case entitled United States v. Three Hundred and Ninety-Six Barrels Distilled Spirits, 1866, 28 Fed. Cas. p. 121, No.16,503, the federal court for the eastern district of Missouri cited many of the earlier cases and analyzed them. In doing so it stated (page 122): "Informations in rem on the exchequer side are not criminal proceedings. They are civiliter, non criminaliter. * * * There are no substantial distinctions between the proper structure of, and rules governing, libels of information and informations for municipal forfeitures. * * * Although the technical precision of an indictment is not necessary, yet the allegations must be sufficiently specific to enable the claimant to traverse them, and the court to see that, if true, a violation of the statute exists. The violation may be charged in the words of the statute, but a general averment that the statute has been violated is not sufficient." In United States v. Mann, 1877, 95 U.S. 580, 24 L.Ed. 531, the court had under consideration an information to forfeit $500 under the provisions of Revised Statutes, § 3177, 26 U.S.C.A. § 1501. Bank checks were required to be stamped. Under the statute the officers of the internal revenue department

were authorized to enter and examine "objects subject to tax". Mann had in his possession a quantity of paid checks. The information alleged that he refused to allow the officers to examine his checks, but did not allege that the checks were not stamped. Mann demurred to the information on the ground that it did not state facts sufficient. The demurrer was sustained and the United States appealed. Commencing on page 585, Mr. Justice Clifford, speaking for the court, said:

"Penal offences created by statute, whether to be prosecuted by indictment or information, must be accurately and clearly described in the pleadings for the recovery of the penalty; and if the offence cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent, as it is universally true that no pleading in such a case can be sufficient which does not accurately and clearly allege all the ingredients of which the charge is composed, so as to bring the accused within the true intent and meaning of the statute defining the accusation.

"In general, says Chief Justice Marshall, it is sufficient in a libel of information to charge the offence in the very words which direct the forfeiture; but the proposition, we think, is not universally true. If the words which describe the subject-matter of the prohibition are general, including a whole class, * * * we think the charge in the libel ought to conform to the true sense and meaning of the words as used by the legislature. The Mary Ann, 8 Wheat. 380, [5 L.Ed. 641]; The Schooner Hoppet and Cargo v. United States, 7 Cranch, 389, [3 L.Ed. 380]; 2 Pars.Ship & Adm. 386."

See, also, 21 Standard Encyclopedia of Procedure, 273; 25 C.J. 1174.

[5-7] The foregoing comments are reinforced by the primary proposition that no one can be deprived of his property without due process of law, nor can a court take property from his possession without a hearing and compel him to prove title to regain it. Havemeyer v. Superior Court, 84 Cal. 327, 400, 401, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Stuparich Mfg. Co. v. Superior Court, 123 Cal. 290, 55 P. 985; Modern Loan Co. v. Police Court, 12 Cal.App. 582, 587, 108 P. 56; People v. Broad, 216 Cal. 1, 12 P.2d 941. It is further reinforced by the fundamental law that every intendment and presumption is against the person seeking to enforce a forfeiture provided for by statute. Savings & Loan Society v. McKoon, 120 Cal. 177, 52 P. 305.

[8-10] The notice contains references to statutory provisions and also makes use of the word "unlawfully". As averments of material facts those statements are not helpful. That the law required the notice provided by the statute should describe the automobile in an appropriate manner, that it had been seized by the division of narcotic enforcement of the state of California, and that it was so seized in the city and county of San Francisco, state of California, on the 12th day of August, 1937, may be assumed from the fact that the plaintiff alleged such facts and the defendant has not questioned the propriety thereof. We think it is obvious that under the foregoing rules it should also have alleged the name of the individual operating the automobile in such terms as the facts would warrant, the nature of his authority, whether a permittee, agent, or employee of the registered and legal owner of the automobile, and that he had in his possession one or more of the drugs enumerated in section 1 of the State Narcotic Act, giving the names of such drugs and the approximate quantity. If in truth and in fact the automobile was used to transport one or more of the drugs mentioned in section 1 of the State Narcotic Act, and if it was so used by a bailee of the owner, with or without her knowledge, said automobile was subject to forfeiture. Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 522, 55 P.2d 908. But the plaintiff did not allege the automobile was used to transport a prohibited drug or that it was so used with the permission of the owner, express or implied.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

27 Cal.App.2d 554

THARP v. SAN JOAQUIN COTTON OIL CO. et al.*

Civ. 6013.

District Court of Appeal, Third District, California.

July 13, 1938.

Rehearing Denied Aug. 12, 1938.

1. **Negligence** ⚷32(2)

A truck driver, who was employed to haul cotton seed to a seed house, where it was unloaded on conveyor by truck drivers, was on premises of seed house as "invitee" of owners on common business purpose connected with or being transacted between truck driver's employer and owners of seed house.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

2. **Negligence** ⚷32(1)

A person may become an invitee for a specific purpose and at the same time become a mere licensee with respect to parts of premises.

3. **Negligence** ⚷32(2)

As respects liability of owner of property for negligence, an "invitee" is on premises on business connected with his employer and the owner of the premises, while a "licensee" is on the premises of his own volition and not pertaining to the business between his employer and the owner of the premises.

[Ed. Note.—For other definitions of "Licensee," see Words & Phrases.]

4. **Negligence** ⚷32(2)

A truck driver who was employed to haul cotton seed to seed house at which cotton seed was unloaded by truck driver on conveyor, and who after unloading cotton seed on conveyor and after turning truck around for return trip noticed that conveyor had stopped and entered motor house, where he voluntarily attempted to assist employee of owner of premises in replacing belt on pulley by which conveyor was operated, was mere "licensee" while in motor house, and hence was not entitled to recover for injuries received because of negligence of employee of seed house in adjusting belt on pulley.

Appeal from Superior Court, Madera County; Ernest Klette, Judge.

Action by Howard Tharp against the San Joaquin Cotton Oil Company and others. From a judgment following an order granting the defendants' motion for nonsuit, the plaintiff appeals.

Affirmed.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, and Jos. Barcroft, of Madera, for appellant.

Ray W. Hays and Wm. M. Conley, both of Fresno, for respondents.

PER CURIAM.

This is an appeal by the plaintiff from a judgment following an order granting the defendants' motion for nonsuit.

It appears that on or about the 24th day of January, 1936, the plaintiff, while in the employ of a brother known as Roy Tharp, was injured at a mill belonging to the defendants. The plaintiff was temporarily working for his brother driving a truck, hauling cottonseed to a seed-house belonging to the defendants at Chowchilla, in the county of Madera. The plaintiff had worked for his brother about a month and a half before the accident, and had made about thirty trips to the seed-house of the defendants unloading cottonseed. On the day of the accident in question the plaintiff had driven a truck containing a load of cottonseed to the warehouse belonging to the defendants. It appears that the cottonseed would be unloaded from the truck into and upon what is called a conveyor belonging to the defendants. This conveyor was used in transporting the cottonseed from the point of loading to a place where the cottonseed was deposited or stored. At times the conveyor would become overloaded. The conveyor was operated by means of a motor and a belt attachment, and when the conveyor was overloaded the belt would come off. On the day of the accident the plaintiff arrived at the cottonseed unloading platform, drove the right hand side of his truck along side of the conveyor, and proceeded to unload the cottonseed from the truck into and upon the conveyor. After completing the unloading of the truck, Tharp drove his truck westward, and thereafter turned around, and after turning around he came back to a view of the conveyor and noticed that the conveyor had stopped. When he noticed that the conveyor had stopped, he did not know exactly whether a small board which had been taken from the truck had fallen into the conveyor, or whether it was the man that was unloading the truck behind him had clogged the conveyor. For some reason Tharp conceived the idea that it was his duty to help replace the belt which had come off following the clogging of the conveyor. With this in view Tharp walked from where his truck was parked or stopped to the motorhouse, and at that time it appears that a Mr. Britton and Mr. Creager were in the motorhouse. Britton was standing toward the south end of the motorhouse between the conveyor and shaft of the driven pulley. It appears that there were tow pulleys connected with the operation of the plant, one a small pulley called the driver pulley, attached to the motor; the other, the driven pulley, a large pulley which operated the conveyor. When Tharp entered the motorhouse, it appears that both Mr. Creager and Mr. Britton were standing with their backs toward him. The testimony of the plaintiff was to the effect that he asked if they needed any help, to which neither Mr. Britton nor Mr. Creager replied, but that Britton simply smiled. At the time in question Creager was instructing Britton how to put on the belt.

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*Rehearing denied 82 P.2d 21.

A great deal of the testimony, and a great deal of the briefs are devoted to the question of how properly to readjust the belt after it had come off the pulleys. It would appear therefrom that the proper method of adjusting the belt would be to adjust the belt to the lower part of the larger pulley, and thereafter replace the belt upon the smaller or driving pulley.

As Britton was engaged in attempting to replace the belt on the larger pulley, it appears that the plaintiff picked up the belt and attempted to place the same upon the driving pulley or the motor pulley which was then in motion. The plaintiff states that he did not know whether the motor was idling, or whether the power was turned off, but at about the time he attempted to place the belt upon the driving pulley, Britton by some means attempted to place the belt on the lower part of the larger pulley, causing a belt slap, or some movement which, while the plaintiff had his hands upon the belt adjusting the same on the driver pulley, caught one of his hands between the belt and the pulley, by which he received serious injury.

[1] The claim is made that the plaintiff was injured by reason of the negligent manner in which Creager attempted to adjust the belt on the larger pulley. The testimony in the case shows that neither Britton nor Creager knew that the plaintiff was attempting to adjust the belt on the smaller pulley. It also appears in the record that the motorhouse was some little distance away from the conveyor, and was a part of the premises to which the truck drivers, according to the testimony, had been instructed to stay away by the superintendent of the plant. It does not appear, however, that any such instruction was given to the plaintiff. However, the motorhouse and the unloading platform were separate and distinct. The truck drivers, of course, in delivering cottonseed to the plant belonging to the defendants, were there as invitees, to-wit, on a common business purpose connected with, or being transacted between their employers and the defendants.

It appears that the motor and the equipment referred to are enclosed in a small house separate and away from the conveyor. This house is called the motorhouse or powerhouse. It also appears that there was a switch which controlled the movement of the motor, situate about 45 feet from the motor itself.

While it appears that some of the truck drivers and the plaintiff himself had previously assisted in replacing the belt, or had replaced the belt instead of waiting for the employees of the defendants to replace the same, the evidence shows that that was no part of their business, and that in so far as the superintendent was aware that any of the truckmen had so done, he had given them notice to stay away from the powerhouse, and to leave the motor and the belt alone. No question is made that O. R. Britton was in the employ of defendants at the time of the accident, and it is sought to hold the defendants liable by reason of the alleged negligent manner in which Britton was attempting to adjust the belt on the larger motor.

At the conclusion of the plaintiff's case, as we have stated, the motion of the defendants for nonsuit was granted. In the comments by the trial court granting the motion for nonsuit it appears to be stated that the evidence fails to show any negligence on the part of the employees of the defendants, and that the evidence does not show any negligence on the part of the defendants in its maintenance and operation of the motor house, pulleys, etc. It appears also that the court was of the opinion that the plaintiff was guilty of contributory negligence in attempting to adjust the belt on the smaller pulley at a time when neither Creager nor Britton knew that he was attempting to do so. This trial court also held that the plaintiff was a mere licensee and not an invitee, and therefore that the defendants, unless guilty of some wilful neglect, could not be held liable.

In the course of the trial several questions arose as to the admissibility of certain testimony. By reason of the views hereinafter expressed it is unnecessary for us to discuss the alleged errors of the trial court in excluding such testimony, and also the alleged error of the trial court in refusing plaintiff's motion to reopen the case.

[2-4] In the case of Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807, this court had before it a case involving the question of whether the plaintiff was an invitee or a mere licensee. That case is relied upon by both the plaintiff and the defendants. The facts, however, of the Buckingham Case are readily distinguishable from the facts involved in the instant case. In the Buckingham Case while the trucks were drawn up on the loading platform alongside of the conveyor, it was the practice of the truck drivers to attempt to dislodge the accumulation of cottonseed which would tend to clog the conveyor. In so doing the truck drivers would step on top of the conveyor. One of the truck drivers in so doing slipped and was injured by the conveyor. The conveyor there was directly connected with the unloading operations and the driver, who was injured in unloading cottonseed at the time of the injury, had stepped upon the conveyor to dislodge the seed which seemed to be clogging the same. It appears that the testimony in the Buckingham Case shows that the obstructing seed could be removed by truckmen by means of a fork, while standing on the truck. Others testified that the customary way of removing the cottonseed while unloading was by getting on the conveyor. In the Buckingham Case the injury occurred where the truckmen were accustomed and expected to be. In the instant case the plaintiff was injured where he was not accustomed to be, and where he was not expected to be, and where it was not necessary for him to be. In the instant case the plaintiff had completed the unloading of his cottonseed; the conveyor had not stopped while he was unloading, and he had completely finished his business as an invitee upon the premises belonging to the defendants, to-wit: the driving upon the platform; the unloading of the cottonseed; and his departure therefrom. In the opinion in the Buckingham Case we find the following words which are directly applicable here (page 808): "It is well settled that one may be an invitee upon premises for a specific purpose and yet become a mere licensee with respect to certain parts of the premises, approaches to it, or appliances contained within it, which were not intended for the use of visitors." (Citing a number of cases.) The court in the Buckingham Case then goes on to specifically draw the line of demarkation between an invitee and a licensee, showing that an invitee is upon the premises upon business connected with his employer and the owner of the premises, while a licensee is upon the premises of his own volition, and not pertaining to the business between his employer and the owner of the premises.

In the case at bar the evidence shows that the plaintiff was not acting for the mutual benefit of his employer and the defendants, and was engaged upon a mission of his own, without the knowledge of either Creager or Britton as to what he was about to do. At the time in question the plaintiff's employer had nothing whatever to do with the restarting of the machinery contained in the defendants' plant. In other words, whatever he did was purely personal to himself, and was not in furtherance of the interests of his employer. Roy Tharp was the employer of the plaintiff, and so far as the truck load of cottonseed belonging to Roy Tharp was concerned, it had all been delivered at the place, and under the circumstances and conditions provided by the defendants for such delivery. There was no business of the plaintiff or of his employer about to be transacted in which the plaintiff or his employer was interested. The matter of replacing the belt was purely an affair for Creager and Britton, and did not concern either the unloading or the delivery of any cottonseed brought to the premises by the plaintiff. The plaintiff had finished unloading his cotton; he had gone from the premises provided for that work; had turned and started toward home; and then, without any business connected with the premises belonging to the defendants, he went back and entered the powerhouse and attempted to perform a service not expected to be performed by truck drivers, and performed at an instant of time when neither Creager nor Britton were aware of the fact that he was about to perform such service. The testimony shows that Creager, who was directing Britton, never saw Tharp in the powerhouse.

It may be admitted that the trial court was in error in concluding that Britton was not negligent in the manner in which he attempted to place the belt upon the large pulley. That, however, does not charge the defendants with liability. We do not need to enter into a discussion of either of the alleged negligence of Britton or of the alleged negligence of the defendants in not having the belt properly guarded. Nor do we need to enter into a discussion of the alleged errors of the trial court in its exclusion of testimony proffered by the plaintiff. The fact remains that the circumstances show that the plaintiff in this case was a mere licensee, and the principles enunciated and the cases cited in the Buckingham Case, supra, showing when one is an invitee and when one is a licensee, we think conclusive of this case and support the order of the trial court in granting a motion for nonsuit on the ground that the plaintiff was a mere licensee, irrespective of whether the court did or did not err in all the other particulars alleged by the appellant.

The judgment is affirmed.

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27 Cal.App.2d 617

PEOPLE v. KANADIAN.

Cr. 513.

District Court of Appeal, Fourth District, California.

July 18, 1938.

Criminal law 🔑1182

Where clerk's and reporter's transcripts were filed in the District Court of Appeal on June 8, no briefs were filed, no extensions of time were granted, cause was on calendar on July 12, but no appearance was made for appellant, conviction was affirmed on Attorney General's motion. Pen.Code, § 1253.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Proceeding between the People of the State of California and Kenneth Kanadian. From the judgment, last-named party appeals.

Affirmed.

Harry Meyers, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The clerk's and the reporter's transcripts were filed in this court on June 8, 1938, and no briefs have been filed and no extensions of time granted. The cause was on the calender on July 12, 1938, and no appearance was made on behalf of the appellant. The Attorney General moved for an affirmance of the judgment under the provisions of section 1253 of the Penal Code and no reason appears why the same should not be granted.

The judgment is affirmed.

We concur: MARKS, J.; HAINES, Justice pro tem.

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27 Cal.App.2d 618

PLOTT et al. v. YORK et al.

Civ. 11810.

District Court of Appeal, Second District, Division 1, California.

July 19, 1938.

Appeal and error 🔑659(3)

On appeal from order denying judgment against defaulting corporation after judgment in favor of employee in action against corporation and employee for injuries received by plaintiffs in collision with automobile driven by employee, on which appeal sole question was effect of judgment for employee on liability of corporation and plaintiffs filed complete judgment rolls relating to both defendants and instructions given and refused relating to defaulting defendant, corporation's motion for diminution of record to require filing of reporter's transcript in its entirety, all instructions as to employee, and written statement of facts and memoranda of point and authorities filed by counsel on motion for judgment against corporation was denied.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action for injuries received in automobile collision by Lulu M. Plott and another against C. H. York and the Foothill Supply Company. From an order denying plaintiffs' motion to enter final judgment against the Foothill Supply Company which defaulted, the plaintiffs appeal. On motion of defendant Foothill Supply Company for diminution of record.

Motion denied.

Flanagan & Sampson, of Los Angeles, for the motion.

H. C. Ellis and Joseph L. Fainer, both of Los Angeles, opposed.

WHITE, Justice.

This is a motion by respondent for diminution of the record on appeal. The action is one for damages alleged to have been sustained by plaintiffs by reason of the alleged negligence of the defendant C. H. York while the latter was driving an automobile which figured in a collision with an automobile driven by the plaintiff Lulu M. Plott. It is further charged in the complaint that at the time of the accident in question defendant York was acting within the scope of his employment as the agent, servant and employee of defendant Foothill Supply Company.

The defendant Foothill Supply Company defaulted, while the defendant C. H. York appeared and answered the complaint. At the trial of the action as to York, and in which the defaulting defendant, Foothill Supply Company, did not appear, judgment was rendered in favor of defendant York and against the plaintiffs.

At a subsequent hearing the trial judge denied the motion of plaintiffs to enter final judgment for damages in their favor against the defaulting defendant upon the theory, as appears from the judgment contained in the clerk's transcript before us, that the responsibility of the defaulting defendant employer, Foothill Supply Company, being secondary, the verdict exonerating the defendant employee (York), whose alleged negligence was primary, necessarily exonerated the principal, since the verdict exonerating the agent is a declaration that the latter has done no wrong, and that the principal cannot be responsible for the agent if the latter has committed no tort. No appeal has been taken from the judgment in favor of defendant York, and this appeal is taken only from the last-named order of the trial court. It is predicated upon the theory that the failure of the principal (Foothill Supply Company) to appear and answer, as well as the subsequent entry of its default, constituted an admission by it of all the material allegations of plaintiffs' complaint, and that they are entitled to recover notwithstanding the exoneration of the agent, York. In support of their contentions on appeal, the appellants have furnished us with complete judgment rolls relating to both defendants, as well as the two and only instructions, one given and the other refused, at the trial, relating in any way to the defaulting defendant.

In its motion for diminution of the record, respondent asks for an order directing the filing in this court of the reporter's transcript in its entirety; all the instructions given and refused by the court at the trial as to defendant York; the reporter's transcript of the proceedings on plaintiffs' motion for judgment against the Foothill Supply Company, a corporation, heard and argued in department 28 of the superior court on February 4, 1938, which hearing was had subsequent to the rendition of the verdict of the jury in favor of defendant York and against plaintiffs; and finally, written statements of fact and memoranda of point and authorities filed by counsel in support of and in opposition to the aforesaid motion.

The addition to the record of the documents referred to in respondent's motion for diminution would not aid in the determination of this appeal. The question before this court is purely one of law, and generally speaking it is to determine the effect of a judgment in favor of and exonerating an agent upon a principal whose default has been entered; or in other words, does such a judgment in favor of the agent, ex proprio vigore, relieve the defaulting principal of responsibility, and may such judgment be availed of by the defaulting principal for that purpose?

For the foregoing reasons respondent's motion for diminution of the record on appeal is denied.

We concur: YORK, P. J.; DORAN, J.

27 Cal.App.2d 570

In re LISSNER'S ESTATE.

LISSNER et al. v. HARRIS et al.

Civ. 10752.

District Court of Appeal, First District, Division 1, California.

July 15, 1938.

Hearing Denied by Supreme Court Sept. 12, 1938.

1. Descent and distribution ⚷60

The creation of a joint tenancy between husband and wife in the separate property of either constitutes a "gift" from one to the other, and, on the death of the surviving spouse, the property covered by the joint tenancy is to be distributed to the heirs of the predeceased spouse. Probate Code, § 229.

2. Appeal and error ⚷1011(1)

Where there is a conflict in evidence, the appellate court has duty to accept lower court's finding.

3. Descent and distribution ⚷71(6)

On petition to determine heirship, evidence sustained trial court's finding that, though certain money with which stock in question had been purchased had been commingled with community funds, the money was traceable directly into the stock, so that, if the money was the separate property of the husband, his heirs would, on his and his wife's death, be entitled to the stock.

4. Husband and wife ⚷249

The mere mingling of separate property of a husband and wife with community property does not change its character from separate to community property unless the property so mingled cannot be traced.

5. Appeal and error ⚷996

A reasonable inference from witnesses' testimony cannot be disregarded on appeal.

6. Evidence ⚷383(7)

The mere recital of a payment in a deed is not evidence that such payment was actually made.

7. Husband and wife ⚷249

An agreement by donees, who were remaindermen, to pay donor of land, who had a life estate, a certain sum per month during his life in event such sum was not produced by the property, and the assumption of mortgages on the land, did not constitute a "purchase" of the land and thereby make an interest in it "community property" of one of the donees and his wife.

8. Husband and wife ⚷249

Even payments from community funds do not change the separate property into community property.

9. Appeal and error ⚷1011(1)

Where the statements of a party testifying as witness created a conflict in testimony, the appellate court was bound by the lower court's action in either rejecting the statements entirely or in determining that the statements were overbalanced by other evidence in the case.

10. Descent and distribution ⚷60

Where stocks were purchased from proceeds of separate property of husband and a joint tenancy was created by the husband and wife, there was a "gift" by husband to his wife, and on her death the husband's heirs were entitled to the stock. Probate Code, § 229.

11. Husband and wife ⚷266

Where husband took out life policy with wife as beneficiary and premiums were paid from community funds, there was an "inchoate gift" of the proceeds of the policy by the husband to the wife, which became complete on his death, and the proceeds became her separate property.

12. Bills and notes ⚷493(3)

The burden of overcoming the presumption that every negotiable instrument has been issued for valuable consideration is on the party claiming that it was executed without consideration. Civ.Code, § 3105.

13. Husband and wife ⚷44

The presumption that note for $3,046.56 from husband to wife was issued for a valid consideration was not overcome by evidence that wife never drew a check in a sum as large, or nearly as large as $3,000. Civ. Code, § 3105.

14. Descent and distribution ⚷60

Where husband gave note to wife apparently for valuable consideration, the note was the separate property of the wife, and would be distributed to her heirs on her death. Civ.Code, §§ 164, 3105.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Elsa Lissner, deceased, wherein Henry H. Lissner and others filed a petition to determine heirship against Camille Harris, as administratrix of the estate of Elsa Lissner, and others, and wherein Camille Harris, as administratrix of the estate of Elsa Lissner, and others, filed a cross-petition. From the decree, Camille Harris, as administratrix of the estate of Elsa Lissner, and others, appeal.

Decree affirmed in part and reversed in part.

Hearing denied by Supreme Court; EDMONDS, J., dissenting.

Morris M. Grupp and Alfred J. Stern, both of San Francisco, for appellants.

Glikbarg & Wolf and Philip Selig, Jr., both of San Francisco, for respondents.

BRAY, Justice pro tem.

This appeal arises out of a petition to determine heirship.

Elsa Lissner died without issue, intestate, three days after her husband, Berthold Lissner, died, in November, 1935. The respondents are a brother and two sons and a daughter of a deceased brother of Berthold Lissner. The appellants are sisters and brothers of Elsa Lissner. Three groups of property are involved in the dispute. The first consists of certain stocks which at the time of the death of Berthold Lissner were held in joint tenancy between him and his wife. The court found that these were the separate property of Berthold Lissner, transferred by gift to his wife, and therefore under the provisions of section 229, Probate Code, should be distributed to respondents. The second consists of the proceeds of a life insurance policy on the life of Berthold Lissner of which his wife was the beneficiary. The court held this fund was community property and should be divided equally between appellants and respondents. The third is a promissory note for $3,046.56 against the estate of Berthold Lissner, payable to Elsa Lissner, which the court ruled was also community property and should be divided equally between the two sets of heirs.

As to the first group, the court found that the stocks were purchased from the proceeds of certain real property in Los Angeles, consisting of two different parcels, which real property the court found to have been the separate property of Berthold. Appellants claim that said real property was community property because they contend that these properties came to Berthold by purchase rather than by gift, as found by the court. The claim of purchase is based, first, upon the recital of $10 consideration in the deed of the property to Berthold and his brothers from their mother and stepfather, which deed reserved a life estate to the grantors. Secondly, upon a like recital of a $10 consideration in a deed transferring the stepfather's life estate in said property to the Lissner brothers. Thirdly, upon the guaranty to the stepfather of a life income of $250 a month. Fourthly, upon a trust agreement made by the Lissner brothers, in which they assumed the payment of mortgages on said real property. All these transactions took place while Berthold and Elsa Lissner were husband and wife, and appellants contend that said transactions amount to a purchase and being a purchase during coverture, the property thereby obtained was necessarily community property.

[1] Appellants further contend that even assuming the real property to be the separate property of Berthold, the proceeds therefrom, which were used for the purchase of the stocks, were so commingled with the community property that they lost their identity as separate property. Again, after the purchase of the stock, a joint tenancy was created by Berthold and Elsa Lissner in themselves. The creation of this joint tenancy the court found to be the gift which is required by section 229, Probate Code. Appellants originally contended that the creation of the joint tenancy could not and did not constitute a gift. However, appellants have practically abandoned that position. The Estate of Harris, 9 Cal.2d 649, 72 P.2d 873, is determinative of this question, the court there holding definitely that the creation of a joint tenancy between husband and wife in the separate property of either constitutes a gift from one to the other, and that upon the death of the surviving spouse the property covered by the joint tenancy is to be distributed to the heirs of the predeceased spouse, under section 229, Probate Code, just as the court did in this case. Also, appellants contend that the evidence shows that before the creation of the joint tenancy Berthold had declared that said stocks were as much Elsa's as his, thus changing their character from separate property to community property.

[2-4] The stocks are the most valuable portion of the estate, and the main question in connection with them is the character of the real property in Los Angeles from the proceeds of which the court found that the stocks were purchased. While there is evidence that these proceeds were commingled with community funds, there

was likewise evidence from which the court was able, very easily, to trace them directly into the stock. The most that can be said is that there was a conflict in the evidence upon this question—and under the well-known rule, it is the duty of the appellate court to accept the findings of the lower court upon this subject. There is ample evidence to support these findings. The mere mingling of separate property of a husband or wife with community property does not change its character from separate to community property unless the property so mingled cannot be traced. Scott v. Remley, 119 Cal.App. 384, 6 P.2d 536.

The Los Angeles real property originally belonged to Matilda Lissner. She was the mother of Berthold Lissner. In 1907, Mrs. Lissner, who remarried and was known as Matilda Cohn, together with her husband, Meyer Cohn, deeded the real property in question to Berthold Lissner and his two brothers, reserving to the grantors a life estate in the property. The deed contains the recital "in consideration of $10.00 in gold coin of the United States." Matilda Cohn died in 1909; Meyer Cohn, the other life tenant, lived until 1935. In 1917 Meyer Cohn deeded to Berthold and his brothers his life interest in the property and in this deed there is, likewise, a recital of a $10 consideration.

There is no evidence in the case that these $10 sums mentioned in these two deeds, or any other sums, were ever paid for the property. Appellants contend that the burden is on the respondents to show that the money was not paid; that they have failed so to do, therefore, it must be considered that Berthold and his brothers did pay $10 for each deed, some portion of which sums was paid for by Berthold, and being purchases during coverture, were community property.

[5, 6] The lower court found that these deeds were gifts rather than purchases, in spite of these recitals. It is apparent from the testimony in the case, together with the inferences which the court might reasonably draw from the actions of the parties to the deeds, that there were no moneys paid for these deeds, the first one being a gift to her sons from the mother and stepfather and the second one being a gift to his stepsons from the stepfather, life tenant. In each instance, however, the conveyances were made with reservations or under arrangements which are hardly consistent with appellants' contention of a purchase. Dr. Lissner testified that there was no money paid by anybody at the time of the transfer of the property. Appellants attempted to narrow his testimony in this respect down to transactions occurring in 1926, but, taking the examination of the Doctor as a whole, it is plain that he was referring to the entire transactions concerning the Los Angeles property. That was evidently the determination of the lower court, and such is a reasonable inference from the witness's testimony, and being such, cannot be disregarded upon appeal. Moreover, the mere recital of a payment in a deed is not evidence that such payment was actually made. Black Eagle Oil Company v. Belcher, 22 Cal.App. 258, 133 P. 1153.

[7, 8] By contract made in 1917, Meyer Cohn agreed to surrender his life estate to the Lissner brothers in exchange for an agreement guaranteeing him $250 per month for life. The undisputed testimony is that none of the brothers ever were called upon to make any payment to Meyer Cohn. The Lissner brothers also agreed to assume the payment of two mortgages upon the property aggregating $150,000. Here again, no sums were ever actually paid by Berthold or his brothers. Appellants contend that the agreement to pay the $250 per month life interest, in the event that such sum was not produced by the property, and the assumption of the mortgages, constitute a purchase of the real property and thereby made it community property. However, this is contrary to the expressed rule of the courts in this state. Noe v. Card, 14 Cal. 576; McRae v. McRae, 67 Cal.App. 480, 227 P. 933; Smith v. Smith, 47 Cal.App. 650, 191 P. 60; Shaw v. Bernal, 163 Cal. 262, 124 P. 1012. Such agreements and even payments from community funds do not change the separate property into community property. The law will not infer from such expenditures alone an agreement either to change the character of the property or even an intent to charge the separate property with a lien in favor of the community property. The transactions between Matilda Cohn and Meyer Cohn on the one hand and Berthold Lissner on the other, show that the interest obtained by the latter were gifts rather than purchases.

[9] One of the appellants testified that Berthold, before the creation of the joint tenancy, stated to his wife, referring to

the stock in question, "It is as much your stock as mine and I want it settled now." Appellants contended that such statement converted the stock from separate to community property. Apparently, the lower court did not believe this testimony, as it was inconsistent with Berthold's actions in keeping the stocks in his own name for many years afterwards and with many other circumstances shown by the evidence. At most, the statements created a conflict in the testimony, and this court is bound by the action of the lower court in either rejecting it entirely or in determining that it is overbalanced by the other evidence in the case. The same rule must be applied to the effect of a reference in Berthold's will made in 1932, in which he states that the community property of himself and wife consists of certain land not involved here, and of bonds and cash amounting to less than $20,000. It is not clear just why appellants stress this matter in view of the fact that the property at issue here is stocks and not bonds, but assuming it to apply in some way and giving it the interpretation claimed by appellants it would merely conflict with other evidence in the case which conflict the court has decided against the position of the appellants.

[10] The ruling of the lower court that the stocks were purchased from the proceeds of the separate property of Berthold, and by reason of the creation of the life tenancy constitute a gift to the surviving wife, and upon her death, under the provision of section 229, Probate Code, should be distributed to Berthold's heirs, is correct.

[11] As to the second group of property, the proceeds of the life insurance policy on the life of Berthold Lissner, respondents at the oral argument of the appeal, conceded appellants' position to be correct. The premiums on the policy were paid from community funds, but Berthold Lissner had named his wife Elsa Lissner as his beneficiary. Under the law this constituted an inchoate gift by the husband to the wife of the proceeds of the policy, which became complete upon his death, and being a gift it became her separate property. Estate of Miller, 23 Cal.App.2d 16, 71 P.2d 1117; Travelers' Ins. Company v. Fancher, 219 Cal. 351, 26 P.2d 482. As stated, respondents concede that the lower court erred in distributing the life insurance proceeds as community property; that the decree of the lower court should be corrected, and the said proceeds should be distributed solely to the appellants, the heirs of Elsa Lissner.

[12-14] The third group consists of a promissory note in the sum of $3,046.56 executed by Berthold Lissner in his life time to his wife, Elsa. Appellant contends that, being an instrument in writing acquired by Elsa during coverture, it carries the presumption under the provisions of Section 164, Civil Code, that it was the wife's separate property, and that there was no evidence offered to rebut this presumption. Respondents argue that said section does not apply to a promissory note, and claim that Elsa never paid any consideration for the note because there was no evidence of her ever drawing a check for a sum as large as $3,000. Appellants contend, however, that the consideration might have consisted of small advances. The court found that this note was community property. However, there is no evidence upon which to base this finding, in view of the presumption under section 164, Civil Code, if that section applies. Respondents cite no authority for their contention that it does not apply. The section is specifically worded, *"whenever any* real or *personal property,* or any interest therein or encumbrance thereon, *is acquired by a married woman by an instrument in writing the presumption is that the same is her separate property."* Sec. 164, Civ.Code. (Italics ours). A promissory note is, of course, personal property, and the debt thereby evidenced is acquired by the holder by an instrument in writing. "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration." Sec. 3105, Civ.Code. The burden of overcoming this presumption is upon the party who claims that the note was executed without consideration. (19 Cal.Jur. 1044.) Respondents attempted to meet this burden by showing that Mrs. Lissner never drew a check in a sum as large as $3,000, or any where near that amount, in her life. This is not sufficient to overcome the presumption. The consideration need not have been paid in a lump sum, it could have been paid in small amounts. The note could have been a gift from the husband to the wife. Appellants were entitled to stand upon the note itself, and the respondents must produce some evidence that there was no consideration for it. Cashman v. Harrison, 90 Cal. 297, 27 P. 283; Yellow Jacket Gold & Silver Mining Co. v. Hol-

brook, 24 Cal.App. 687, 142 P. 128. Merely showing no large check was drawn by Mrs. Lissner is not enough, because that circumstance is perfectly consistent with the presumption, rather than overcoming it in the slightest degree. The note, therefore, was the separate property of Elsa and should be distributed to her heirs.

It is ordered, therefore, that the portion of the decree appealed from determining the distribution of said stocks be and the same is hereby affirmed; and that those portions of said decree determining the distribution of the proceeds of the life insurance policy, and of the promissory note, be and the same are hereby reversed with directions to revise and re-enter those portions of said decree in conformity with the views hereinabove expressed. It is further ordered that the costs of appeal be paid out of the assets of the estate. (Probate Code, § 1232.)

We concur: KNIGHT, J.; CASHIN, J.

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27 Cal.App.2d 583

PEOPLE v. WALTHER.

Cr. 1599.

District Court of Appeal, Third District, California.

July 15, 1938.

1. False pretenses 🔑26

A count of an indictment which charged that accused unlawfully sold a security for value upon false representations and under trick and device with intent of defrauding the purchaser, in a certain sum, and appropriated the sum to accused's own use, failed to state public offense of grand theft based on deceit and fraud. Pen.Code, § 532.

2. Indictment and Information 🔑110(15)

It is not sufficient to charge a crime based on fraud or deceit in the language of the statute. Pen.Code, § 532.

3. Fraud 🔑69

In a criminal prosecution based on fraud or deceit, it is necessary to specify the fraud relied upon with such particularity as to enable the court to determine whether it is of such a nature as to fall within the statute, and accurate enough to inform the accused of the particular charge which he is required to defend against. Pen.Code, § 532.

4. Conspiracy 🔑43(6)

A count of an indictment which charged accused with conspiring to sell and selling a certificate of interest in a profit-sharing agreement without permission of the corporation commissioner sufficiently stated a public offense. Pen.Code, §§ 950, 952, 959; St.1917, p. 673, as amended; St.1931, p. 938, § 2, subd. 7.

5. Criminal law 🔑878(4)

Where accused was acquitted under count charging him with selling a security of his own issue in a profit-sharing agreement without permission of corporation commissioner and accused was convicted under count charging him with conspiring to sell and selling a security of his own issue in a profit-sharing agreement without permission of corporation commissioner so to do, verdict of guilt was void in so far as it found accused guilty of actually selling the security, since the acquittal and conviction in that respect were irreconcilable. Pen. Code, §§ 950, 952, 959; St.1917, p. 673, as amended; St.1931, p. 938, § 2, subd. 7.

6. Licenses 🔑42(4)

Evidence *held* insufficient to sustain conviction of selling a certificate of interest in a profit-sharing agreement without permission of corporation commissioner. Pen.Code, §§ 950, 952, 959; St.1917, p. 673, as amended; St.1931, p. 938, § 2, subd. 7.

7. Conspiracy 🔑47

Evidence *held* insufficient to sustain conviction for conspiracy to sell certificate of interest in a profit-sharing agreement without permission of corporation commissioner. Pen.Code, §§ 950, 952, 959; St.1917, p. 673, as amended; St.1931, p. 938, § 2, subd. 7.

8. Criminal law 🔑428

Where district attorney tenders immunity from prosecution to one of two coconspirators in reward for his state's evidence against his colleague, the evidence of such coconspirator should be examined with great care.

9. Criminal law 🔑427(3)

In prosecution for conspiring to sell a certificate of interest in a profit-sharing agreement without permission of corporation commissioner, where existence of conspiracy had not been established at time coconspirator testified for state, court erred in overruling objections to testimony of coconspirator. Pen.Code, §§ 950, 952, 959; St.1917, p. 673, as amended; St.1931, p. 938, § 2, subd. 7; Code Civ.Proc. § 1870, subd. 6.

10. Criminal law ⟹427(3)

The existence of a conspiracy to commit a crime must first be established before the declarations of a coconspirator with relation thereto are admissible in evidence. Code Civ.Proc. § 1870, subd. 6.

11. Criminal law ⟹1169(7)

Where existence of a conspiracy to commit a crime is not established before declarations of a coconspirator with relation thereto are introduced in evidence, and such declarations are prejudicial, their admission is reversible error. Code Civ.Proc. § 1870, subd. 6.

12. Criminal law ⟹854(9)

That one of the jurors lagged behind his associates in going to and coming from the courtroom during the progress of the trial did not constitute such a separation of the jury as to require reversal of conviction, where it did not appear that jurors were ever out of sight or actual custody of the officer or that anyone of them was improperly approached or interviewed by other individuals.

13. Criminal law ⟹1141(1)

It was presumed that the jurors and officer in charge of them were obedient to the admonitions of the court and that the jury rendered its verdicts solely on the evidence regularly adduced in open court.

14. Criminal law ⟹858(1)

It was not reversible error for the jurors to secure and consider in their deliberations the pleadings or the exhibits which had been previously received in evidence during trial, since jury had a right further to consider such evidence.

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Appeal from Superior Court, Napa County; Percy S. King, Judge.

Lucian E. Walther was convicted of conspiring to sell and selling a certificate of interest in a profit-sharing agreement without permission of the corporation commissioner so to do and of grand theft, and he appeals.

Reversed.

Wallace T. Rutherford, of Napa, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was jointly indicted with another defendant on six counts for alleged violations of the Corporate Securities Act and for grand theft. The indictment against the codefendant was dismissed. A demurrer to each count of the indictment was overruled. The appellant was convicted of four counts of the indictment and acquitted of the remaining two counts. On motion for a new trial the causes were dismissed as to two other counts. The motion for a new trial was denied as to the fifth and sixth counts of which the appellant was convicted. The fifth count charges the appellant with,

"Violation of the Corporate Securities Act of the State of California, in that Lucian E. Walther and * * * knowingly, unlawfully, and feloniously conspired together to violate the Corporate Securities Act * * * by conspiring to, and did sell to, Margaret Holst, for a valuable consideration, in the County of Napa, State of California, on or about the 11th day of September, 1935, * * * a security of their own issue, namely, a certificate of interest in a profit sharing agreement, * * * without having permission of the Corporation Commissioner of the State of California so to do."

The sixth count contains the following language:

"The Grand Jury of the County of Napa, State of California, further hereby accuses Lucian E. Walther and * * * of a felony, towit, grand theft, in that Lucian E. Walther * * * knowingly, feloniously, and unlawfully sold a security for value to Margaret Holst, in the County of Napa, State of California, on or about the 11th day of September 1935, upon false representations and under trick and device with the intent of defrauding said Margaret Holst, in the sum of Three Hundred and Ninety Dollars, ($390.00), lawful money of the United States, and appropriated the same to their [his] own use and benefit."

It is asserted that neither the fifth nor the sixth count of the indictment states a public offense; that the verdicts and judgment are not supported by the evidence; that the jury received and considered evidence outside of the court proceedings; that the court erred in receiving and rejecting testimony and in giving to the jury and refusing certain instructions, and that the district attorney was guilty of prejudicial misconduct during the trial of the cause.

[1-3] The sixth count of the indictment clearly fails to state a public offense. The gist of the offense sought to be charged in that count is the procuring of $390 from Margaret Holst by means of deceit and fraud, contrary to the provisions of section 532 of the Penal Code. It fails to specify any act or statement of the defendant constituting the alleged fraud. It is not sufficient to charge a crime based on fraud or deceit in the language of the statute. The allegations of the information or indictment are wholly insufficient when they merely charge the accused with procuring the money or property "by false pretenses". On the contrary it is invariably necessary to specify the fraud relied upon with such particularity as to enable the court to determine whether it is of such a nature as to fall within the statute, and accurate enough to inform the accused of the particular charge which he is required to defend against. 25 C.J. 623, sec. 56; 12 Cal.Jur. 464, secs. 16 and 17; 11 R.C.L. 857, sec. 39; People v. McKenna, 81 Cal. 158, 22 P. 488. In the text of 11 Ruling Case Law, supra, it is said:

"It (the indictment) must aver all the material elements of the offense, and hence must show what the false pretenses were; that they were made or authorized by the defendant; that they were false and fraudulent, and deceived the prosecutor; and what was obtained by and under them; or, as differently expressed, it must set out the pretenses and the scienter, and that by means of the pretenses, which were false, the defrauded party was induced to part with the property described."

In the case of People v. McKenna, supra, a judgment of conviction was reversed and the court was directed to dismiss an information which was couched in almost the identical language employed in the present indictment. In that case there was imposed neither a demurrer to the pleading nor a motion in arrest of the judgment. The court there said (page 489):

"It matters not that no objection is made by demurrer. Objection may be made at any time, because it goes to the substance of the complaint or indictment. The question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud in general terms presents no issuable facts. Meeker v. Harris, 19 Cal. [278] 289, 290 [79 Am.Dec. 215]; Triscony v. Orr, 49 Cal. [612] 617; Sacramento Savings Bank v. Hynes, 50 Cal. [195] 202."

The sixth count of the indictment in this case therefore states no cause of action and the court was without jurisdiction to try the appellant on the charge of fraud.

[4] We are of the opinion count five of the indictment states a good charge against the defendants for conspiring to sell and for selling to Margaret Holst a security of their own issue in the form of "a certificate of interest in a profit sharing agreement", without having first procured from the corporation commissioner a permit so to do, contrary to the provisions of the Corporate Securities Act of California. (Stats.1917, p. 673, and amendments thereto; 2 Deering's Gen.Laws 1931, p. 1924, Act 3814.)

The fifth count states a public offense in the precise language of the statute in plain language sufficient to inform a person of common understanding of the exact offense with which the appellant is charged. It sufficiently conforms to the requirements of sections 950, 952 and 959 of the Penal Code. It charges that the defendants on September 11, 1935, in Napa county, California, did conspire to sell and "did sell to Margaret Holst, for a valuable consideration, * * * *a security of their own issue*, namely, *a certificate of interest in a profit sharing agreement*, * * * without having permission of the Corporation Commissioner of the State of California so to do." Section 2, subdivision 7, of the Corporate Securities Act, St.1917, p. 673, § 2, as amended by St. 1931, p. 938, defines the word "security" to include "any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, *certificate of interest in a profit-sharing agreement*", etc.

We are of the opinion the allegations of the information which were held to be fatally defective in the case of People v. Davenport, 21 Cal.App.2d 292, 69 P.2d 862, upon which the appellant relies, may be distinguished from the language employed in the fifth count of the indictment in the present case. In the Davenport Case the information merely alleged that the defendant issued and sold, without a permit, "a security for value, to-wit, *an investment contract*" (page 863). The court there said:

"Since in the generic sense of the word every contract is an investment contract, and it is perfectly lawful to sell, assign, or otherwise transfer or dispose of one's rights in or to any investment contract without first securing a permit from the commissioner of corporations of the state of California, * * * we must, in the absence of appropriate pleadings, assume that the contract described in this count was one, the rights of which could lawfully be sold without the seller first obtaining a permit from the commissioner of corporations."

While it may be true, as the court says, that in the generic sense all contracts are in the nature of investments, and that the charge of selling a mere *investment contract* is not in conflict with the provisions of the Corporate Securities Act, the statute specifically prohibits the sale of "certificate of interest *in a profit sharing agreement*". In other words, when a "certificate of interest" is issued in a "profit sharing agreement" it is specifically designated by the statute as "security" which may not be lawfully sold without a permit from the corporation commissioner. Count five of the indictment in the present case is distinguishable from the Davenport Case, and we think it is sufficiently specific to inform the defendants of the identity of the security which they are charged with conspiring to sell to Margaret Holst without a permit.

[5] Assuming that count five of the indictment adequately charges the appellant with conspiring with George W. Webb to unlawfully sell "a certificate of interest in a profit sharing agreement" and also with the actual sale of that security contrary to the statute, we are still compelled to eliminate therefrom the portion which charges him with actually selling the security for the reason that he was formally acquitted of that very charge by the same jury at the same trial. Count four, of which the appellant was then acquitted, separately charged him with the same offense in almost the identical language which was contained in the fifth count, to-wit, that, on September 11, 1935, he sold to Margaret Holst without a permit, a security of his own issue in a profit sharing agreement. The two verdicts upon that issue of the alleged actual sale of the security are inconsistent and absolutely irreconcilable. In so far as the verdict purports to find the appellant guilty of actually selling to Margaret Holst the specified security, it is null and void, and should therefore be disregarded.

Moreover, the evidence indicates that an actual sale of the specified security did not occur. There was never an actual transfer of title to the certificate. Margaret Holst testified in that regard: "Q. Did you get any stock certificate? A. No. Q. Did you ever see any interests in this matter? A. No sir."

Assuming, as the attorney-general contends, that a sale of profit sharing interests may occur without actually transferring the certificates thereof, we have searched in vain for evidence of that fact. Our attention is not called to any evidence supporting the contention that the designated securities were actually sold.

[6] We are therefore of the opinion the verdict of the jury finding the appellant guilty of selling a specified security of his own issue is not supported by the evidence.

This leaves for our consideration only the verdict with respect to that portion of the fifth count which charges the appellant with conspiring with George W. Webb, contrary to the provisions of section 182 of the Penal Code to commit the crime of violating the Corporate Securities Act, by attempting to sell securities without a permit.

[7] It is unsatisfactory that the conviction of one of two conspirators to commit a crime should depend so completely as does the present case upon the testimony of the coconspirator, Webb, against whom the indictment was finally voluntarily dismissed by the prosecuting officer. It may be true the evidence indicates that the appellant was guilty of conspiring with Webb to defraud Margaret Holst of her money by means of false pretenses, but there seems to be a total absence of evidence of a conspiracy to merely violate the Corporate Securities Act by selling securities without a permit. If the appellant is guilty of the last-mentioned offense, his coconspirator is equally culpable, and under such circumstances the court should carefully scrutinize his evidence to see that the wholesome rule with respect to proving the facts constituting a conspiracy independently of the coconspirator's admissions has been complied with.

[8] We may assume that the district attorney has a right to arbitrarily select one of two coconspirators to whom he may tender immunity from prosecution in reward for his state's evidence against his colleague, but such evidence is open to suspicion lest the temptation to thus escape a threatened penalty of law may result in irreliable testimony. Under such circum-

stances the evidence of a coconspirator should be examined with great care. When a codefendant who is a coconspirator has been offered immunity from prosecution in reward for his testimony, the cause should be promptly dismissed against him. Otherwise, the maintenance of the action against him throughout the trial may serve to intimidate the witness and furnish an inducement for him to color his testimony. Moreover, retaining a person as a party defendant throughout the trial, who has been promised immunity from prosecution in reward for his evidence may become a mere subterfuge to avoid the necessity of adhering to the established rule that the fact of the existence of a conspiracy may not be proved by the admissions of a coconspirator.

We shall assume that the voluntary dismissal of a criminal charge against one of two coconspirators to commit a crime will not necessarily invalidate a verdict convicting his associate therein, although the procedure under such circumstances is not ordinarily very satisfactory. It has been held that a voluntary dismissal of a criminal case against one of several coconspirators does not invalidate the verdict of conviction against the others. In the case of Harrison v. United States, 2 Cir., 7 F.2d 259, it was held that a nolle prosequi as to one of six defendants charged with conspiracy did not affect the result or prevent a conviction of the other parties thereto. 97 A.L.R. 1312, note.

[9] In considering the charge of conspiracy to commit the crime of violating the Corporate Securities Act by trying to sell to Margaret Holst certain securities without a permit, of which the appellant was convicted, we are of the opinion the court erred in overruling the numerous objections to the testimony of George W. Webb, the coconspirator, on the ground that the fact of the existence of the alleged conspiracy had not been first established.

[10, 11] It is fundamental that the fact of the existence of a conspiracy to commit a crime must first be established before the declarations of a coconspirator with relation thereto become competent or admissible. When such declarations are prejudicial, as they certainly are in the present case, their admission in evidence necessitates a reversal of the judgment. Code Civ.Proc. § 1870, subd. 6; People v. Doble, 203 Cal. 510, 517, 265 P. 184; People v. Linde, 131 Cal.App. 12, 19, 20 P.2d 704; 5 Cal.Jur. 517, sec. 21.

It will be observed that the fifth count of the indictment, which is the only one under which a verdict of guilty, under the circumstances of this case, could possibly be sustained, does not charge a conspiracy to defraud Margaret Holst by procuring her money by false pretenses. It merely charges a conspiracy to violate the Corporate Securities Act by selling, or at least trying to sell to her "a security of their own issue", represented by a certificate in a profit sharing agreement, without having procured a permit therefor from the corporation commissioner. That specific charge does not appear to be supported by the evidence. After a diligent examination of the lengthy record, we are unable to find any substantial evidence of a conspiracy to sell a certificate in a profit sharing agreement, issued, or to be issued by the alleged conspirators. We are directed to no evidence which does support that charge. We are therefore of the opinion the evidence is insufficient to support the verdict on that particular charge.

It is quite evident from a critical examination of the record, in view of the instructions which were given to the jury, and the evident theory upon which the case was tried, that the prosecution did not rely upon proof of a conspiracy to unlawfully sell securities, but rather upon evidence that the defendants defrauded Mrs. Holst of her money by false and fraudulent representations. The evidence of the proof of a conspiracy to defeat the Corporate Securities Act by selling securities without a permit is most unsatisfactory, if, indeed, it is not entirely lacking.

In view of our previous conclusions which require a reversal of the judgment it is not necessary to review the numerous instructions which were given and refused in this complicated case, to which the appellant objects. Most of them have no bearing on the principles affecting the charge of conspiracy.

[12-14] There seems to be little merit in the charge of alleged misconduct of the district attorney. The fact that one of the jurors lagged behind his associates in going to and coming from the courtroom during the progress of the trial does not constitute such a separation of the jury as will require a reversal of the judgment on that account. It is not contended the jurors were ever out of the sight or actual custody of the sworn officer of the court, or that any of them were improperly approached or interviewed by other individuals. The circumstances of

this case do not constitute an unlawful separation of the jury. 16 Cal.Jur. 1166, sec. 2675. Nor does the record indicate that the jurors received or considered evidence obtained out of the presence of the court. It is true that an affidavit was filed on motion for a new trial in which it is asserted that "certain documents and papers unknown to this affiant" were delivered to the jury outside of court. This affidavit was not contradicted. It does not appear what the nature of the documents was which were delivered to the jury. In the absence of evidence to the contrary we must assume that both the jurors and the officer in charge of them were obedient to the admonitions of the court, and that the jury rendered its verdicts solely on the evidence regularly adduced in open court. In support of that presumption we may assume the documents which were handed to the jurors had no application to the case on trial, or that they consisted of pleadings or exhibits which had been formally received in evidence during the progress of the trial. If that is not the fact it would have been easy to introduce evidence of the nature of the documents. It was not reversible error for the jurors to secure and consider in their deliberations the pleadings or the exhibits which had been previously received in evidence during the trial. They had a right to further consider such evidence. 16 Cal.Jur., p. 1083, sec. 2543, and p. 1171, sec. 2679; People v. Balestieri, 23 Cal.App. 708, 139 P. 821.

The judgment and the order are reversed.

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27 Cal.App.2d 623

WINN v. TORR et ux.

Civ. 6092.

District Court of Appeal, Third District, California.

July 19, 1938.

1. Judgment 🔑407(2)

Where mortgagee in foreclosure proceeding failed to make mortgagor's wife who was not party to mortgage but who had recorded homestead prior to foreclosure party to foreclosure proceeding, mortgagee's effort to set aside judgment on foreclosure for excusable neglect pursuant to statute would not bar proceeding in equity to obtain relief from judgment of foreclosure. Code Civ.Proc. § 473.

2. Judgment 🔑407(2)

Statutory relief from a void or erroneous judgment procured by excusable neglect, fraud, or mistake is concurrent with the remedy afforded by equity under proper circumstances, and a refusal to grant relief under statute is not res judicata in a proceeding in equity to obtain relief from judgment. Code Civ.Proc. § 473.

3. Mortgages 🔑427(1)

Where mortgagor's wife did not join husband in executing note and mortgage but recorded homestead prior to foreclosure proceedings, mortgagor's wife was a "necessary party" in foreclosure proceeding, since her homestead became cloud on title, subject to the prior lien of the mortgage, which was necessary and proper to remove so as to authorize a valid sale of the premises to satisfy the judgment for mortgage indebtedness. Civ.Code, § 1241(4).

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

4. Mortgages 🔑497(1)

Where mortgagee failed to make mortgagor's wife, who was not party to note or mortgage, but who had recorded homestead subsequent to recordation of mortgage, party to foreclosure, decree of foreclosure was ineffectual as against homestead lien and a new action of foreclosure was properly instituted. Civ.Code, § 1241(4).

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Mortgage foreclosure proceedings by Albert L. Winn, administrator of the estate of Hattie Winn Sales, also known as Hattie M. Winn, also known as Hattie Winn Gaston, also known as Mary Hattie Sales, deceased, against Mead O. Torr and his wife, Mary Torr. From a judgment of foreclosure last-named defendant appeals.

Affirmed.

John H. Moskowitz, of Petaluma, for appellant.

Lounibos & Lounibos, of Petaluma, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, Mary Torr, has appealed from a judgment of foreclosure of a mortgage which was executed by her husband alone to secure a debt of $5,000. Mrs. Torr had subsequently filed a homestead against the property.

In a previous suit to foreclose the same mortgage, which was originally brought against both the husband and wife, the action was inadvertently dismissed as to Mrs. Torr for the reason that she was not a party to the note or mortgage, and the plaintiff was not aware of the recording of the homestead. In that suit a decree of foreclosure was rendered against Mead O. Torr. The property was sold and a deficiency judgment was entered against him. After that judgment was rendered the plaintiff discovered, for the first time, that Mary Torr had filed the homestead against the mortgaged property subsequent to the execution of the mortgage and before the commencement of the suit for foreclosure. Within six months after the rendering of that judgment the plaintiff moved, under the provisions of section 473 of the Code of Civil Procedure, to set aside the judgment as void for the reason that the foreclosure proceeding was unavailing to relieve the property of the homestead lien. That motion was granted. On application of the defendants, however, that order was subsequently set aside for the reason that it was granted without previous notice. The present suit to foreclose the same mortgage was then instituted against both the husband and wife. Defendants' demurrer to the complaint was overruled. An answer was filed, denying the material allegations of the complaint. The defendants also filed a cross-complaint, affirmatively alleging that the plaintiff was charged with knowledge of the recording of the homestead, and that he is therefore bound by the first decree of foreclosure, and that the plaintiff, who purchased the land at the commissioner's sale thereof, took it subject to the homestead lien. Findings were adopted favorable to the plaintiff on all the material issues. A decree was thereupon rendered against both Mr. and Mrs. Torr, setting aside the former judgment and awarding plaintiff judgment for the amount of the unpaid note together with accrued interests and costs, and directing the sale of the property to satisfy the debt. From that decree Mrs. Torr has appealed.

It is contended the first decree of foreclosure is res judicata and binding on the respondent in this case; that this suit amounts to a collateral attack upon the former judgment; that the defect of parties in the original suit was due to plaintiff's negligence in failing to search the records; that plaintiff was charged with knowledge of the recording of the homestead prior to the commencement of his action, and that equity will not relieve plaintiff from the homestead lien under such circumstances.

The record shows that Mead O. Torr and Mary Torr are husband and wife. December 20, 1930, Mead O. Torr alone executed and delivered to Hattie Sales Winn his note for $5,000, secured by a mortgage on a house and lot in the city of Petaluma. Mrs. Torr did not join in the note or mortgage. The mortgage was recorded January 23, 1931. The homestead was recorded by Mrs. Torr June 2, 1931. The complaint was filed in the original suit to foreclose the mortgage on July 8, 1931. The mortgagee, Hattie Winn Sales, died September 9, 1932, and upon appropriate proceedings the plaintiff was appointed and qualified as administrator of her estate October 26, 1932, and he was duly substituted as plaintiff in the action. Inadvertently the first suit was dismissed against Mrs. Torr November 6, 1933, on the theory that she was not a necessary party to the suit since she was not a party to the note or mortgage. The plaintiff then had no knowledge of the fact that the homestead had been recorded before the commencement of the action. He knew that a homestead had been recorded, but was informed and believed that it was recorded after the filing of the complaint. A decree of foreclosure was rendered in the original action on the last-mentioned date. The property was sold to the plaintiff under order of the court for $2,500 and a deficiency judgment of $3,877.86 was entered against Mead O. Torr alone. February 20, 1934, Mead O. Torr deeded the property to his wife. March 1, 1934, the plaintiff first discovered that the homestead had been filed before the commencement of the action. March 23, 1934, on ex parte application of the plaintiff, under the provisions of section 473 of the Code of Civil Procedure, the decree was set aside as void, for the reason that the case had been dismissed as to Mrs. Torr, and the property therefore remained vested with her homestead lien. The following September Mead O. Torr moved the court to vacate the last-mentioned order on the ground that the court was without jurisdiction to make that order since no notice thereof was given as required by section 473. The order vacating the original judgment was therefore set aside November 7, 1934. This action was then commenced long before the note and mortgage had outlawed. The note was dated December 20, 1930, and did not mature until two years thereafter. Judgment in this case was rendered October 9, 1936.

[1, 2] Assuming that plaintiff's motion to vacate the original decree, although it was made within six months of the time of the entry thereof, was ineffectual under the provisions of section 473 of the Code of Civil Procedure for lack of notice, that did not bar him from subsequently applying to a court of equity for relief from the effect of that ineffectual judgment. Section 473 is not the sole remedy for relief from a void or erroneous judgment procured by excusable neglect, fraud or mistake. It is merely concurrent with the remedy afforded by equity under proper circumstances. A refusal to grant the relief under section 473 is not even res judicata which is conclusive of a subsequent application to a court of equity for the same relief. Jeffords v. Young, 98 Cal.App. 400, 407, 277 P. 163. In that case it is said in that regard (page 166):

"Finally, it is contended that in an effort to vacate the judgment, having unsuccessfully resorted to the remedy provided by section 473 of the Code of Civil Procedure, the appellants are now barred from applying to equity for the same relief. The remedies for relief from a judgment procured by fraud, mistake, or excusable neglect, provided by section 473 of the Code of Civil Procedure, and the ordinary suit in equity, are entirely distinct and cumulative. An unsuccessful resort to the first-mentioned remedy does not bar an application to equity for relief. 15 Cal.Jur. 27, § 127; Estudillo v. Security L. & T. Co., 149 Cal. 556, 561, 87 P. 19; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Herd v. Tuohy, 133 Cal. 55, 63, 65 P. 139; 3 Freeman on Judgments, 5th Ed., p. 2488, § 1198. In Bacon v. Bacon, supra [150 Cal. 477], at page 484 (89 P. 317), it is said with respect to these different remedies: 'It (sec. 473, Code Civ.Proc.) is a cumulative remedy, and does not displace the remedy in equity. (Baker v. O'Riordan, 65 Cal. 368, 4 P. 232.) We have recently held not only that it does not displace the equitable remedy, but also that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause.' To the same effect, the author of Freeman on Judgments, supra, says: 'The summary disposition of a question upon motion, resulting in a denial of the relief claimed, should not ipso facto preclude the party from obtaining the aid of chancery. * * The denial of a motion to open a judgment should not of necessity preclude a court of equity from subsequently granting the relief denied at law. The decision of such motion is not such a res adjudicata as precludes equity from reexamining the question. The opening of a judgment in a court of law is usually ex gratia, while restraining the plaintiff from proceeding on the judgment is, in equity, more nearly a matter of right. The facilities for investigating the issues presented in the motion are usually much better in equity than at law, owing to the more summary character of the motion proceedings.'

"We are of the opinion that the complaint in the present action alleges facts sufficient to state a cause of action against the defendants Thomas I. Young, Lillie E. Young, and W. H. Lorenz justifying the aid of equity, and that the former application to vacate the judgment in the statutory proceeding does not bar the remedy here sought."

[3] Since the appellant's homestead was recorded prior to the commencement of the original action to foreclose the mortgage, she was a necessary party to that suit to secure an effective foreclosure of plaintiff's mortgage lien, notwithstanding the fact that she did not join her husband in executing the note or mortgage. Her homestead became a cloud on the title, subject to the prior lien of mortgage, which it was necessary and proper to remove so as to authorize a valid sale of the property to satisfy the judgment for the mortgage indebtedness. Indeed, under circumstances similar to those of the present case, quoting with approval from the case of Brackett v. Banegas, 116 Cal. 278, 48 P. 90, 58 Am.St.Rep. 164, it was said in Ludwig v. Murphy, 143 Cal. 473, 475, 77 P. 150, 151, that the former judgment was "absolutely

void as to the security". At least the first decree was ineffectual and the plaintiff was entitled to a decree of foreclosure and sale of the property including the homestead which vested thereon subsequent to the execution and recording of the mortgage, to completely satisfy the lien for the indebtedness. It has been held that under such circumstances the proper procedure is to institute a new action of foreclosure. Hurt v. Pico Inv. Co., 136 Cal.App. 390, 393, 29 P.2d 310. That is exactly what was done in the present action. The homestead and subsequent deed from Mr. Torr to his wife were evidently recorded to defeat the prior mortgage lien. Even when a wife has not joined in the execution of a note and mortgage, her subsequent filing of a homestead on the mortgaged property is subject to execution and forced sale to satisfy a judgment of foreclosure, when the mortgage is executed and recorded before the declaration of homestead was filed for record. (26 C.L.R. 468; sec. 1241, Civ. Code.) The last mentioned section provides in part:

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained;

* * * * * *

"4. On debts secured by mortgages on the premises, *executed and recorded* before the declaration of homestead was filed for record."

[4] The plaintiff, who was the purchaser of the property at the foreclosure sale thereof, was entitled to maintain this subsequent foreclosure suit which was filed long before the note and mortgage outlawed to correct the mistake of inadvertently dismissing the original action against Mrs. Torr so as to obtain a valid decree of foreclosure as against her homestead lien. The original decree was not a bar to this action. Ludwig v. Murphy, supra; Hurt v. Pico Inv. Co., supra; Gerig v. Loveland, 130 Cal. 512, 62 P. 830; Baker v. Superior Court, 120 Cal.App. 1, 3, 7 P.2d 193. In the case last cited it is said (page 194):

"For the purposes of this decision, we assume that petitioners, as purchasers at the first foreclosure sale, had the right to institute their second foreclosure action for the purpose of correcting the error into which they had fallen by omitting to make Marjorie McKinsey a defendant in the first foreclosure action. The decision cited by them, Norton v. Newerf, 45 Cal.App. 10, 187 P. 57, appears to sustain the right of a purchaser at a foreclosure sale to maintain such an action to foreclose the equity of such omitted party whose ownership of the property was acquired subject to the mortgage."

In the Hurt Case, supra, it is said (29 P.2d page 312):

"In such a situation as herein presented the proper remedy is by a new action in foreclosure, although the courts have allowed the original suit to be reinstated upon amended pleadings. Norton v. Newerf, 45 Cal.App. [10] 14, 187 P. 57. It follows that there is no merit in appellant's contention that in this action a collateral attack is made upon the decree in action No. 194481."

Under circumstances similar to those of the present case it is said in the Ludwig Case, supra:

"The mortgage note here sued on became due April 25, 1899. The present action to foreclose the same was begun on September 11, 1902, which was much less than four years after the cause of action accrued. The cause of action, considering the case as an action to foreclose the mortgage, was therefore not barred by the statute of limitations.

"This being true, no question can arise concerning the effect of laches, or as to the sufficiency of any excuses existing therefor. *A party holding a valid mortgage lien has an absolute right to an effectual foreclosure by an action begun at any time within four years from the time his cause of action accrues,* irrespective of, and in the face of, any degree of laches or delay. *The previous attempt to foreclose was, so far as the security was concerned, wholly ineffectual,* and in Brackett v. Banegas [116 Cal. 278, 48 P. 90, 58 Am.St.Rep. 164], a similar judgment of foreclosure was held absolutely void as to the security. If it was void as to the security, it could not affect the mortgage, nor the lien created thereby, and it could not constitute a bar, nor in any wise affect an action to foreclose the same. * * * The additional facts included therein, disclosing *the previous judgment of foreclosure and the excuses for not making the husband a party to that action,* do not constitute a bar to the present action, nor any defense whatever, but, on the contrary, they show that the former judgment was void, and that, therefore, it could not affect the present action.

"* * * Whatever may be the effect of the former judgment with respect to the note, it was void as a foreclosure, and * * * it did not operate as a waiver of the mortgage lien, nor of the right to foreclose the same."

In the present case the court found that the plaintiff inadvertently dismissed the former action against this appellant without previous knowledge that her homestead had been recorded against the land prior to the commencement of the first action; that the previous suit did not foreclose the plaintiff's mortgage lien, and that this action is not barred thereby. Those findings are supported by the record in this case.

The judgment is affirmed.

I concur: PULLEN, P. J.

ASSOCIATED CONSTRUCTORS, Inc., v. PAONESSA et al.*

Civ. 11451.

District Court of Appeal, Second District, Division 1, California.

July 19, 1938.

Hearing Granted by Supreme Court Sept. 17, 1938.

1. Appeal and error ⚷1227

The failure of sureties to justify after exceptions taken to their sufficiency does not relieve them from liability upon their undertaking to stay execution pending an appeal, and they are bound by a judgment taken against them for the amount specified in the undertaking.

2. Appeal and error ⚷1227

Individual sureties on undertaking to stay execution of judgment were not released by their failure to justify and by the acceptance and approval of a subsequent undertaking by surety company which qualified, in absence of evidence that surety company's undertaking should supersede undertaking of individual sureties, or that liability of individual sureties terminated when surety company's undertaking was filed. Civ.Code, § 2836.

3. Principal and surety ⚷192

Sureties who are bound for a common principal to insure the performance of the same duty or obligation are cosureties, although they are bound by different instruments.

4. Appeal and error ⚷1227

The alleged failure of judgment creditors to file claim with state insurance commissioner in connection with liquidation of surety company which filed an undertaking to stay execution pending appeal did not release individual sureties from liability on their prior undertaking, in absence of showing that dividend had been paid or would be paid.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Associated Constructors, Inc., against Alfred E. Paonessa and others. The defendants recovered judgment against the plaintiff on a cross-complaint, and the plaintiff appealed. Harold and Laura Fisch offered themselves as sureties upon an undertaking to stay execution pending the outcome of the appeal. The judgment was affirmed. Summary judgment was entered against Harold and Laura Fisch as sureties. From an order denying their motion to vacate the summary judgment, Harold and Laura Fisch appeal.

Order affirmed.

Edward Flam, of Los Angeles, for appellants.

Ralph D. Paonessa and Hal Hughes, both of Los Angeles (G. Vernon Brumbaugh, of Los Angeles, of counsel), for respondents.

YORK, Presiding Justice.

Respondents recovered judgment upon a cross-complaint against Associated Constructors, Inc., plaintiff in a superior court action, in the sum of $2,500, plus costs. Thereafter Associated Constructors, Inc., appealed from such judgment and appellants Fisch offered themselves as sureties upon an undertaking to stay execution pending the outcome of the appeal. Respondents objected to the sufficiency of the sureties and to the form of the undertaking on appeal, and on November 15, 1933, their objections were sustained by the court. On the same day appellants filed another undertaking in proper form which was also excepted to by respondents and the matter set for hearing on November 22, 1933. Appellants attempted to justify as such sureties but failed to do so, and the hearing was continued until 2 o'clock of that day and the execution stayed until that hour. At that time a new undertaking to stay execution was filed in which the Coast Surety Corporation, a corporation then qualified to execute surety bonds, was named as surety. The surety to this last-named undertaking justified, was accepted by respondents and the undertaking filed staying execution pending said appeal.

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*For subsequent opinion see 88 P.2d 924.

On December 16, 1935, respondents filed affidavit and notice of motion for an order requiring a new undertaking in the place and stead of the undertaking of the Coast Surety Corporation on the ground that said company had become insolvent and was in the hands of the state insurance commissioner, and that the rights of the said judgment creditors would be prejudiced unless a further undertaking was had. Appellants were not made parties to this proceeding, and notice of said motion was not served upon them. However, the record herein shows that the matter was placed "off calendar" on April 2, 1936.

Subsequently, the judgment of the superior court was affirmed upon appeal, and on May 26, 1936, an ex parte motion for summary judgment was made by respondents against the appellants Fisch and the Coast Surety Corporation, as sureties on the two undertakings. On May 27, 1936, pursuant to said motion, judgment for the sum of $2,520, plus costs and interest, was entered against the surety company and appellants. On October 27, 1936, appellants filed notice of motion under section 473 of the Code of Civil Procedure to vacate and set aside said summary judgment on the ground that it was entered through inadvertence and was invalid and void as to them, for the reason that they failed to qualify upon the undertaking in which they were named sureties, and were not parties to the undertaking in which the Coast Surety Corporation was surety. In opposition to the motion to vacate the summary judgment, there was filed an affidavit of one of the respondents alleging that at the hearing on November 22, 1933, as to the sufficiency of appellants, "it was ascertained that the Associated Constructors, Inc., a corporation, was the alter ego of Harold Fisch. That thereafter the said Harold Fisch did procure an undertaking to stay execution upon which the Coast Surety Company was the surety." It was further alleged that at the time of the making of application for such undertaking, the appellants Fisch did execute to the Coast Surety Corporation a trust deed upon certain real property owned by the said appellants.

From the order denying the motion to vacate the summary judgment, appellants Fisch have appealed urging (1) that the court erred in denying said motion because they cannot be considered as sureties upon the undertaking upon which they failed to justify where a subsequent undertaking by other sureties was qualified, accepted and approved; and (2) that the court erred in not holding that they were released from liability by the failure and neglect of the judgment creditors to pursue the remedies which existed against the surety company upon the subsequent undertaking, thereby losing rights which would inure to the benefit of appellants as prior sureties.

[1-3] It is now settled law in this state that the failure of sureties to justify after exceptions taken to their sufficiency does not relieve them from liability upon their undertaking to stay execution pending an appeal, and they are bound by a judgment taken against them for the amount specified in said undertaking. McColgan v. Scoble, 2 Cal.2d 285, 289, 40 P.2d 483.

The cardinal rule that a surety cannot be held beyond the express terms of his contract finds expression in section 2836 of the Civil Code, and various paraphrasings of the rule are to be found in the decisions. The condition of each of the two bonds or undertakings in the instant action is identical, to-wit: that judgment may be entered against the surety upon motion of the judgment creditor, in the event the judgment debtor does not pay the judgment appealed from within thirty days after the filing of the remittitur from the appellate court in the court from which said appeal is taken.

There is nothing in the record indicating an intention that the surety company bond should supersede appellants' undertaking or that the liability of appellants terminated when the surety company's undertaking was filed. Likewise the record is silent respecting any intention to exonerate appellants of their liability on their undertaking.

Sureties, who are bound for a common principal to insure the performance of the same duty or obligation, are cosureties, although they are bound by different instruments. 50 C.J. 280; U. S. Fidelity & Guaranty Co. v. Naylor, 8 Cir., 237 F. 314; Powell v. Powell, 48 Cal. 234.

In the Powell Case, supra, action was brought against two different sureties upon two executor's bonds, one given when letters testamentary were issued and the other given subsequently pursuant to an order to sell real estate, both bonds conditioned that the executor should faithfully execute the duties of his trust. A demurrer was sustained to the complaint on the ground that several causes of action had been improperly united. The court there held that "the condition of each of the two bonds by the executor is identical; the burden of the sureties the same, and their consequent liability inter sese to contribution clear. * * The sureties who are sued, * * * though executing separate bonds, assumed a common burden, and as being sureties on separate instruments, may be properly joined as co-defendants in the action."

The Naylor Case, supra, at page 316, holds that "The test of cosuretyship is a common liability for the same debt or burden. This liability may arise at the same time or at different times, out of the same writing or out of many writings. A common interest and a common burden alone are required to create the relation, and to enable the cosurety who has paid more than his due proportion to claim contribution from those who have paid less than their just proportion of the common liability. 'If several persons, or several sets of persons, become sureties for the same duty or debt, of, to, and for, the same persons, though by different instruments, at different times, and without a knowledge of the obligations of each other, they will be bound to mutual contribution.' 2 Wait's Actions and Defenses, 297; 4 Pomeroy's Equity Juris. § 1418."

[4] Appellants further urge that they were exonerated by the failure of the judgment creditors to file a claim with the state insurance commissioner in connection with the liquidation of the Coast Surety Corporation and thereby enable them to participate in a possible dividend of the assets of that company. In this regard, appellants have made no showing that such claim was not filed, nor have they established that such dividend has been paid or will be paid.

The order appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

27 Cal.App.2d 612

PEOPLE v. BROWN.

Cr. 1640.

District Court of Appeal, Third District, California.

July 16, 1938.

1. Homicide ⚷145

In prosecution for assault with deadly weapon with intent to commit murder, prosecution has burden to prove specific intent to commit murder.

2. Homicide ⚷145

In prosecution for assault with deadly weapon with intent to commit murder, intent cannot be inferred or presumed from commission of unlawful act since intent is essential ingredient of the crime.

3. Homicide ⚷145

In prosecution for assault with deadly weapon with intent to commit murder, an instruction advising that presumption of law that defendant intended to kill arose from fact that defendant shot victim and that defendant must controvert such presumption was incorrect.

4. Homicide ⚷348

In prosecution for assault with deadly weapon with intent to commit murder, instruction advising that firing weapon warranted jury in finding defendant's intention was to commit murder, and that in absence of other evidence showing such was not the intention jury were justified in finding defendant's intention was to commit murder, was reversible error, since defendant has no burden to prove he did not intend to commit the murder, except in prosecutions for murder. Const. art. 6, § 4½.

5. Criminal law ⚷826

Noncompliance with rule of court fixing time for presentation of requested instruction authorized refusal of instruction.

6. Homicide ⚷347

In prosecution for assault with deadly weapon with intent to commit murder where evidence warranted conviction of assault with deadly weapon, instruction incorrectly advised jury regarding facts from which jury might find intent to commit murder, and defendant was convicted of offense as charged, District Court of Appeal instructed trial court to modify judgment to assault with deadly weapon.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Elmer Brown was convicted of assault with deadly weapon with intent to commit murder, and he appeals.

Reversed, with instructions.

S. P. Galvin, of Merced, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was charged, arraigned, tried and found guilty of assault with a deadly weapon with intent to commit murder.

This is an appeal from the judgment of conviction and from the order denying the motion for a new trial.

It appears that about 6:30 o'clock on the evening of February 25, 1938, James Estep, a cotton farmer, went to his cotton camp near Dos Palos in Merced county, and was met by the defendant carrying a .22 rifle, who fired upon Estep, one of the bullets taking effect. The defendant then left camp in an automobile, but was captured a few miles from the camp. There is evidence that the defendant had been drinking, and also testimony that after the assault defendant had made statements that he shot Estep and intended to kill him.

[1, 2] On this appeal defendant contends that the court erred in giving certain instructions requested by the prosecution, and that by reason thereof the jury was misled to the prejudice of the defendant. Under the charge of assault with a deadly weapon with intent to commit murder, it is incumbent upon the prosecution to prove a specific intent to commit murder, and being an essential ingredient of the crime, the intent cannot be inferred or presumed from the commission of an unlawful act. People v. Landman, 103 Cal. 577, 37 P. 518; People v. Johnson, 106 Cal. 289, 39 P. 622; People v. Maciel, 71 Cal.App. 213, 234 P. 877.

[3] On examining the instructions given it is apparent the jury were charged in effect while proof of intent to commit murder must be proved, proof of the commission of the unlawful act of discharging the rifle and shooting the complaining witness was presumptive proof that the defendant intended to commit murder; also that if it were established that the defendant shot Estep, that constituted proof that he intended to kill him.

Among the instructions given was the following:

"I instruct you that if you are convinced to a moral certainty and beyond a reasonable doubt that the defendant Elmer Brown intended to do an unlawful act and did wilfully do an unlawful act he is thereby presumed to have intended all the natural, probable and usual consequences of this act, unless there is evidence to controvert this presumption."

Also in the following instruction the court, in effect, told the jury the burden was on the defendant to prove lack of intent:

"If you are convinced to a moral certainty and beyond a reasonable doubt that the defendant intended to do an unlawful act and did wilfully do it, he is presumed to have intended all the natural and probable consequences of the act unless he controverts this presumption by evidence on his own part."

In this instruction the jury were not only advised that a presumption of law that he intended to kill arose from the shooting, but the jury were also advised that he must controvert this presumption. This is incorrect. There is no burden placed upon the defendant to prove lack of intent. The burden is upon the prosecution to prove the intent.

In the case of People v. Maciel, supra, the defendant was charged with assault with a deadly weapon with intent to commit murder. The court there gave the following instruction (page 879):

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence, but when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and the burden of proof falls upon the defendant to show the absence of criminal intent."

It was contended upon the part of the defendant therein that this instruction violated the rule that whenever a specific intent was an essential ingredient no presumption of law arose as to the existence of such intent, for it was a fact to be proved like any other fact in the case. The court considering this, said while the first portion of the instruction was in the language of section 20 of the Penal Code, the latter portion was erroneous and prejudicial. The court stated that the jury were charged that when the act committed by the accused was unlawful, the law raised the disputable presumption that the act was intended, and that the person doing it, if done voluntarily, also intended the ordinary consequences of the act. This the court held was an instruction stating a rule of evidence, citing People v. Abbott, 2 Cal.Unrep. 383, 387, 4 P. 769. The court also held that had the court worded its instruction as contemplated in section 1963 of the Code of Civil Procedure it would have been proper, but the vice in the instruction as given lay in the fact that it went beyond the rule that an accused who had done an unlawful act was presumed to intend to have done that act, and asserted that when the act committed by the accused was unlawful, the law presumed the criminal intent without telling the jury what the criminal intent was which the law presumed. The court held that the words "criminal intent" were broad enough to include any and every unlawful intent which was embraced within the crime charged against the appellant. "It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. * * * When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. * * *

" 'Where one is charged with assault with intent to murder, and it is proved that he fired a loaded pistol at another, there is no presumption of law that he intended to murder the person thus fired at.' " People v. Maciel, supra.

The court there held also that the vice of the foregoing instruction was not cured by another instruction to the effect that the defendant could not be convicted of the crime of assault with a deadly weapon with an intent to commit murder unless the jury believed beyond a reasonable doubt that the assault was committed with intent to commit murder.

In the instant case the instruction was to all intent and purposes the same instruction as that given in the case of People v. Maciel, supra.

In People v. Mize, 80 Cal. 41, 22 P. 80, the jury were instructed that every person is presumed to have intended the natural and probable consequences of his act and therefore "if the jury believe that the defendant did shoot at said Henry Coffey as charged in the indictment, and the natural and ordinary consequences of such shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Henry Coffey with intent to kill him."

The court in condemning this instruction said (page 81):

"In homicide cases, where the killing is proved, it rests on the defendant to prove justification, excuse, or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the prisoner; but this is because the statute expressly shifts the burden of proving circumstances of mitigation upon the defendant in homicide cases. The rule is confined to murder trials. * * * This is an exception to the general rule that where a specific intent is an essential element of a crime, that the intent must be established as a fact."

[4] In the present case the jury were instructed substantially to the same effect. By this instruction the jury were advised that the firing of the weapon warranted them finding it was the intention of the defendant to commit murder, and that in the absence of other evidence that would show that it was not the intention, the jury were justified in finding that it was the intention of the defendant to commit murder. As pointed out in the Mize Case, supra, there is no shifting of the burden except in that of murder, and this instruction tells the jury that the burden had shifted to the defendant to prove by other evidence that it was not his intention to commit murder. It was also held in the Maciel Case, supra, that such an erroneous instruction was beyond the reach of the saving clause of section 4½ of article 6 of the Constitution.

In People v. Mize, supra, the court said that had the defendant been convicted of one of the lesser offenses included with the crime charged then the vice of the erroneous instruction could have been disregarded. In the present case the evidence discloses that the defendant was clearly guilty of assault with a deadly weapon, and in reversing this case we do so with instructions hereinafter set forth.

[5] The second point made by appellant is that an instruction which was submitted after the other instructions had been presented and after the time set by the trial court for presentation of instructions, was improperly refused. This instruction was

endorsed by the trial judge, "Offered by the defendant too late. E. N. Rector." Noncompliance with a rule of court fixing the time for presentation of requested instructions is of itself sufficient to authorize a refusal. Steinberger v. California Electric, etc., Co., 176 Cal. 386, 168 P. 570. If there is a rule requiring instructions to be handed to the judge at a specified time during the progress of the trial it is not error for the court to refuse to give an instruction if not submitted at the required time, and it is immaterial whether the requested instruction be good or bad law. Waldie v. Doll, 29 Cal. 555. Therefore the court was entirely within its right in refusing to give the proffered instruction when offered at a time not within the scope of the rule.

[6] The judgment from which this appeal is taken is reversed, and the defendant remanded to the trial court with instructions to modify the judgment of assault with intent to commit murder, to assault with a deadly weapon, and that defendant be sentenced accordingly.

The order denying a new trial is affirmed.

I concur: THOMPSON, J.

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27 Cal.App.2d 621

NAGELMANN et ux. v. McINTYRE et al.

Civ. 11498.

District Court of Appeal, Second District, Division 1, California.

July 19, 1938.

Hearing Denied by Supreme Court Sept. 15, 1938.

1. Appeal and error 🔑356

An appellate court has no power to entertain an appeal which is not taken within the time allowed by law. Code Civ.Proc. § 939.

2. Appeal and error 🔑348(1)

Service of notice of entry of judgment is not necessary to start the time, within which appeal may be taken, running. Code Civ.Proc. § 939.

3. Appeal and error 🔑348(1)

Where notice of appeal was filed more than 60 days after entry of a default judgment but within 60 days after entry of order denying motion to vacate such judgment, appeal was dismissed although notice of entry of judgment was served and filed after notice of appeal. Code Civ.Proc. § 939.

4. Appeal and error 🔑113(3)

An appeal from an order refusing to set aside a default judgment for damages growing out of an automobile accident, on the ground that constitutional and statutory defects existed in provision of vehicle code for service on nonresidents by mail, did not lie where such ground existed before entry of judgment and was available on appeal therefrom. St.1935, p. 154, § 404.

◆

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by C. B. Nagelmann and wife against Joe McIntyre and Robert I. Wood for damages growing out of an automobile accident, wherein a change of venue was granted to first-named defendant. Judgment by default against last-named defendant, he appealed, and plaintiffs move to dismiss appeal.

Appeal dismissed.

Smith & Delwiche, of Santa Barbara, for the motion.

B. M. Benson and Cecil E. Edgar, both of Fresno, opposed.

WHITE, Justice.

Motion to dismiss appeal. Plaintiffs brought this action to recover damages growing out of an automobile accident in which it was claimed defendants were guilty of negligence. As to defendant McIntyre, a motion for change of venue to the superior court of Fresno county was granted, while the defendant Robert I. Wood, a nonresident of this state, was served by mail pursuant to the provisions of section 404 of the Motor Vehicle Code as adopted in 1935 (St.1935, p. 154). Defendant Wood's default was duly entered, and thereafter the court rendered judgment against him in the sum of $8,000, which judgment was entered October 14, 1936. On November 9, 1936, defendant Wood moved the court to vacate the default entered against him and to set aside the judgment entered pursuant thereto, which said motion was by the court denied on January 11, 1937. Notice of entry of the judgment was served and filed February 1, 1937. Defendant Wood filed his notice of appeal on January 20, 1937, which was more than sixty days after the entry of judgment, but within sixty days after the entry of the order denying his motion to vacate the same judgment.

[1-3] Section 939 of the Code of Civil Procedure provides that an appeal, to be timely, must be taken within sixty days after entry of the judgment or order which it is sought to have reviewed. In Lawson v. Guild, 215 Cal. 378, at page 380, 10 P.2d 459, the Supreme Court says: "The statute limiting the time in which an appeal may be taken is jurisdictional and mandatory. If the appeal is not taken within the time allowed by law, an appellate court has no power to entertain it." Citing Bley v. Board of Dental Examiners, 101 Cal.App. 666, 669, 282 P. 19. In the case of Lawson v. Guild, supra, it is also settled that service of notice of entry of judgment is not necessary to start the time running within which an appeal may be taken, citing also, Schainman v. Kierce, 199 Cal. 249, 251, 248 P. 905. Of necessity, it therefore follows that the appeal from the judgment herein must be dismissed.

[4] Appellant, however, contends that his appeal from the order denying the motion to set aside the judgment was seasonably taken and is now properly before us. It is the settled law of this state that an appeal will not lie from an order refusing to vacate a final judgment if the grounds upon which the party sought to have the same vacated existed before the entry of judgment and were available on appeal from the judgment. Lawson v. Guild, supra; Barry v. Learner, 113 Cal. App. 651, 299 P. 82. Appellant's motion to vacate was grounded solely upon the claim that the court below was without any jurisdiction to enter the default or direct a judgment against appellant, by reason of constitutional and statutory defects alleged to exist in section 404 of the Motor Vehicle Code as it existed in 1936, at the time of the happening of the accident out of which this litigation grew. These matters were all reviewable upon appeal from the judgment, and an order refusing to set aside the judgment on these grounds is not, therefore, an appealable order.

The appeal taken from the judgment and the order refusing to vacate the judgment is therefore dismissed.

We concur: YORK, P. J.; DORAN, J.

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27 Cal.App.2d 551

APPELL v. WEBSTER et al.

Civ. 10805.

District Court of Appeal, First District, Division 2, California.

July 13, 1938.

1. Trover and conversion ⚷35

Evidence that deceased's stock certificate contained an assignment, signed by deceased, to holder of notes made by deceased, that on deceased's default on notes stock was sold by holder at public sale as a pledge to secure the notes, and that holder of notes purchased the stock, *held* insufficient to make prima facie case for trier of facts regarding conversion of stock by holder, as against contention that burden was on holder to prove special defense that stock was pledged to holder.

2. Trial ⚷174

In action for conversion of stock, defendants' motion for nonsuit on ground that plaintiff had failed to prove his cause of action, in that stock certificate issued to plaintiff's deceased bore indorsement by deceased and that it was admitted that stock was sold by indorsee as a pledge, sufficiently stated grounds of motion.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by George Appell, as administrator of the estate of Sherman Appell, deceased, against Hal A. Webster, sometimes known as Hal Webster, and another, to recover for the alleged conversion of certain shares of stock. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

George Appell, of Los Angeles, in pro. per., and Geary & Geary, of Oakland, for appellant.

Decoto & Hardin, of Oakland, for respondents.

SPENCE, Justice.

Plaintiff brought this action as administrator of the estate of Sherman Appell, deceased, for the alleged conversion of certain shares of stock in the Hal Webster Co., a corporation. At the close of plaintiff's case, defendants moved for a nonsuit, which motion was granted. A judgment of nonsuit was thereupon entered and plaintiff appeals therefrom.

Plaintiff alleged in substance that Sherman Appell, deceased, was the owner of 999½ shares of said stock at the time of his death and that plaintiff thereafter became the owner thereof as administrator of the estate of said deceased; that on April 7, 1937, defendants unlawfully converted said stock to their own use to plaintiff's damage in the sum of $7,500. Defendants denied all the material allegations of the amended complaint, and as a separate and further defense alleged that during his lifetime, said Sherman Appell had executed two promissory notes in favor of defendant Hazel P. Webster and had pledged said shares of stock to said defendant as security for the payment of said promissory notes; that thereafter default was made in the payment of said notes and that after demand and nonpayment thereof, defendant Hazel P. Webster sold said shares of stock at public auction to the highest bidder, pursuant to notice of sale of pledged property given in the manner required by law, for the sum due as principal and interest on said promissory notes and no more.

The proceedings on the trial were very brief. The only witness called by plaintiff was defendant Hal Webster, who was called under section 2055 of the Code of Civil Procedure. The stock certificate issued to Sherman Appell was admitted in evidence as plaintiff's exhibit number 2. On said stock certificate appeared the following assignment signed by the deceased:

"For value received, I hereby sell, assign and transfer unto Hazel P. Webster, nine hundred and ninety-nine ½ shares (999½) represented by the within certificate and do hereby irrevocably constitute and appoint Hal Webster attorney to transfer the said shares on the share register of the within named corporation, with full power of substitution in the premises.

"Dated March 4, 1934.

"Sherman Appell

"In presence of
"Hal A. Webster."

The notes signed by the deceased were also admitted in evidence. It was stipulated that said stock was purchased by defendant Hazel P. Webster at the public sale held in April, 1937. Counsel for respondents stated: "I would like to ask Mr. Appell with reference to the question about the legality of the sale." Mr. Appell, the plaintiff, replied: "I am not raising that question at all, the sale of the 999½ shares." No other evidence material to this discussion was introduced before plaintiff rested.

Counsel for defendants then moved for a nonsuit "upon the ground that plaintiff has wholly failed to prove a cause of action in this matter, and in that connection may I point out to your Honor, that Plaintiff's Exhibit 2, which is the certificate of stock of the Hal P. Webster Company issued to Sherman Appell, bears on the back thereof the endorsement by Sherman Appell to Hazel P. Webster, and it is admitted here in this testimony that on April 7th, at a sale this stock was sold as a pledge, and I think plaintiff has wholly failed to prove the issues set forth in the complaint". Argument followed in which the court pointed out to plaintiff that an agreement between the deceased and defendant Hal A. Webster, introduced in evidence, did not prohibit the subsequent pledge of the stock and that in any event defendant Hazel P. Webster was not a party to said agreement. The court then stated, "The evidence shows that on its face the certificate of stock was assigned on March 4th, 1934, to the defendant Hazel Webster and I feel there has been a failure of proof of any conversion. The motion for a nonsuit may be granted."

[1, 2] Appellant contends that the trial court erred in granting the motion for nonsuit but we find no merit in this contention. The record contains no evidence whatever showing any wrongful act on the part of either of respondents with respect to said shares of stock. On the contrary, it affirmatively shows that said shares of stock were duly assigned by Sherman Appell, now deceased, to respondent Hazel P. Webster on March 4, 1934. Appellant argues that he had made out a prima facie case and "the burden of proof was upon respondents to prove their special defense of alleged pledge of the stock". It is a sufficient answer to point out that appellant had wholly failed to make out a prima facie case of conversion or any other wrongful act. Appellant further argues that respondents' motion was defective because the grounds thereof were not stated. We are of the opinion, however, that it sufficiently appears from what has been said that the grounds of the motion were adequately stated.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

27 Cal.App.2d 579

COLEMAN v. CALIFORNIA YEARLY MEETING OF FRIENDS CHURCH.

Civ. 11470.

District Court of Appeal, Second District, Division 1, California.

July 15, 1938.

1. Negligence ⚷89(1)

Members of a congregation who donated their labor to the construction of a new meetinghouse were engaged in a "joint enterprise" within the law of negligence since a community of interests in the objects of the undertaking and an equality of right to direct each other's conduct was present.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words & Phrases.]

2. Negligence ⚷89(1)

A carpenter who volunteered to contribute his services to building a new meetinghouse for a church which he had been attending although he was not a member was engaged in a "joint enterprise" with other members contributing services and with church corporation notwithstanding that he did not have power to bind the joint enterprise or to take part in its management.

3. Torts ⚷3

A "tort" consists in a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction.

[Ed. Note.—For other definitions of "Tort," see Words & Phrases.]

4. Torts ⚷3

To constitute an "actionable tort," there must be a legal duty, imposed by statute or otherwise, owing by defendant to the one injured, and in the absence of such duty damage caused is "injury without wrong" or "damnum absque injuria."

[Ed. Note.—For other definitions of "Damnum Absque Injuria," see Words & Phrases.]

5. Negligence ⚷89(1)

Where a carpenter, who was injured when a joist broke in the ceiling of a religious meetinghouse which he had volunteered to help construct, was engaged in a joint enterprise with religious corporation and members of church who also donated services although carpenter was not a member of church, injury did not result from the violation of any duty owed by corporation concerning carpenter's safety, and recovery for such injuries could not be had on the ground that corporation was negligent.

6. Negligence ⚷1

The essential elements constituting "actionable negligence" are a duty or obligation which the defendant is under to protect the plaintiff from injury, failure to discharge duty and injury resulting from failure.

[Ed. Note.—For other definitions of "Actionable Negligence," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; E. R. Brand, Judge.

Action by William M. Coleman against the California Yearly Meeting of Friends Church for injuries sustained in constructing a new meetinghouse. Judgment for defendant after granting motion for nonsuit, and plaintiff appeals.

Affirmed.

Charles T. Woodbury, of Inglewood, and William C. Jensen, of Los Angeles, for appellant.

Gerald C. Kepple and Thomas W. Bewley, both of Whittier, for respondent.

WHITE, Justice.

This is an appeal by plaintiff from a judgment entered in favor of the defendant after an order granting its motion for a nonsuit. Defendant is a corporation organized for religious purposes, and holds title to real property for the benefit of various congregations or branches, designated as "meetings", of the Friends Church, commonly known as Quakers. One of these congregations or meetings, located at Inglewood in Los Angeles county, determined upon the erection of a new meetinghouse. The pastor of the Inglewood church made an appeal to the members of the meeting to volunteer their services in building the new meetinghouse. The plaintiff, though not a member of the Inglewood meeting, had been attending Sunday services, and responding to the aforesaid appeal by the pastor, he volunteered to contribute his work as a carpenter on the new meetinghouse. As he was so working on August 20, 1934, he stepped out on a ceiling joist which broke under his weight, and he fell to the floor below, sustaining injuries to his right ankle and leg. At the time of the injury plaintiff was regularly and gainfully employed by the National Supply Company, and was only working on the meetinghouse during the time when he was not engaged at his regular employment. For his services in connection with the erection of the meetinghouse plaintiff received no compensation in the way of money or other thing of material value.

The briefs of the respective parties are devoted in their entirety to the question of the status occupied by appellants in performing the services in connection with the building of the meetinghouse, it being contended by appellant that he was either an employee or an invitee; while respondent urges that he was neither an employee nor an invitee, but a volunteer; but that if he was an employee, jurisdiction to compensate him for injuries sustained was vested solely in the industrial accident commission under the workmen's compensation and employers' liability law (Stats. 1917, p. 831). Respondent further contends that in the event the evidence does not show that its workmen's compensation and employers' liability insurance policy covered the particular employment upon which appellant was engaged, and that he was an employee, that he was guilty of negligence which proximately contributed to the injuries he sustained, while it is claimed that respondent was free from negligence.

[1, 2] None of the foregoing contentions are determinative of the issues presented herein. The testimony adduced at the trial clearly showed that this church was being erected with labor contributed by members of the congregation or attendants at church services, and was to be used by them in the performance of their spiritual duties and obligations as well as for recreational and social activities incident thereto. As to plaintiff, the pastor, and the other members of the meeting or congregation who donated their labor, this project was, within the meaning of the law of negligence, a joint enterprise, because there was present here a community of interest in the objects or purposes of the undertaking. There was also equality of right to direct and govern the movements and conduct of each other with reference thereto—that is to say, while appellant could not supervise the conduct of anyone else interested in the construction of the church, neither did those others have authority to direct appellant, either as to the time when he would come to work, how long he would work, the quantity of work he should do, or the time when he should quit work. While it is true appellant did not have the power to bind the joint enterprise, nor to take part in the management of the same, yet in a joint venture one or more of the partners oftentimes do not have those usual powers of a general partner.

[3-6] This action sounds in tort, and a tort in contemplation of law consists in a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. Hallidie v. Enginger, 175 Cal. 505, 166 P. 1. The evidence in this case plainly indicates that the plaintiff seeks to recover because defendant neglected to do something which it ought to have done, whereby plaintiff suffered injury. In order to constitute an actionable tort, there must be a legal duty—imposed by statute or otherwise—owing by the defendant to the one injured, for in the absence of such a duty any damage caused is injury without wrong—damnum absque injuria. Wilson v. Union Iron Works Dry Dock Co., 167 Cal. 539, 140 P. 250; Mernin v. Cory, 145 Cal. 573, 79 P. 174; Smith v. Whittier, 95 Cal. 279, 30 P. 529; People v. Schmitz, 7 Cal.App. 330, 370, 94 P. 407, 419, 15 L.R.A.,N.S., 717. A reading of the evidence in this case does not indicate the existence of any such duty on the part of respondent to appellant. In view of the relation existing between the parties here, coupled with the circumstances surrounding the accident, where appellant and respondent were engaged in a joint enterprise, and appellant was injured while performing an act in furtherance of their joint venture, we are unable to perceive the existence of any duty reposing upon respondent the violation of which resulted in injury to appellant. In order to constitute actionable negligence, there must exist three essential elements—namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. And the evidence must support them, while the absence of proof of any one of them is fatal to recovery. Means v. Southern Cal. Ry. Co., 144 Cal. 473, 478, 77 P. 1001, 1 Ann.Cas. 206. The evidence introduced at the trial does not meet all these essential requirements, but, on the contrary, shows an entire absence of any duty resting upon respondent toward appellant with reference to the lat-

ter's safety in the manner of his doing the things which resulted in the accident and injury; and hence we find the absence of one of the essential requirements to a recovery under the rule of law referred to. A nonsuit should have been granted.

Judgment affirmed.

We concur: YORK, P. J.; DORAN, J.

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27 Cal.App.2d 548

HOMESTEAD VALLEY SANITARY DIST. v. DONOHUE, County Tax Collector.

BARNETT v. REDDING, County Treasurer.

Civ. 10766, 10767.

District Court of Appeal, First District, Division 2, California.

July 12, 1938.

1. Statutes 🔑162

The rule that the provisions of a prior special act control inconsistent provisions of subsequently enacted general law is not a rule of positive law, but is a rule of construction which must yield where there is a manifest legislative intention that the general act shall be of universal application, notwithstanding the prior special or local act.

2. Drains 🔑67

The provision of the general law that governing body of any special tax or assessment district where a tax levy for such district is not carried on the regular county or city and county assessment roll, except seven enumerated classes of districts expressly exempted, shall file with county board of supervisors itemized estimate of expenditures and income for preceding and next ensuing fiscal year, manifests legislative intent to apply budgetary scheme to all local tax assessment districts except those expressly exempted from operation thereof and was not construable to exempt sanitary districts created under prior special act, since such construction would constitute judicial legislation. Gen.Laws 1931, Act 7105; Pol. Code, § 3714b, as added by St.1933, p. 2204.

Appeal from Superior Court, Marin County; A. F. Bray, Judge.

Two proceedings for writs of mandate by the Homestead Valley Sanitary District against M. F. Donohue, County Tax Collector of Marin County, and Phillip Barnett against Charles A. Redding, County Treasurer of Marin County, which were consolidated for hearing. From judgments denying both applications, the plaintiffs appeal.

Affirmed.

Phillip Barnett and Samuel Vartan, both of San Francisco, for appellants.

A. E. Bagshaw, Dist. Atty., of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiffs each sought a writ of mandate in the superior court; the causes were consolidated for hearing; both applications were denied. The two appeals of the plaintiffs are, by stipulation, heard upon the same briefs.

The Sanitary District was regularly organized under the Sanitary District Act of 1923. Act 7105, Deering's Gen.Laws. It demanded of the county tax collector that he collect special taxes for its benefit in accordance with an assessment list which the governing board of the district prepared. The tax collector refused the demand on the ground that the assessment was not approved by the county board of supervisors pursuant to the provisions of section 3714b of the Political Code, as added by St.1933, p. 2204.

The plaintiff Barnett was regularly employed as special counsel for the district. He demanded of the county treasurer the payment of a sum for legal services performed for the district, his demand having been approved by the directors of the Sanitary District. This demand was refused upon the same ground—noncompliance with the code section.

The question involved in both appeals is whether this section controls the action of the governing body of the Sanitary District in the matter of levying assessments and disbursing funds for district purposes. The section reads in part:

"(1) The governing body of any special tax or assessment district in a county where a tax levy for such district is not carried upon the regular county or city and county asssessment roll, except irrigation, reclamation, water conservation, drainage and levee districts, revenue producing utility districts and those districts that are situated in two or more counties, shall at least sixty days prior to the time the county board of supervisors is required by law to pass upon the general county budget, file with the county board of supervisors of such county an itemized estimate of expenditures and income for the preceding and next ensuing fiscal year.

"(2) *Contents.* The estimate shall be known as the district budget and shall state:

"(a) The probable revenues from sources other than taxation or assessment that will accrue during the next ensuing fiscal year;

"(b) All expenditures required by such district for the next ensuing fiscal year. * * *

"(5) *Consideration.* The board of supervisors of the county shall consider such budget at the time and in the manner and form prescribed by section 3714 of the Political Code. * * *

"(7) *Assessment limited by budget.* No tax or assessment for district purposes whether or not such taxes or assessments appear on the regular county assessment roll, shall exceed the amount approved in the budget by the county board of supervisors."

[1] Because the district was formed under the special Sanitary District Act of 1923, and because the limitations on the taxing power are found in the general provisions of the code section enacted in 1933, the appellants argue that special provisions of the act should control the general provisions of the code. This rule of statutory construction "is not a rule of positive law, but of construction, and it must yield where there is a manifest legislative intention that the general act shall be of universal application, notwithstanding the prior special or local act". 25 R.C.L., p. 928.

[2] Here there is no room for judicial construction because the positive terms of the code section demonstrate that it was the intention of the legislature to apply the budgetary scheme to all local tax assessment districts except those which are expressly exempted from the operation of the section. Construction under such circumstances would be judicial legislation. By expressly exempting seven of such local districts by name, the legislature must be deemed to have intended to include all such districts as were not designated.

Appellants argued that we should construe the code section as applicable only to departments, subdivisions, and districts of a county, and not to a self-governing district such as this. But the legislature declared that it should apply to "any special tax or assessment district in a county" except the seven classes of districts expressly exempted. There is no ambiguity here and no room for judicial construction resting merely on a judicial view of the expediency of the legislation.

On these two points we find no purpose in discussing the authorities cited by appellants on the general rules of statutory construction as they apply only to circumstances where the statutes involved were ambiguous or their application to other legislation was uncertain. Here there is no ambiguity or uncertainty, and no doubt of the legislative intent.

The judgments are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

BERRY v. MAYWOOD MUT. WATER CO. NUMBER ONE.*

Civ. 11474.

District Court of Appeal, Second District, Division 1, California.

July 19, 1938.

Rehearing Denied Aug. 13, 1938.

Hearing Granted by Supreme Court Sept. 15, 1938.

1. Trial 🔑59(1)
Witnesses 🔑269(15)

In attorney's action against corporation to recover for legal services, where attorney testified that none of the items sued on had been paid, court erred in permitting corporation, on cross-examination of attorney, to question attorney as to receipt of money from corporation and to introduce in evidence receipts signed by attorney acknowledging receipts from corporation of various sums as attorney's fees, and checks of corporation payable to attorney, since proof of payment was a matter of defense to be established only in corporation's case in chief.

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*For subsequent opinion see 88 P.2d 705.

2. Attorney and client ⚷166(5)

In attorney's action against corporation to recover for legal services, burden of proving payment was upon corporation.

3. Attorney and client ⚷166(3)

In attorney's action against corporation to recover for legal services, burden of proving oral agreements regarding attorney's compensation, which tended to defeat attorney's claims, was on corporation.

◆

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Victor A. Berry against the Maywood Mutual Water Company Number One to recover for alleged legal services rendered by plaintiff to defendant. Judgment for defendant, and plaintiff appeals.

Reversed.

Victor A. Berry, in pro. per., and Earl Blodgett, of Los Angeles, for appellant.

H. W. Shaw, of Los Angeles, and Pearson C. Schaefer, of Glendale, for respondent.

YORK, Presiding Justice.

Appellant brought an action against the respondent mutual water company to recover the sum of $2,150 for alleged legal services rendered by him to said company during the period of May 1, 1933, to May 20, 1935, in the handling of five causes of action which are itemized in a bill of particulars set out in the engrossed bill of exceptions on file herein. The first cause of action is for reasonable value of such services, and the second cause of action is based upon an open book account.

Respondent in defense alleged payment for the services rendered during the period in question, and also set up two oral agreements, one of April 12, 1933, pursuant to which it is alleged appellant was to handle all legal business for respondent on a monthly retainer of $50. The other oral agreement is alleged to have been entered into on September 12, 1934, under the terms of which appellant was to continue to receive the monthly retainer of $50 and in addition thereto the sum of "$50 per day while on trial in court for any and all cases then pending".

This is the second appeal in the case, the first being reported in 11 Cal.App.2d 479, 53 P.2d 1032, reversing a judgment for appellant. In the instant trial, judgment was rendered in favor of respondent corporation, from which judgment this appeal is taken.

Upon direct examination, appellant testified concerning the items of the bill of particulars upon which he is suing: "None of these sums of money have been paid to me, no part of it." Upon cross-examination, appellant was asked "During the years 1933, 1934 and up to the first of May, 1935, did you receive any moneys from the Maywood Mutual Water Company?", to which question appellant objected; his objection being overruled, he duly excepted to the ruling and answered: "The retainer fee was started about February 1, 1934. That was on account of the time involved. My time was taken up constantly by Mr. Goodway. I had a conversation with him at the office of the company. I told him he took up too much of my time and that I wanted $50.00 a month retainer, and that would not include any appearance in court. I was not paid the retainer fee for the month of May, 1935." Respondent then introduced its letter to appellant dated May 9, 1935, to-wit:

"Dear Sir: The Board of Directors, at their meeting on the 8th inst. passed a resolution to discontinue your employment on a monthly salary basis, but to continue your employment in the cases now on file. To-wit, The Gale case, the Strauss case, and the case against the old Board, on a fifty dollar ($50.00) per day basis for time in Court when the cases are tried, and instructed me to notify you of their decision. Respectfully, Miriam Kelly, Sect."

Thereupon, over the objection of appellant, respondent's exhibits thirty-six in number, "C to LL", were received in evidence. Exhibits "C to O", inclusive, were thirteen receipts dated June 10, 1933, to January 3, 1934, signed by appellant acknowledging receipt of various sums of money aggregating $475 to apply on attorney's fees. Exhibits "P to LL" consisted of twenty-three checks dated February 5, 1934, to May 1, 1935, made payable to appellant and aggregating the sum of $1,400. From notations appearing on the face of each check, as well as from the testimony of appellant, it appears that fifteen were given in payment of the monthly retainer from February, 1934, to and including April, 1935, and the other eight were for services rendered in connection with cases other than those itemized in the bill of particulars and for which appellant is here seeking compensation.

Appellant urges that the court erred in admitting this evidence, first, because it was not proper cross-examination in that it was unnecessary for appellant to prove nonpayment of the debt sued upon; and second, because the introduction of the checks and receipts, none of which tended to reduce his demands in this action in any manner, was in anticipation of respondent's defense of payment.

In support of this contention, appellant cites the case of Haines v. Snedigar, 110 Cal. 18, 42 P. 462. That was an action on a promissory note, alleged in the usual form. The answer admitted making the note but pleaded part payment and a contract in writing as defenses. Upon direct examination of plaintiff Haines, the promissory note was presented, and he testified that it belonged to plaintiffs and was signed by defendant, whereupon it was admitted in evidence, and the witness added: "No part of that note has been paid." On cross-examination the witness testified that the consideration for the note was a harvester. Defendant's counsel was then permitted, against the objection of plaintiffs, to prove that after the execution of the note a new agreement was entered into between the parties, which agreement was produced, its execution proved, and thereupon, against the objection of plaintiffs, it was admitted in evidence. It was there held (page 21, 42 P. page 463): "We think the court erred in its rulings. The defense set up by defendant involved the plea of an entirely new and distinct contract, made subsequent to the contract upon which the action was based. It was a plea by way of confession and avoidance, involving new matter to be proven by the defendant. Its allegations are, under our Code, to be treated as though denied. The entire answer is made up of affirmative matter. Whatever was necessary to be alleged therein devolved upon the defendant to prove. But he could not, by any recognized rule of procedure, offer such proofs until plaintiffs had made their case, and submitted it to the court. * * * The limit placed upon cross-examination is so largely within the discretion of the trial court that its action in allowing a wide range to questions upon cross-examination will only be reversed in extreme cases.

"The court might in its discretion, as is often done, permit the defendant to prove by plaintiffs' witness, when on the stand, the due execution of an agreement important to his defense. This course, treated as a mere matter of convenience, was not open to serious objection. To permit this agreement to be then admitted in evidence was, however, quite a different matter.

"It was in effect to inject into the case of the plaintiffs a portion of the defense, and was subversive of known and fixed rules of procedure, and violative of the whole theory upon which those rules are founded. The proof of the execution of the written agreement of August 6, 1892, was not proper in cross-examination, and its admission in evidence was error.

"Greenleaf, in his work on Evidence, volume 1, § 447, after discussing the difficulty of laying down a precise rule in reference to the limit to be placed upon cross-examination, adds: 'A party, however, who has not opened his own case, will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party, though, after opening it, he may recall them for that purpose.'"

[1-3] The situation here is obviously analogous to that announced in the cited case. It was incumbent upon respondent mutual water company to prove payment of the items sued upon by appellant, and as well to prove the existence of the two oral agreements. Such proof was not proper upon cross-examination of appellant before respondent opened its defense, and its admission in evidence was error.

In view of the fact that a reversal of the judgment is deemed advisable, it will not be necessary to consider appellant's second point to the effect that certain findings are not supported by the evidence, are contrary thereto and contrary to each other.

The judgment is reversed.

We concur: DORAN, J.; WHITE, J.

27 Cal.App.2d 562

MOELLER v. MARKET STREET RY. CO. et al.

Civ. 10516.

District Court of Appeal, First District, Division 1, California.

July 14, 1938.

Rehearing Denied Aug. 13, 1938.

Hearing Denied by Supreme Court Sept. 12, 1938.

1. Evidence ⚿588

In street car passenger's action for injuries received when street car was suddenly started while she was alighting, contradiction in testimony of witnesses as to manner in which street car was operated and physical facts tending to contradict testimony did not establish that passenger's evidence was inherently improbable but merely concerned credibility of witnesses and weight and effect to be given to passenger's evidence.

2. Appeal and error ⚿994(2), 1003
Trial ⚿139(1), 140(1)

Decision on credibility of witnesses and weight and effect of their evidence is for the jury and verdict is final and conclusive on such question.

3. Carriers ⚿318(1)

Evidence *held* to justify judgment against street railroad company and crew of street car for injuries received by passenger while alighting from car on ground that injuries were received because of negligence of crew in starting street car as passenger was alighting therefrom.

4. Carriers ⚿306(1)

A street car conductor was not absolved from liability for injuries received by passenger when car was suddenly started while passenger was attempting to alight because he gave no signal to motorman, since conductor was in charge of street car and had duty before permitting motorman to start car to ascertain if any passenger was attempting to disembark and failure so to do was negligence.

5. Carriers ⚿321(23)

In street car passenger's action against street railroad company and street car motorman and conductor for injuries received when street car was suddenly started as passenger was attempting to alight, instruction that it was admitted fact that conductor was operating, managing and controlling street car, was not error notwithstanding that answer contained no such admission where answer admitted that he was conductor on street car and was acting within scope of his employment as such at the time of the accident, since duties of conductor gave him control and management of operation of street car.

6. Carriers ⚿303(5)

A street railroad company as employer of crew of street car could be held liable for injuries received by passenger when street car was suddenly started while passenger was alighting only if employees of company were negligent.

7. Carriers ⚿295(1)

Employees operating street car must exercise same degree of care as that to which street railroad company is held in order to secure performance of duty imposed on common carrier by statute, since company could only operate street car by its employees. Civ.Code, § 2100.

8. Carriers ⚿321(21)

In action against street railroad company and street car crew for injuries received by passenger when car was suddenly started as passenger attempted to alight, use of word "presumption" in instruction on doctrine of res ipsa loquitur that prima facie "presumption" of negligence arose on proof that passenger was injured by act of carrier in exclusive control of movement of car was erroneous and word "inference" should have been substituted therefor.

9. Appeal and error ⚿1064(1)

In passenger's action against street railroad company and street car crew for injuries received when car was suddenly started while passenger was attempting to alight, erroneous use of word "presumption" instead of "inference" in instruction on doctrine of res ipsa loquitur was not prejudicial and hence did not warrant reversal of judgment for passenger under evidence.

10. Carriers ⚿321(21)

In action against street railroad company and street car crew for injuries received by passenger when car was suddenly started while passenger was alighting, instruction on doctrine of res ipsa loquitur was not erroneous as throwing on street railroad company and street car crew burden of proving freedom from negligence if passenger's evidence tended to prove that her injury was caused by acts of carrier while in exclusive control of car's movements.

11. Carriers ⚿321(21)

In passenger's action against street railroad company and street car crew for injuries received when car was suddenly started while passenger was attempting to alight, instruction that law presumes that crew used requisite care and acted as reasonably prudent persons was properly refused, since doctrine of res ipsa loquitur raised inference of negligence.

12. Damages ⚿208(1)

In street car passenger's action for injuries received when street car was suddenly started while passenger was attempting to alight, question whether passenger had suffered concussion of brain as result of accident was for jury under conflicting evidence.

13. Carriers ⚿316(1)
Damages ⚿163(1)

In passenger's action against street railroad company and street car crew for injuries received when car was suddenly started when passenger was attempting to alight, wherein passenger claimed as principal item of damage that she had suffered miscarriage, passenger had burden to prove not only that defendants' negligence was proximate cause of her fall but that her fall was proximate cause of miscarriage.

14. Damages ⚿185(1)

In passenger's action against street railroad company and street car crew for injuries received when car was suddenly started as passenger was attempting to alight, wherein passenger claimed that she had suffered miscarriage as result of accident, testimony which left to surmise and conjecture causal connection between accident and miscarriage was insufficient to justify award of damages for miscarriage.

15. Appeal and error ⚿1178(6)

Where evidence in action for injuries was sufficient to justify judgment against defendants on ground that defendants' negligence caused accident, but evidence was insufficient to support award of damages, judgment was required to be reversed and remanded for new trial solely on issue of amount of damages, with direction to trial court to enter judgment in favor of plaintiff for amount of damages so found on determination of such issue.

* * *

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Antonia I. Moeller against the Market Street Railway Company and others for injuries received when street car on which plaintiff was passenger was suddenly started while she was alighting therefrom. Judgment for plaintiff, and defendants appeal.

Reversed and remanded with directions.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Faulkner & O'Connor, of San Francisco, for respondent.

GRAY, Justice pro tem.

The jury awarded plaintiff $5,000 against defendants Market Street Railway Company, August Stoltz, its motorman, and Daniel Cassotta, its conductor, for personal injuries, which she claimed to have received because defendants negligently started a street car as she was alighting therefrom. From the judgment entered accordingly, defendants appeal, assigning as error (1) the insufficiency of the evidence; (2) certain instructions given and refused; (3) excessive damages, and (4) denial of their motion for a new trial.

[1-3] As is usual in this type of litigation, the respective versions of the accident, while each sufficient to support a verdict, are in irreconcilable conflict. Plaintiff testified that she had been sitting near the rear exit of a street car which was southbound on San Bruno avenue in San Francisco; that the street car stopped at Arleta street in response to her signal; that the conductor was then on the front platform conversing with the motorman; that a number of passengers got off at the front end; that as she, in leaving the street car, placed one foot on a rear step and the other on the ground, the street car started with a jerk and she was thrown to the pavement. Her testimony was corroborated by a salesman, and by the proprietor of a gasoline service station, who each stated that while talking to the other at the station he saw the car stop, several passengers get off, the car start as plaintiff was stepping off, plaintiff fall, and the crew of the car leave its front end in going to plaintiff's aid. The salesman did not know from which end the other passengers disembarked, but the proprietor said that they left from the rear. In contradiction of plaintiff, the conductor stated that he was standing on the rear platform; that plaintiff suddenly attempted to alight from

the rear exit, when the car was yet four or five feet from its stop; that but one stop was made and that no other passengers got off. The motorman likewise swore that he made a single stop, in compliance with the company's rules, but not in response to any signal and that no passengers unloaded at the front end. After a painstaking analysis of the evidence in fuller detail defendants argue that while the evidence produced by plaintiff superficially is sufficient to sustain the verdict, yet it is incredible for the following reasons: Plaintiff differs with the proprietor as to the place of departure of the other passengers. She and her witnesses disagree with the car crew as to the departure of such passengers. The absence of such passengers from the scene, after the accident, is unexplained. The testimony of herself and her witnesses as to the movement of the car cannot be reconciled with its known stopping place. The distance of the gasoline station from the street car made it impossible for her witnesses to have observed what they testified. Obviously such matters do not prove that plaintiff's evidence is inherently improbable but merely concern the credibility of her witnesses and the weight and effect to be given to her evidence. The decision upon such considerations is committed to the jury and its verdict is final and conclusive thereon. Skulte v. Ahern, 22 Cal.App.2d 460, 71 P.2d 340. Plaintiff's evidence is sufficient to support the jury's finding of defendants' liability.

[4, 5] The defendant Cassotta claims that the judgment against him must be reversed as there is no evidence that he was in any wise negligent. In support thereof, he points out that the evidence shows that he gave no signal to the motorman. But, since as conductor he was in charge of the street car, it was his duty, before permitting the motorman to start the street car, to ascertain if any passenger was attempting to disembark, and his failure so to do was negligence. Hoffman v. Pacific Electric R. Co., 45 Cal.App. 751, 188 P. 597; Gainer v. United Railroads of San Francisco, 58 Cal.App. 459, 208 P. 1013. He further contends that the court erred in instructing the jury that it was an admitted fact that he was operating, managing, and controlling the street car, because his answer contains no such admission. His answer, however, does admit that he was the conductor on such street car and that he was acting within the scope of his employment as such at the time of the accident. His duties as conductor gave him the control and management of the operation of the street car (12 Cor.Jur., p. 413), and therefore the instruction was correct.

[6, 7] The court gave several instructions, which are not criticized, to the effect that the Market Street Railway Company, as a carrier of passengers, was required, in the operation of its street car, to use the highest degree of care for plaintiff's safety, but it refused other instructions which stated that the conductor and motorman were required only to exercise ordinary care. Defendants assign such refusal as error upon the argument that the law imposes upon the employees actually operating the street car a lesser degree of care than it does upon their employer, a common carrier. But, on reason, such cannot be the law. Plaintiff's injuries were caused by the crew's operation of the street car, in which the company, being an artificial entity without physical existence, could and did not directly participate. The latter, as employer, can only be held liable if the former, its employees, were negligent. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am. St.Rep. 171; Thompson v. Southern Pac. Co., 31 Cal.App. 567, 161 P. 21; Fimple v. Southern Pacific Co., 38 Cal.App. 727, 177 P. 871. Under the refused instructions, the employees would be exonerated if they used ordinary care, while inconsistently the company might be held for its failure to use the highest degree of care. Obviously, since the company can only operate its street cars by its employees, the latter must be held to the same degree of care as the former in order to secure the performance of the duty imposed upon a common carrier by section 2100 of the Civil Code. Little v. Los Angeles Ry. Corp., 94 Cal.App. 303, 271 P. 134. In an action against a carrier alone, it has been held erroneous to instruct that its employees are required only to exercise ordinary care. Bosqui v. Sutro R. Co., 131 Cal. 390, 63 P. 682; Frost v. Los Angeles R. Co., 165 Cal. 365, 132 P. 442. In actions against a carrier and its employees, the latter have been held to the same degree of care as the law imposes upon the former. McNeil v. East Bay Street Rys. Ltd., 220 Cal. 591, 32 P. 2d 598; Bezera v. Associated Oil Co., 117 Cal.App. 139, 3 P.2d 622.

[8-11] The following instruction on the doctrine of res ipsa loquitur was given: "* * * A prima facie case for the plaintiff is established when the plaintiff shows

that she was injured while being carried as a passenger by the defendant, Market Street Railway Company, and that the injury, if any, was caused by the act of the carrier in the exclusive control of the movement of the car used in its business. In such a case there is a prima facie presumption of negligence which throws upon the carrier the burden of showing the injury was sustained without negligence on the part of the carrier." Substantially, the same instruction was approved in Jones v. United Railroads, of San Francisco, 54 Cal.App. 744, 202 P. 919. However, as defendants argue, the use of the word "presumption" was erroneous and the word "inference" should have been substituted therefor. Dowd v. Atlas Taxicab & Auto Service Co., 187 Cal. 523, 202 P. 870. But this error, under the evidence, was not prejudicial and therefore does not warrant a reversal. Lawrence v. Pickwick Stages, Northern Division, Inc., 68 Cal.App. 494, 229 P. 885; Atkinson v. United Railroads of San Francisco, 71 Cal. App. 82, 234 P. 863; Harvey v. San Diego Electric R. Co., 92 Cal.App. 487, 268 P. 468; Even v. Pickwick Stages System, 109 Cal. App. 636, 293 P. 700; Hilson v. Pacific Gas & Electric Co., 131 Cal.App. 427, 21 P.2d 662. Defendants further complain that the instruction erroneously threw upon them the burden of proving their freedom from negligence if plaintiff's evidence tended to prove that her injury was caused by the act of the carrier, while in exclusive control of the car's movement. They argue that a correct statement of the doctrine would require the jury, before applying it, to first find as a fact, after weighing all of the evidence, that her injuries were so caused. This same argument was considered by this court in Lynch v. Market Street R. Co., 130 Cal.App. 433, 19 P.2d 1009, and there held untenable. An instruction that the law presumes that the carmen used the requisite care and acted as reasonably prudent persons was properly refused as the doctrine of res ipsa loquitur raised an inference of negligence. Smith v. Hollander, 85 Cal. App. 535, 259 P. 958. There is no error in the instructions which requires a reversal.

[12] Immediately after her fall, plaintiff was taken by ambulance to an emergency hospital, where she remained for seven hours and was then removed to another emergency hospital. Later in the evening she was taken to her home. On the next day she was visited by a physician in whose care she continued until the trial. The evidence, without conflict, shows that she sustained multiple contusions of her head, back and buttocks, which, while temporarily painful, healed normally and without any permanent ill effects. Upon his first visit, she complained to her attending physician of severe headaches, dizziness and nausea, and told him that she had been unconscious following the accident. Upon the basis of these symptoms, he expressed the opinion that she had suffered a concussion of the brain. The car crew, the ambulance attendance and the emergency doctor each testified that at the time of his observation she was conscious. An expert for defendants swore that there can be no concussion without unconsciousness. These contradictions merely raised a conflict which left to the jury's decision the correctness of the diagnosis. The concussion cleared up in due time without any residual ills, except possibly occasional headaches. Plaintiff evidently did not consider the concussion as serious, for she failed to include it among the injuries specified in her complaint.

The principal item of damage claimed by her was that she had suffered a miscarriage as a result of her fall. Plaintiff testified that at the time of the accident she was pregnant of four and one-half months' duration. A doctor, who had examined her several months before, stated that he then thought her pregnant. The emergency doctor said that she was not bleeding from the vagina nor complaining of abdominal pains when he examined her at the first emergency hospital. Her physician, on his first visit, found her bleeding profusely from the vagina and complaining of pains in the lower abdomen and then diagnosed her condition as an incomplete miscarriage. Not having seen her previously, his knowledge of her pregnancy was acquired from her. Such bleeding and complaints continuing for twelve days, he had her removed to a hospital where under an anaesthetic he dilated and curetted her womb, removing tissue which upon visual examination he determined to be a part of the afterbirth. Her testimony that a dead baby was then taken out of her is worthless, as the operation was performed while she was under an anaesthetic. She remained in the hospital for five days and then was taken to her home, where she was confined to her bed wholly for two months and partially for a third month. At the time of trial she was twenty-five or thirty pounds under weight, and her womb was enlarged thrice its normal size, inflamed and painful. Her expenses for medical services, hospitalization, nursing and X-rays amounted to $1,476.35. If plaintiff suffered a miscarriage as a result of her fall, the verdict for $5,000 is not excessive. Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 42 P. 983; Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597, L.R.A.1917A, 394.

[13, 14] The burden of proving not only that defendants' negligence was a proximate cause of her fall, but also that her fall was a proximate cause of her miscarriage, rested upon plaintiff. McConnell v. Quinn, 71 Cal. App. 671, 236 P. 200. An obstetrician, called by the defendants, testified without contradiction that a foetus, four and one-half months old, was of such a size that plaintiff would have known of its abortion. Other than her incredible statement that the baby was removed from her in the operation by her physician at the hospital, there is no evidence that she ever aborted. If her doctor's diagnosis that she was suffering from an incomplete miscarriage when he examined her on the day following the accident, is accepted, it is apparent that any miscarriage must have occurred previously. However, plaintiff did not claim to have miscarried between the accident and her doctor's examination. The emergency physician testified that on his examination made shortly after the accident, she did not show any symptoms of an incipient miscarriage. Her physician stated that in the operation twelve days after the accident, he removed what he concluded after a visual examination was a part of the afterbirth. The worth of this conclusion was attacked by the opinions of two experts for defendants to the effect that in the absence of personal knowledge of pregnancy and the passage of a foetus, the character of the removed tissue could not be determined without a microscopic examination. But even if her doctor's conclusion that he removed part of the afterbirth is accepted as true, yet the time of the miscarriage still remains uncertain. Such uncertainty leaves to surmise and conjecture the causal connection between the fall and the miscarriage. Symington v. Graham, 165 Md. 441, 169 A. 316; Lanham v. Illinois Central R. Co., 181 Ill.App. 63.

[15] As the jury, after a consideration of all available testimony, found upon sufficient evidence that defendants' negligence caused plaintiff's fall, there is no reason for a retrial of that issue. Since the evidence is insufficient to support the award of damages, that issue must be retried. This conclusion makes unnecessary the consideration of alleged errors in plaintiff's voluntary statements of poverty in her cross-examination and in the denial of a new trial upon the ground of newly discovered X-rays showing that plaintiff was not pregnant, for such errors only affected the award of damages. The judgment is therefore reversed, and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of plaintiff for the amount of damages so found upon a determination of that issue. Pretzer v. California Transit Co., 211 Cal. 202, 294 P. 382.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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27 Cal.App.2d 509

CHRONISTER et al. v. BRENNAN et al.

Civ. 11811.

District Court of Appeal, Second District, Division 2, California.

July 11, 1938.

1. Appeal and error ⊂=931(1)

On appeal from judgment for defendants rendered after trial without a jury, reviewing court would view evidence most favorably to defendants.

2. Automobiles ⊂=244(43)

In action arising out of automobile intersection collision, evidence that plaintiff stated immediately after the collision that "I was just driving along and all of a sudden a car appeared right in front of me" warranted finding that plaintiff was contributorily negligent in entering intersection without looking.

3. Appeal and error ⊂=996

Where different minds may reasonably draw different conclusions from the evidence, trial court's fact finding will not be disturbed on appeal.

4. Appeal and error ⚷931(1), 989

The reviewing court must resolve every substantial conflict in the evidence in favor of a fact finding, accept as true all evidence tending to establish the correctness of such finding, and disregard all contrary evidence.

5. Appeal and error ⚷1170(6)

In action arising out of collision between automobiles driven by two women, tried before court without a jury, trial judge's jocular expression of belief that both women were powdering their noses at time of collision, and similar comments, were not reversibly erroneous. Const. art. 6, § 4½.

6. New trial ⚷99

That counsel for an unsuccessful plaintiff had a written memorandum of statements by witnesses inconsistent with their subsequent testimony, which counsel forgot about until after the trial, was not ground for new trial as being newly discovered evidence.

7. Appeal and error ⚷981

Where newly discovered evidence is merely cumulative or merely tends to impair the credibility of prevailing party's evidence, trial court's denial of motion for new trial will not be disturbed on appeal.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Zuma A. Chronister and another against J. B. A. Brennan and another, for injuries suffered in automobile collision. From a judgment for defendants after trial before the court without a jury, plaintiffs appeal.

Affirmed.

Wm. J. Bryan, Jr., and Albert D. Pearce, both of Los Angeles, for appellants.

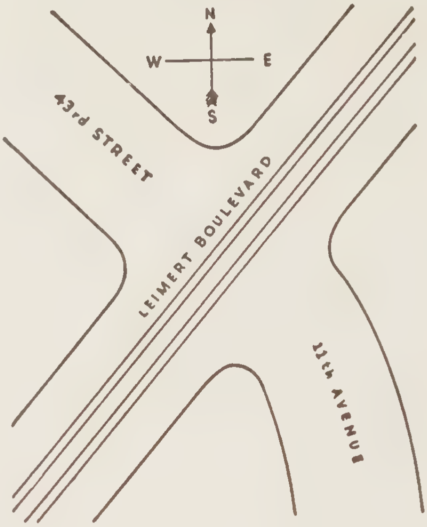
George L. Greer, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover damages for personal injuries resulting from an automobile accident plaintiffs appeal.

[1] Viewing the evidence most favorable to defendants (respondents) (Patten & Davies Lbr. Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429), the material facts are these:

Diagram of the Intersection Where the Accident Hereinafter Described Occurred



September 18, 1936, plaintiff Zuma Chronister was driving an automobile in a westerly direction on the northeast side of Leimert boulevard just east of where it intersects Forty-third street in the city of Los Angeles at the rate of about twenty-five miles per hour. She proceeded into the intersection and the front, left portion of her car collided with the right, front portion of an automobile being operated by defendant Agnes M. Brennan, who traveling in a northerly direction on Eleventh avenue had entered the intersection at a speed of approximately thirty-five miles per hour. As a result of the collision plaintiff Zuma Chronister received serious personal injuries.

Plaintiffs rely for reversal of the judgment on these propositions:

First: There was no substantial evidence to sustain the trial court's finding that plaintiff Zuma Chronister was contributorily negligent.

Second: The attitude of the trial judge was so biased and unfair that it amounted to a denial of justice to plaintiffs.

Third: The trial judge committed prejudicial error in refusing to grant plaintiffs' motion for a new trial on the ground of newly discovered evidence.

[2, 3] The first proposition must be answered in the negative. The law is settled in this jurisdiction that where different conclusions from the evidence may reasonably be drawn by different minds the trial court's finding of fact will not be disturbed on ap-

peal. Toms v. Mercantile Arcade Realty Corp., Cal.App., 76 P.2d 153.

Witness Card testified that immediately following the accident plaintiff Zuma Chronister stated to him in response to his query as to how the accident occurred, "Oh, I don't know; I was just driving along and all of a sudden a car appeared right in front of me."

The trial judge's conclusion that plaintiff Zuma Chronister was negligent in proceeding into an unobstructed intersection without looking to her left and observing the automobile approaching from a southerly direction driven by defendant Agnes Brennan thus finds support in the evidence and supports the finding that plaintiff Zuma Chronister was contributorily negligent.

[4] We are not unmindful that plaintiff Zuma Chronister denied having made the statement to the witness Card. However, it needs no citation of authority to support the well-established rule that every substantial conflict in the evidence must be resolved by this court in favor of a finding of fact and that a reviewing court must accept as true all evidence tending to establish the correctness of a finding and disregard all evidence contrary thereto.

[5] The second proposition is likewise untenable. At the conclusion of the trial the trial judge said among other things:

"I still adhere to the theory, although unsupported by the evidence, that both of them were powdering their respective noses and paying no attention to the mundane affairs of life."

Although the foregoing comment and others similar thereto do not comport with the dignity which should attach to a trial in the superior court or any other court, plaintiffs have failed to show wherein prejudice resulted to them from such expressions, and we must under article 6, section 4½ of the Constitution of the state of California disregard such statements.

[6] Plaintiff's final proposition is also untenable. On the motion for a new trial plaintiffs filed affidavits showing that:

(a) After the accident above described one of plaintiff's attorneys, Mr. Bryan, interviewed the witness Card and also the witness Simmons and these witnesses stated to him that they had not asked the plaintiff Zuma Chronister how the accident had happened; and he, Mr. Bryan, had a written memorandum of his interview with these witnesses but did not remember such memorandum until after the trial;

(b) Subsequent to the trial plaintiffs had located another eyewitness to the accident, John Higel, who would on a retrial testify that plaintiff Zuma Chronister did not make the statement attributed to her by witness Card.

As to the facts set forth under paragraph (a) above, it is obvious that the evidence therein described was not newly discovered, as it was in the possession of plaintiffs' attorney during the course of the trial. Mere forgetfulness upon the part of counsel is not a ground for granting a motion for a new trial.

[7] As to the facts set forth in paragraph (b), supra, the proposed evidence of Mr. Higel was merely cumulative of testimony introduced at the trial, plaintiff Zuma Chronister having denied that she had made the statements attributed to her. Where newly discovered evidence is merely cumulative or merely tends to impair the credibility of the evidence of the prevailing party, the trial court's ruling in denying a motion for a new trial will not be disturbed on appeal. Estate of Walden, 166 Cal. 446, 450, 137 P. 35. Plaintiffs have thus failed to show that the trial court committed prejudicial error in denying the motion for a new trial.

For the foregoing reasons the judgment and order appealed from are, and each is, affirmed.

We concur: CRAIL, P. J.; WOOD, J.

27 Cal.App.2d 594

STATE LIFE INS. CO. v. WILLIAMS et al.

Civ. 2073.

District Court of Appeal, Fourth District, California.

July 15, 1938.

Hearing Denied by Supreme Court Sept. 12, 1938.

1. **Courts** 🔑198

Superior courts have both probate and equity jurisdiction.

2. **Courts** 🔑200¼

Probate courts may exercise equitable functions, where necessary to do justice to all parties.

3. Courts ⚷200¼

An order of the superior court in estate proceedings, permitting executrix to consent to reduction of rentals on testatrix' land, and ordering rentals to be used in paying taxes and mortgage, was beyond court's power in so far as it allegedly created an irrevocable trust for benefit of mortgagee to the exclusion of third party for whom testatrix held the land in trust, especially in absence of consent to creation of trust by third party.

4. Attorney and client ⚷98

An attorney's authority to collect money that was due client by virtue of a trust in realty for client's benefit did not include authority to consent to order directing rentals of such land to be paid to a mortgagee, in absence of written power of attorney.

5. Courts ⚷200¼

An order of superior court in estate proceedings, permitting executrix to consent to reduction of rentals on testatrix' land and directing payment of rentals for taxes "and the balance thereof to be used and applied in paying past due and current interest on an existing lien," and consent thereto by attorney for third party who claimed that testatrix held land in trust for his benefit, could not be construed as an attempt to create a trust in favor of lienholder or to invest lienholder with any new right. Civ.Code, §§ 1559, 2221, 2251.

6. Estoppel ⚷76

Where attorney for one claiming to be beneficiary of a trust involving land consented to order of probate court directing payment of rentals to a mortgagee, and mortgagee's agent saw the order but did not know of or investigate nature of alleged beneficiary's claim, and nothing was done to prevent mortgagee from foreclosing, beneficiary was not estopped from asserting paramount right to such rentals.

7. Trial ⚷396(4)

A finding should not be based on an offer of testimony excluded by the court.

8. Appeal and error ⚷1071(5)

The trial court's error in making a finding based on an offer of testimony excluded by the court may be disregarded on appeal if finding is not necessary to the decision.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by the State Life Insurance Company against Joseph Henry Kaiser and others, to obtain rentals on mortgaged premises impounded by the court, wherein the named defendant died and S. P. Williams, administrator of his estate, was substituted as a party. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hulme, Hastings & Bartlett, of Los Angeles, for appellant.

Harry W. Horton, of El Centro, Elmer W. Heald, of Brawley, and S. L. McCrory, of El Centro, for respondents.

HAINES, Justice pro tem.

During or about the year 1917 one Mary L. MacCarthy and one J. H. Kaiser entered into a verbal understanding whereby the two were to jointly buy from the Southern Pacific Land Company the property located in Imperial county, California, known as the North half (N½) of tract 139, Township 13 South, Range 12 East S. B. M. Kaiser appears to have furnished his half of the funds with which the property was purchased and also further funds from time to time to meet costs of leveling the land and various carrying charges. Kaiser, however, was a resident of New York and the said Mary L. MacCarthy took title to the property in her own name, executing to Kaiser two writings under date February 12, 1919, and March 25, 1920, respectively, acknowledging his ownership of a half interest in the land. Neither of these writings was recorded.

On April 1, 1925, being, so far as the public records show, the exclusive owner of the property, the said Mary L. MacCarthy executed to Thorne-Hill Investment Company her note for $3,200 payable on April 1, 1930, with interest at 6 per cent per annum, payable semiannually, and to secure the same executed to the Security First National Bank of Los Angeles as trustee, and to said Thorne-Hill Investment Company as beneficiary, a deed of trust affecting the most easterly 80 acres of said land. On January 22, 1926, being still, so far as the public records showed, the sole owner of the property, she executed to the same payee another note for $2,000 payable on February 1, 1931, with interest at 6 per cent per annum, payable semiannually, and, to secure that, executed to the Pacific Southwest Trust & Savings Bank, since absorbed in the Security First National Bank of Los Angeles, as trustee, and to said Thorne-Hill Investment Company as beneficiary, a further trust deed affecting 80 acres of said land adjacent on the west to that affected by the first trust deed. Both of these notes were subsequently assigned before their due date to plaintiff and appellant, The State Life Insurance Company. Mary L. MacCarthy sold and conveyed, apparently without Kaiser's knowledge or consent, the west half of the whole property purchased, leaving, as we take it, standing in her name only the two encumbered parcels above referred to.

In March, 1930, the said Mary L. MacCarthy died, and, her will having been admitted to probate in Imperial county, defendant and respondent, Esther L. Doolittle, was appointed and qualified as executrix thereof. Thereafter, having first filed a claim against the MacCarthy estate which was rejected, Kaiser, on June 23, 1930, brought an action in the superior court of Imperial county against the said Esther L. Doolittle, as executrix of that estate, to obtain a judgment establishing in his favor a trust as to a half interest in the whole of the property so jointly bought, and for an accounting.

On July 10, 1931, the superior court of Imperial county made, in the matter of the MacCarthy estate, an order "that any and all rentals and income from the following described real property be paid into court and impounded pending the determination of the claims of J. H. Kaiser in and to said real property" (followed by a description of the whole property as originally bought). An order in the same terms was at the same time made in the action between Kaiser and the MacCarthy estate.

Neither of the promissory notes above referred to was paid at maturity nor was any interest on either of them paid after the principal of the respective notes matured, nor were any taxes paid on the property described in the deeds of trust subsequent to those of the fiscal year 1930-31, and there also remained unpaid assessments of the Imperial Irrigation District for various years. Foreclosures were had under the respective deeds of trust resulting in sales thereunder in January, 1935, and the property in each instance sold for the exact amount of the principal only on the note secured, leaving as of January 8, 1935, on account of costs of sale, trustee's fees and expenses and accrued interest an unpaid balance due plaintiff (appellant) of $947.12 on account of the larger note and $590.70 on account of the smaller one.

The property had been under lease to a firm known as Jack Brothers and McBurney and said Esther L. Doolittle, as executrix of the MacCarthy estate, found it necessary to appeal to the court sitting in probate for leave to reduce the rentals. Thereupon, with the written consent of counsel for Kaiser, the court made on September 6, 1932, an order permitting the executrix to consent to such reduction of rentals and proceeding further as follows:

"It is further ordered that said rental which is to be paid for the year commencing August 1, 1932, eight hundred dollars ($800.00) of which is to be paid forthwith and the balance of eighteen hundred dollars ($1,800.00) payable February 1, 1933, are each and both to be paid into Court herein to be used and applied in payment of past due and delinquent taxes upon said leased premises, and the balance thereof to be used and applied in paying past due and current interest on an existing lien upon said premises, and any additional thereof to be used to protect and satisfy an existing lien upon said premises in favor of the present lien holder holding trust deed or mortgage upon said premises."

On September 10, 1932, that is some four days after this order was made, the attorney for the said lessees, Jack Brothers and McBurney, without, so far as appears, any authority to represent anyone else, wrote one Tompkins, who was the mortgage loan collection agent of the plaintiff (appellant), advising him of the making of this order, quoting the part of the same above set out and adding the following:

"You will see from the order that you are protected in the matter.

"The $800.00 has been paid into Court and I think it might be well for you to take up with the attorney for the executrix the matter of paying taxes and also interest if it is due you. I do not know how much the delinquent taxes amount to but, of course, the payment of taxes will inure to your benefit as much as it will to the estate. There will be a larger payment made on the 1st of February.

"Do not quote me in this matter to the executrix. I am giving you this information so that you can take whatever action you desire regarding the disposition of the money which will be paid into the Court for you should, undoubtedly, receive a considerable portion of it.

"My client desires the fullest protection in this matter and if anything should arise which might affect their rights I will appreciate your notifying me. We have done everything we could to cooperate with you."

Tompkins' testimony is to the effect that he advised the plaintiff (appellant) of the existence of this order and that he would look at it the next time that he was in the valley; that he did so; that the clerk handed him a file and showed him the order and also advised him of the amount paid in under it; and that thereafter, in reliance on the order, plaintiff (appellant) took no further action toward making collections on the note until August, 1934, when the proceedings were commenced that resulted, as above stated, in the completion of the foreclosure upon the deeds of trust in January, 1935.

There were actually impounded and deposited in the county treasury of Imperial county under the court order referred to $799.20 rentals on October 1, 1932, and the further sum of $1,798.18 on June 30, 1933.

Kaiser's action against the MacCarthy estate resulted in a judgment entered on September 20, 1933, establishing the trust contended for, decreeing that by reason of the alienation by the decedent, Mary L. MacCarthy, of the westerly half of the tract bought, Kaiser was entitled to the whole of the remainder, that is the property encumbered by the deeds of trust, and further that Kaiser was entitled to all of the said collections impounded in the county treasury. Thereupon the court made a separate ex parte order directing that the respondent Garey, as county auditor, draw his warrant on the respondent Varney, as county treasurer, in favor of Kaiser's attorney for the whole of the impounded sum aggregating $2,597.38.

Thereafter appellant filed the present action claiming that the said monies constituted a trust fund of which it is the beneficiary and seeking judgment requiring payment of the same to it. During the pendency of this latter action Kaiser died and defendant (respondent), S. P. Williams, is now the administrator of his estate and has been substituted as such. The trial court denied the relief asked by the plaintiff (appellant) and the present appeal followed.

Appellant's contentions are (a) that the orders of the superior court sitting in probate directing the impounding of the rentals from the property and their application upon the payment of taxes and the interest on the obligations held by it, coupled with its delay in faith thereof in instituting any foreclosures, resulted in an irrevocable trust enforcible by it; and, (b) that the circumstance that counsel for Kaiser consented to the making of said order of September 6, 1932, and allowed it to be made a public record estops Kaiser and all persons interested in his estate from questioning its sufficiency as against them. Respondents, on the other hand, question the fact of appellant's reliance on the order referred to; question appellant's right, as a matter of law, to rely on the order; and claim that the arrangements for the impounding of the rentals were merely transactions had between Kaiser and the MacCarthy estate for conserving their respective interests as between themselves until the litigation could, as between them, be determined, and that such impounding was a matter with which appellant had no concern.

[1-4] The first inquiry, when a court order is involved, must necessarily have to do with the authority for making it. Superior courts, indeed, have both probate and equity jurisdiction, and, where necessary to do justice to all parties the probate courts may, in aid of their functions as such, exercise equitable powers. Estate of Barreiro, 125 Cal.App. 752, 764, 14 P.2d 786, and cases cited. The order here involved, however, is no part of any statutory proceeding in probate, such, for example, as a decree of distribution would be; nor is it, on the other hand, a judgment determining any controversy, rendered in response to pleadings by adverse parties. It is, therefore, so far as the court is concerned, a mere administrative direction given to the executrix as the court's officer, with respect to her conduct of certain details pertaining to the duties of her office. We know of no authority vested in the court, by virtue of its probate jurisdiction, or of any equitable powers ancillary to its probate jurisdiction, to create, by such an order, any irrevocable trust. Certainly it had no authority by any such order to bind Kaiser, whose interests were adverse to the MacCarthy estate, to any further or greater extent than he might consent to be bound. It seems to us, then, that any

force or effect that can be asserted for the order of September 6, 1932, so far as appellant is concerned, must rest not primarily on the circumstance that the court made it, but on some claim that the executrix of the MacCarthy estate on the one hand and Kaiser on the other consented to it. The only evidence in the record that Kaiser did so consent is the circumstance that the attorney who was representing him in his action against the MacCarthy estate appended his written consent to the order. The record fails, however, to disclose any power of attorney from Kaiser that could serve to authorize such consent on his behalf, nor does it disclose any other authority to his lawyer to act for him than the law itself implies from the circumstance that his lawyer was at the time engaged in conducting Kaiser's litigation against the MacCarthy estate and was presumably authorized to do so and to make collection for Kaiser of any funds that an accounting to be had in such litigation might show to be due to Kaiser. While such authority might authorize such lawyer to enter into reasonable stipulations with his opponents for the conservation of assets in controversy until the litigation between Kaiser and the MacCarthy estate could be concluded, it would be stretching it considerably to construe it as authorizing such lawyer to create an irrevocable trust in favor of appellant.

Having in mind then, these limitations upon the court's power in the matter, and, so far as appears from the record, upon the powers of the lawyer representing Kaiser, we have next to consider what the court by the order in question and Kaiser's attorney by undertaking to consent to it, can be believed to have intended or attempted to do.

Our attention in that connection is, on appellant's behalf, directed to various sections of the Civil Code and also to the language from Raffo v. Foltz, 106 Cal.App. 51, 288 P. 884, to the effect that (page 886):

"A 'trust' may be defined as any arrangement which exists where property is transferred with an intention that it be held and administered by the transferee or trustee for the benefit of another."

Section 2221 provides that:

"Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

"1. An intention on the part of the trustor to create a trust, and,

"2. The subject, purpose and beneficiary of the trust."

Section 2251 declares that:

"The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission."

Reference has also been made to section 1559 of the Civil Code to the effect that:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

As illustrative of the sort of an instrument that will be considered as creating a trust in favor of one who is not formally a party to it we are referred to Tyler v. Mayre, 95 Cal. 160, 27 P. 160, 30 P. 196; National Bank of California v. Exchange National Bank, 186 Cal. 172, 199 P. 1; and Sherwood & Sherwood v. Gill & Lutz, 36 Cal.App. 707, 173 P. 171.

Tyler v. Mayre, supra, involved a situation wherein one Jane E. Chase had brought an action through one Tyler, as her attorney, for judgment on a certain note payable to her. Pending the action she assigned the note and cause of action besides various additional claims held by her to one Irvine as trustee, by a written assignment whereby Irvine was directed to collect the various claims so assigned by her to him and with the proceeds to see certain persons who had become bondsmen for the said Jane E. Chase on her official bond as administratrix of the estate of one M. S. Chase, and their successors as such bondsmen, indemnified against liability on the bond "first deducting and paying out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made" (page 161). Tyler proceeded to reduce to judgment the obligation that he had been employed by the said Jane E. Chase to enforce and then sued the administrator of Irvine, who had meanwhile died, to recover his attorney's fee out of the trust fund. In the opinion of Commissioner Vanclief, adopted by the majority of the court, it is said (pages 167, 168, 27 P. page 161):

"That one of the purposes of the trust was to pay the plaintiff and other attorneys of Chase their proper fees and charges for services and expenditures in the actions in which they were employed is expressed with sufficient certainty in the instrument itself. * * *

"The trust in this case devolved upon the administrator of Irvine (Perry, Trusts, §§ 143, 144), and the facts stated in the complaint constitute an equitable cause of action directly against Irvine's administrator. 'The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission.' Civil Code, § 2251; Bettis v. Townsend, 61 Cal. 333. And, even though the relation between Chase and Irvine should be held not to be that of trustor and trustee, the agreement between Chase and Irvine, upon a sufficient executed consideration, that the latter should pay plaintiff for his services to Chase, may be enforced by plaintiff directly against Irvine in an action at law."

In National Bank of California v. Exchange National Bank, supra, where a contractor had assigned and delivered to a bank his warrant and assessment for public work with written instructions authorizing the bank to collect the amounts due and to receive and sell the unpaid assessments, and directing the payment from the amounts collected of a promissory note of which the contractor was a guarantor, it was held by the Supreme Court that a trust was created in favor of the holder of the note. It was, inter alia, held that the trust was not subject to revocation by the contractor. In that connection the court said (199 P. page 5):

"Section 1559, Civil Code, providing that a contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it, has no application to this case, where a trust has been created in favor of such third person. Such trust is governed by the provisions of the Code with reference to trusts."

This expression we take to have been made, in answer to the contention in that case that the trust involved had been revoked, and to be understood with reference to that contention. The law on that subject has now, as respects voluntary trusts, been changed by the amendment of 1931 to section 2280 of the Civil Code, St.1931, p. 1955, which now reads:

"Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby."

In Sherwood & Sherwood v. Gill & Lutz, supra, it was held that where on sale of a business the purchasers agreed with the vendor to pay all indebtedness of the latter contracted in or about the business, creditors of the latter might, under section 1559 of the Civil Code, sue on the agreement as upon a new contract made in their favor and that the statute of limitations began to run from the date of the new contract rather than from the time respective items of indebtedness were contracted by the vendor.

[5] After a consideration of the statutory provisions involved as well as the authorities to which counsel have directed our attention we cannot bring ourselves to feel that the order under discussion was ever intended to have the effect contended for by appellant. Undoubtedly it was couched in very broad language, and after providing first for payment from the impounded rentals of the delinquent taxes on the property affected and past due and current interest "on an existing lien upon said premises", it goes on to provide that any additional funds available shall "be used to protect and satisfy an existing lien upon said premises in favor of the present lienholder holding trust deed or mortgage upon said premises". It may be conceded that this language is quite as strong as that used, for example, in the instrument involved in Tyler v. Mayre, supra. In so far, however, as Kaiser was concerned, unlike Jane E. Chase, the trustor in Tyler v. Mayre, supra, he was under no moral obligation whatever to make any arrangement for the protection of the supposed beneficiary, in this case the appellant.

It is not claimed that the order was made as a result of any negotiations by anybody with appellant. It undoubtedly evidences the opinion of the respective attorneys for Kaiser and the executrix of the MacCarthy estate, entertained in September, 1932, when it was made, that it would be to the interest of those litigants to have the money already ordered by the court to be impounded, applied to preserve the equities in the land rather than to allow it to be idle pending their litigation with each other, which if done would incidentally protect the interests of appellant as trust deed holder. We think that the circumstances indicate that to have been the only purpose of this new order. We see, in those circumstances, no reason to attribute to counsel for Kaiser or to the court any initial intention by this order, however broad its language, to invest appellant with any new right or to create any trust in its favor or to make any arrangement with respect to these impounded funds which might not be changed at any time before it was carried out. Neither do we see that so far as the record shows, any authority existed in the court to create or in Kaiser's counsel to consent to any such trust to operate in futuro. Touli v. Santa Cruz County Title Company, 20 Cal.App.2d 495, 67 P.2d 404, relied on by appellant does not appear to us to cast any light on the present situation. What is here involved is not an attempt to repudiate the MacCarthy deeds of trust, but the question whether a new trust resulted from the court's order.

[6] It seems clear to us, then, that appellant can have no claim to these impounded moneys unless it be upon some theory of estoppel in pais, operating against Kaiser and his estate. We have then to examine the situation from that point of view. The trial court has in that connection very distinctly found that appellant did not refrain from foreclosing in reliance upon the order in question. This finding is attacked as unsupported by the evidence, consisting on that subject largely of statements contained in Tompkins' testimony, which for their part respondents attack, as in various respects unlikely. It is not altogether a question, however, of whether appellant did rely on this order, but there is also involved the question of whether appellant had any right to rely on it. This question we are constrained to answer in the negative. Appellant's attention was never called to the court order of September, 1932, by anyone connected either with Kaiser or the MacCarthy estate, nor yet at the instance of the court. The information came initially from a third party, the attorney for the tenant, and the letter containing the information specifically suggested to Tompkins as appellant's agent that he take up the question of having the taxes and interest paid in pursuance of the order with the attorney for the estate. The evidence fails to disclose that he ever did anything of the sort. He says that the next time he visited the Imperial valley he looked at the order. If he looked at it with any care he must have seen the appended consent of Kaiser's attorney. He says that he looked at no other papers in the estate. He made no attempt whatever to further investigate the condition of the estate and claims never to have heard of the Kaiser litigation until after it had been decided and he ultimately heard of it through a title company. In the circumstances any contention that he or appellant were misled to their detriment by any conduct of Kaiser or anybody representing Kaiser seems to us very tenuous. The trial court may readily have believed that if appellant or Tompkins, its agent, in fact placed any reliance on the order they would have sought to compel the immediate application of the rentals to the purposes indicated in the order instead of ignoring the situation until after the Kaiser litigation had been decided. Nothing said or done in behalf either of Kaiser or the MacCarthy estate could in any way have prevented the appellant's foreclosure of its deed of trust at any time after the first default in the obligations thereby secured had appellant desired to take that course, nor is it even claimed that Kaiser or any representative of the MacCarthy estate made any representation to appellant to dissuade it from such action. In the circumstances we cannot say that the trial court's finding that appellant did not refrain from foreclosure in reliance on the court's order is not justified, nor that the situation warrants any claim as against the Kaiser estate of any estoppel nor yet that appellant has as against that estate any equities.

[7, 8] It is doubtless true that so much of the finding numbered XI as undertakes to state an agreement subsequent to the order of September 6, 1932, between counsel for Kaiser and counsel for the MacCarthy estate that application should not be made of the impounded moneys as provided in that order, is based on an offer of testimony excluded by the court and that such finding ought not, therefore, to have been made. The finding on this subject, however, appears to us to have been unnecessary to the decision. It may, therefore, be disregarded. It is certainly clear from the court's order for the payment of the funds in question to counsel for Kaiser that the latter, whether he be said to have revoked or repudiated the arrangement for the application of the impounded rentals did in fact claim them for himself.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

11 Cal.2d 501

RANCHO SANTA MARGARITA v. VAIL et al. (BOGART et al., Interveners).

L. A. 15078.

Supreme Court of California.
July 12, 1938.

As Modified on Denial of Rehearing
Aug. 11, 1938.

1. Waters and water courses 🔑39

Where upper owners' tract was acquired as a part of a single grant, large areas of it had access to both tributary river and main river, and tract was contiguous to main river for about one-half mile below the confluence, court erred in holding that, as to downstream owner on main river, riparian lands of upper owners in drainage area of the tributary river were not "riparian" to the main river.

[Ed. Note.—For other definitions of "Riparian," see Words & Phrases.]

2. Waters and water courses 🔑39

To be "riparian," land must ordinarily be contiguous to or abut on stream.

3. Waters and water courses 🔑39

The "riparian" right extends only to the smallest tract held under one title in the chain of title leading to the present owner.

4. Waters and water courses 🔑39

Land, to be "riparian," must be within the watershed of the stream.

5. Waters and water courses 🔑39

As to any owner below the confluence of two branches of a stream, the drainage areas of both branches must be deemed to constitute a single watershed, where riparian land, at least in one single grant, is owned by the upper owner on both branches.

6. Waters and water courses 🔑39

Where two streams unite, with regard to lands abutting thereon above the junction, the drainage area of each stream is a separate watershed as regards whether such lands are riparian.

7. Waters and water courses 🔑39

In determining whether land is riparian to a stream the "surface drainage theory," which is predicated on the concept that return drainage must reach the stream entirely on the riparian tract, is unsound.

8. Waters and water courses 🔑39

Frontage on a stream is not the controlling factor in determining the amount of riparian land, since, if a tract has any access to the stream at all, and other requirements for riparian land exist, the entire tract is "riparian."

9. Waters and water courses 🔑39

The size of a drainage area has nothing to do with "riparian" status, but it is the situation of the land within the watershed that is material.

10. Waters and water courses 🔑39

In determining the riparian status of land, the same rules of law apply regardless of the size of the tract, the extent of the watershed or the amount of the runoff.

11. Waters and water courses 🔑39

The amount of water in a stream has no bearing whatever in determining whether a particular tract is "riparian."

12. Waters and water courses 🔑39

The alleged fact that if upper owners diverted water from river to their riparian lands, the waters would be entirely consumed, so that there would be none for lower riparian owner, had no relevancy on the subject of the status of upper owners' land.

13. Waters and water courses 🔑39

The fact that upper riparian owners were awarded the full flow of a tributary river in no way affected question whether riparian lands of the upper owners in the drainage area of the tributary river were also riparian to the main river.

14. Waters and water courses 🔑42

As between riparians, each is limited to a reasonable use.

15. Waters and water courses 🔑49

A riparian owner may be enjoined from an unreasonable use of water.

16. Waters and water courses 🔑155

Where the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status.

17. Partition 🔑116(1)

On partition of riparian lands, each parcel retains its water right though each parcel may not be contiguous to the stream, and though the decree is silent as to the division of riparian rights.

18. Partition 🔑116(1)

Lots in certain grant did not lose their riparian status because of the fact that partition decree was silent as to riparian rights, notwithstanding that those lots did not abut on the river.

19. Evidence ⚷96(1)

Where new matter set up in answer creates a new issue, the burden of proof shifts to defendant.

20. Evidence ⚷98

If no evidence is introduced on any issue, the finding will be against the party having the burden of proof.

21. Pleading ⚷123, 132

A plea controverting the original cause of action and tendering no new issue is a mere "traverse" and cannot be properly described as a plea setting up new matter.

[Ed. Note.—For other definitions of "Traverse," see Words & Phrases.]

22. Waters and water courses ⚷87

In suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, plaintiff had burden of proving, as alleged in its complaint, that it was entitled to six times as much water as defendants.

23. Waters and water courses ⚷87

In suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, defendants' answer, which denied that amount of irrigable riparian land owned by plaintiff was six times or at all greater than that of defendants, as alleged by plaintiff, and which set forth affirmatively amount and location of lands claimed by them to be riparian and irrigable, created no new issue on which defendants would have burden of proof.

24. Waters and water courses ⚷87

In suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, material error as to riparian acreage was prejudicial, notwithstanding that there was not sufficient water for reasonable beneficial uses of plaintiff and defendants, and notwithstanding that the main issue was the extent of the irrigable riparian acreage.

25. Waters and water courses ⚷39

The fact that in some years, depending on direction of wind, water from mesa drained across ocean beach to mouth of river and in other years drained directly into ocean, did not make the mesa riparian, since riparian rights do not depend on such an unstable and changeable factor as wind direction.

26. Waters and water courses ⚷39

The fact that mesa land may in past geological ages have been delta land and riparian to river would not render it riparian, since riparian rights are not determined by past geological formations but from present natural topography.

27. Waters and water courses ⚷49

In suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, finding that plaintiff owned three times as much irrigable riparian acreage as defendants did not support an injunction prohibiting use of water by defendants on their riparian lands for reasonable and beneficial purposes when and while plaintiff was not using it.

28. Waters and water courses ⚷49

A riparian owner is entitled to enjoin other riparian owners from taking water so as to improperly injure him.

29. Waters and water courses ⚷42

Whether a riparian owner has in fact been injured by the taking of water by other riparian owners depends on riparian owner's present needs and uses, and not on the extent of its ownership of irrigable riparian lands.

30. Waters and water courses ⚷42

A riparian does not own the water of a stream but owns a "usufructuary right," which is the right of reasonable use of the water on his riparian land when he needs it.

31. Waters and water courses ⚷42

If one riparian has no present need for water, the others may use it all.

32. Waters and water courses ⚷49

A lower riparian cannot secure an injunction against the upper riparian unless the upper owner is using an excessive portion of the waters of the stream, resulting in actual damage to the lower proprietor.

33. Waters and water courses ⚷38

Underground and surface portions of a stream constitute one common supply.

34. Waters and water courses ⚷42

Whether the use of underground basins simply to support the surface flow of a stream, in order that use may be made of the surface flow, is a "reasonable beneficial use," is a fact question.

35. Waters and water courses ⇨49

Where a relatively small quantity of water is available, which is far insufficient to meet all the needs therefor, a court should not grant an injunction until every reasonable physical solution and every reasonable source of supply has been thoroughly investigated.

36. Waters and water courses ⇨42

Neither lower riparian nor upper riparians were entitled, as a matter of law, to supply their needs entirely from surface stream of river, if they could economically secure water from underground basins.

37. Waters and water courses ⇨42

As between riparians, each must make a reasonable use of all water of the stream, including both surface and subsurface flow and water in underground basins.

38. Waters and water courses ⇨87

In ascertaining whether a lower riparian has suffered sufficient damage by reason of an upper riparian's diversion, to warrant an injunction, the trial court should take into consideration all water available to either party from the river, and then determine, considering the entire supply, the needs of the parties, their methods of use and methods of diversion and other necessary factors, whether the lower riparian has in fact suffered damages. Const. art. 14, § 3, adopted in 1928.

39. Waters and water courses ⇨87

In considering whether injunction should be granted to restrain diversion of water by upper riparian, trial court had duty to ascertain whether there was a physical solution of the problem that would avoid waste and would not unreasonably or adversely affect the rights of the parties.

40. Waters and water courses ⇨85

An injunction should not be granted to restrain diversion of water by upper riparian if its effect would be to waste water that could be used. Const. art. 14, § 3, adopted in 1928.

41. Waters and water courses ⇨87

If trial court in water rights case needs or desires expert assistance or evidence to determine a physical solution in problem of putting water resources to beneficial use to fullest extent of which they are capable of being put, as provided by the Constitution, it possesses the statutory power either to refer the matter to the division of water rights, or to appoint it as an expert. Const. art. 14, § 3, adopted in 1928.

42. Waters and water courses ⇨87

Where there was only a small quantity of water available in stream in summer months, trial court should have thoroughly investigated the possibility of some physical solution, such as the storage of water in reservoirs during the winter, before granting an injunction that might be ruinous to either or both parties. Const. art. 14, § 3, adopted in 1928.

43. Waters and water courses ⇨87

In suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, trial court was sitting as a court of equity, and, as such, possessed broad powers to see that justice was done in the case. Const. art. 14, § 3, adopted in 1928.

44. Waters and water courses ⇨36

The state has a definite interest in seeing that none of the valuable waters from any of the streams of the state should go to waste. Const. art. 14, § 3, adopted in 1928.

45. Waters and water courses ⇨49

Each water rights case must turn on its own facts, and the power of the court extends to working out a fair and just solution, if one can be worked out, of those facts. Const. art. 14, § 3, adopted in 1928.

46. Waters and water courses ⇨43

The watering of cattle is a "reasonable beneficial use," within meaning of Constitution. Const. art. 14, § 3, adopted in 1928.

47. Waters and water courses ⇨85

If lower riparian's cattle could only be watered from the surface stream without unreasonable expenditure, lower owner might be entitled to an injunction restraining diversion by upper riparians, but if the cattle could reasonably be watered at reasonable expense by some artificial means, it would be an "unreasonable use" to require the flow of the surface stream. Const. art. 14, § 3, adopted in 1928.

48. Waters and water courses ⇨42, 49

A riparian is not entitled to the full flow of the stream as it existed in a state of nature, but each riparian is required to make a reasonable use of the waters, and any riparian or riparians can be required to endure a reasonable inconvenience or incur a reasonable expense in order that water may be reasonably used by others. Const. art. 14, § 3, adopted in 1928.

49. Waters and water courses ⚷49

A lower owner cannot be expected or required to endure an unreasonable inconvenience or an unreasonable expense in order to make more water available for the use of an upper riparian. Const. art. 14, § 3, adopted in 1928.

50. Waters and water courses ⚷87

If, in suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, it should develop that the only feasible physical solution would involve the expenditure of large sums of money by plaintiff, and that the sum required, when all facts, including the necessities and uses of the parties, are considered, would be unreasonable, the trial court would have full power to make its injunctive order conditional so as to require defendants to bear a portion of the expense. Const. art. 14, § 3, adopted in 1928.

51. Appeal and error ⚷854(1)

Where any ground of an objection is good, trial court's action in sustaining the objection must be upheld.

52. Evidence ⚷557

In suit to have water rights adjudicated and to enjoin defendants from interfering with flow of river, the exclusion of defendants' evidence as to tests made of underground basins or wells in land adjoining that of plaintiff, on ground that, even if there was similarity between that land and plaintiff's land, the evidence was incompetent, irrelevant, and immaterial, was serious error. Const. art. 14, § 3, adopted in 1928.

* * *

In Bank.

Appeal from Superior Court, San Diego County; Lacy D. Jennings, Judge.

Action by Rancho Santa Margarita against Margaret R. Vail and others for an adjudication of water rights of plaintiff and defendants in and to the waters of a certain river and its tributaries, and to enjoin the defendants from interfering with the flow of the river, wherein Guy Bogart and others, executors of the will of Murray Schloss, deceased, and Phillip Playtor intervened. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment reversed, with directions.

O'Melveny, Tuller & Myers, Louis W. Myers, and William W. Clary, all of Los Angeles, Ward, Ward & Ward, Ward & Ward, and John M. Ward, all of San Diego, and Haas & Dunnigan and Stephens & Stephens, all of Los Angeles, for appellants.

Hunsaker, Britt & Cosgrove, Cosgrove & O'Neil, and T. B. Cosgrove, all of Los Angeles, for respondent.

PER CURIAM.

Defendants appeal on a bill of exceptions from a judgment adjudicating the water rights of plaintiff and defendants in and to the waters of the Temecula-Santa Margarita river and its tributaries, located in Riverside and San Diego counties, and enjoining defendants from interfering with the flow of the river except as provided in the judgment. At the outset it should be mentioned that on this appeal the questions presented for review all pertain to the rights of the parties as riparians.

The voluminous record presented for review is to be found in 11 printed volumes, supplemented with 4 large volumes of exhibits. The cause below was tried over a period of 3 years, and actually consumed 444 court days. The briefs of the parties total over 2,000 pages.

An examination of the pleadings and the record demonstrates that many issues were contested below that are now abandoned by appellants on this appeal. Among other things the rights of certain interveners were involved below and determined by the judgment. The correctness of this phase of the judgment is conceded.

The respondent brought this action primarily to secure a declaration of its riparian rights in the waters of the Temecula-Santa Margarita river, and its tributaries, and for an injunction to prevent appellants from using more than their reasonable share of the waters of the stream. The trial court determined that respondent was reasonably entitled to 75 per cent of the flow of the main stream, and that appellants were entitled to 25 per cent, and during the specified months of low flow enjoined appellants from using more than 25 per cent of the flow of the main stream measured as provided in the judgment.

Before discussing the issues presented on this appeal a brief description of each of the parties' properties and of the river and its tributaries should be given.

The respondent is the owner of a tract of land situated in San Diego county originating in a single Mexican grant known as the Santa Margarita y Las Flores rancho, containing 133,440 acres. In the court below this property was referred to as the Santa Margarita ranch, and will be so referred to in this opinion. The western boundary of this ranch is the Pacific ocean, along which it extends for about 17½ miles. The property extends easterly from the ocean a distance of about 15 miles.

The lands of appellants are situated in Riverside county east of respondent's ranch, and contain in all about 79,177 acres. The western boundary of appellants' land is about 10 miles easterly of the east boundary of respondent's ranch. Appellants' property consists of several contiguous tracts or grants, four of which originated in Mexican grants entitled Pauba grant, Temecula grant, Little Temecula grant, and Santa Rosa grant. In addition appellants own a 460-acre parcel contiguous to Little Temecula grant referred to below and in the briefs as the Vail government lands. These 5 parcels form one large irregularly shaped tract of land, frequently referred to in the trial court as the Vail ranch, and will be so referred to in this opinion.

The most easterly of appellant's properties is the Pauba grant, containing 27,662 acres. This tract was obtained by appellants as a single grant, and no part thereof has ever been conveyed away.

West of the Pauba grant, and contiguous thereto, are two other grants—the Temecula and the Little Temecula grants. The appellants own about ½ of the original Temecula grant. The portion they now own contains 10,402 acres and was obtained by them as a single grant. Located within the boundaries of the portion of this grant now owned by appellants are several fair sized parcels of land not now owned by appellants. Little Temecula grant is south of Temecula grant and west of Pauba grant, and contiguous to both. This was originally a single grant but in 1891 was partitioned by court order into 6 lots designated as lots A, B, C, D, E and F. Lots A, B, C and D have since been acquired by appellants and contain in all 1,726.73 acres.

Northwesterly of the Temecula grant, and contiguous thereto, is the Santa Rosa grant which contains 46,340 acres. This grant is riparian to certain tributaries of the Temecula-Santa Margarita river, but it is conceded on this appeal that no portion of this grant is riparian to the main river.

The Vail government lands containing 460 acres are south of Little Temecula grant and contiguous thereto. Appellants concede that this land is not riparian to the main river but contend, contrary to the finding of the trial court, that such land is riparian to a tributary of the main stream.

Through portions of the appellants' and respondent's ranches, for varying distances, there flows the Temecula-Santa Margarita river and its tributaries—a river, which, in the summer months, has a relatively small flow. The hyphenated name given to this river is used for the reason that in its upper portion it is called the Temecula river, while in its lower portion it is called the Santa Margarita river. The trial court found (finding 8) that "the river or stream referred to in these findings as the Santa Margarita, and the river or stream referred to in these findings as the Temecula, is one and the same stream or river, and is hereinafter referred to as the Temecula-Santa Margarita River". The respondent contends that the Temecula is a mere tributary of the Santa Margarita, and that it and another tributary—Murrieta creek—unite to form the Santa Margarita. The respondent is in no position to challenge the above quoted finding.

The Temecula-Santa Margarita river has its source in the mountains about 20 miles southeasterly of the southeastern boundary of Pauba grant. After entering the Pauba grant it flows northwesterly through a portion of the grant known as Nigger valley for a distance of a little over 3 miles. It then enters a narrow canyon on the Pauba grant known as Nigger canyon through which it flows for a distance of about 2 miles. As the river leaves this canyon it debouches over a porous area referred to as "the outwash area", into which, except in times of heavy rains and floods, it disappears from the surface and percolates underground. In the dry season the river customarily reappears and becomes a surface stream on the Pauba grant about 3 miles westerly of the mouth of Nigger canyon, and flows westerly across the western boundary of the Pauba grant. It then enters the Little Temecula grant through which it flows westerly for a distance of about 1½ miles. It then enters and flows westerly through a portion of the Temecula grant for a distance of about 1⅘ miles. After crossing the westerly boundary of

Temecula grant the river leaves the lands of appellants. From the time the river enters the Pauba grant until it leaves the Temecula grant it flows entirely within the properties of appellants, except for a distance of about ¼ mile in the Temecula grant where the channel of the stream crosses a small parcel of land belonging to persons not parties to this action.

As the river leaves the westerly boundary of the Temecula grant it enters a narrow gorge known as Temecula canyon or gorge. The trial court found that, although through much of its length the Temecula-Santa Margarita river has both a surface and subsurface flow, all of the water—surface and subsurface flow—is brought to the surface at about the eastern end of Temecula gorge due to the existence of granite bedrock in the channel along the banks immediately easterly of this point. The court also found that the normal and usual surface flow of the Temecula-Santa Margarita river, at this point, when not artificially diverted, during the dry season of the year, amounts to 500 inches, exclusive of the flow of the Murrieta creek.

After entering Temecula gorge the river flows westerly for about 10 miles through this canyon and on to the lands of respondent. Within this 10 mile stretch are a number of small users of water, a few of whom appeared in this action as intervenors, and whose rights were fixed by the judgment. Neither appellants nor respondent question the propriety of the judgment insofar as it relates to intervenors.

After entering the Santa Margarita ranch the Temecula-Santa Margarita river flows in a general southwesterly direction through the ranch for a distance of about 21 miles to the Pacific ocean. After crossing the easterly boundary of the ranch the course of the river lies entirely within respondent's property until it empties into the ocean. The trial court found (finding 8) and the finding is not challenged, that after entering respondent's ranch, the stream does not flow as a continuous surface stream but "that in the dry and irrigating season of the year the surface stream customarily and ordinarily disappears, when not artificially interfered with, at a point on the plaintiff's lands approximately eight (8) miles from the ocean, sinking into the sands and gravels of its bed or channel, and again reappearing as a surface stream two (2) to three (3) miles below, and thence flowing as a surface stream of diminishing volume to its confluence with tidewater".

In describing the Temecula-Santa Margarita river generally the trial court found that in the dry summer months, when not interfered with, the stream flows from its headwaters to the ocean partly on the surface and partly under the surface, rising to the surface and flowing thereon in places and disappearing below the surface in other places.

The main river has several tributaries to which reference should be made. The most important tributary is Murrieta creek, which joins the Temecula-Santa Margarita river in Temecula grant about ½ mile east of the westerly boundary of that grant. This river has its source north of Temecula grant, and flows through that grant to its junction with the main stream. This tributary has a continuous yearly flow, but in the summer months the flow averages about 20 inches. On its course through Temecula grant the Murrieta crosses several of the parcels heretofore mentioned that are no longer owned by appellants.

The Murrieta has several tributaries. One of these is Santa Gertrudis creek, which rises in the Pauba grant, flows for about 5 miles through that grant, then flows for about 4 miles through lands not owned by parties to this action, then crosses the extreme northeasterly tip of Temecula grant through which it flows for about ⅔ of a mile, and then leaves the lands of appellants flowing over lands not owned by parties to this action for about 3 miles to its junction with the Murrieta. The surface flow of this creek is not continuous, flowing only during the rainy seasons. Cottonwood creek arises in the northerly portion of Santa Rosa grant, flows northerly through that grant for several miles to its junction with the Murrieta. This stream has no surface flow in the summer months.

The court found that separating the drainage area of the Temecula-Santa Margarita river from the drainage area of Murrieta creek is a well defined crest line which separates the two watersheds. This crest line is referred to as the Temecula-Murrieta crest line. The effect of this crest line is to divide the drainage so that all of appellants' lands within Pauba and Temecula grants southeast of this crest line (amounting to 22,359 acres) drain directly into the Temecula-Santa Margarita river, while all of appellants' lands northwest of the crest line (amounting to 33,655 acres) drain directly into Murrieta creek or its tributaries. The court also found that the Temecula-Santa Margarita river watershed upstream from its confluence with the Murrieta contains 373 square miles, and that the Murrieta watershed contains 258 square miles.

Another tributary of the Little Temecula-Santa Margarita river is Penjango creek or dry wash. It has its origin south of all of appellants' lands, flows in a northwesterly direction across a corner of Temecula grant to its junction with the main river a short distance upstream from where the Murrieta joins the river. This creek carries no surface water except in the rainy or flood season. There is a material dispute between the parties, hereafter discussed, as to whether the Penjango creek touches the Vail government lands, and as to whether it has an appreciable underground flow.

Another tributary of the Temecula-Santa Margarita river is Sandia creek, which has its source in the Santa Rosa grant through which it flows for several miles, then meandering southerly across lands not owned by parties to this action to its junction with the main stream just east of where the main stream enters the Santa Margarita ranch. Deluz creek also has its source on the Santa Rosa grant, then flows southwest across lands not owned by parties to this action, and then enters respondent's ranch, where it joins the Temecula-Santa Margarita river. These two tributaries have their source north of the main river. South of that river is Fallbrook creek, which flows through the Santa Margarita ranch in a westerly direction for almost all of its length. This tributary, as well as the others above described, flows mainly in the rainy season. Near where this creek joins the Temecula-Santa Margarita river on respondent's property, respondent has constructed a dam and created an artificial lake known as Lake O'Neill reservoir, used for irrigation purposes. This reservoir is used to store not only some of the waters of Fallbrook creek, but also some of the waters of the main river where a diversion dam and ditch have been constructed.

Located on the Vail ranch along both sides of the channel of the main river is a large level valley or basin known as Temecula alluvial basin. This basin extends along the line of the river for about 8¾ miles, and varies from ⅔ to 1½ miles in width. The trial court found that this basin is entirely surrounded by hill lands, except where intercepted by the river, and is almost entirely composed of impervious mesa silt. At the trial appellants contended that a vast underground water plane underlay this ancient silt formation. This was one of the main issues presented to the trial court. The trial court found that no such common water plane existed, but that there were a few lozenges or lenses of pervious material in the mesa silt formation thus creating small suspended water planes in that formation. These findings are not challenged on this appeal, the appellants, in view of the conflicting evidence, conceding that these findings are amply supported.

The basin itself is composed of porous materials—sands, gravels, boulders and other fluvial deposits—to a depth of several hundred feet. The upper ½ in area and ⅓ in length of this basin is filled with coarser and looser material than the balance of the area, and is called the outwash area of the basin. The outwash area contains 2015.48 acres. The balance of the basin is called the artesian area. The basin as a whole, and particularly the outwash area, creates a large underground basin into which the water of the river sinks, and in fact, in the dry season, into which it entirely disappears as a surface stream, reappearing again on the surface across the artesian area.

Appellants for many years have diverted water for irrigation both from the surface stream and from the underground basin. The trial court found that diversions from the basin were tantamount to surface diversions, finding that any pumping from the basin had the effect of diminishing the surface flow to the extent of the pumping, and also finding that there is no appreciable return from appellants' irrigation.

About 1900 the predecessors of appellants constructed, and until 1927 maintained, on the Pauba grant, at about the upstream edge of the artesian area where the river reappears as a surface stream, an earthen dam across and intersecting the flow of the Temecula-Santa Margarita river. Water diverted by means of this canal and certain diversion works was used in portions of Pauba-Temecula grants riparian to the main stream. This diversion is referred to as the upper diversion. By means of this diversion the appellants and their predecessors for many years during the irrigation season have diverted the entire or nearly the entire surface flow of the stream in varying amounts from approximately 75 to approximately 200 miner's inches. In 1927, while this action was on trial, appellants abandoned this upper diversion and substituted for it the Tule pumping plant, about ⅘ of a mile downstream from the upper diversion. By means of this plant appellants divert the surface flow formerly diverted by the upper diversion.

In 1919, about 1 mile easterly from the upper diversion and about ⅓ mile northerly from the channel of the river, in Temecula alluvial basin in Pauba grant, appellants constructed a well and pumping plant designated as well No. 30. By means of this plant appellants during the irrigation season have pumped between 1,000 and 1,800 acre-feet annually, and have used the same for beneficial purposes on their riparian lands in Pauba and Temecula grants.

In 1922 and 1923 the appellants constructed the Cantarini pumping plant in Little Temecula grant. This plant draws water directly from the surface flow and from 3 wells sunk into the alluvial basin about 45 feet from the stream channel, and is capable of diverting practically the entire surface flow in the summer months. This water so secured is used partially on riparian lands, but the greatest part is used on lands in Temecula and Little Temecula grants not riparian to the main stream, and also an appreciable portion is used on the Vail government lands, found by the trial court to be nonriparian.

Also in 1922 and 1923 appellants remodeled and reconstructed another pumping plant—this one located in Temecula grant several miles dowstream from the Cantarini plant, and called the Bridge pumping plant. This plant had been originally constructed in 1912, but had been only operated intermittently. In 1922 and 1923 two large power pumps that divert directly from the surface stream were installed. This plant has a maximum capacity of 260 miner's inches, and the water diverted thereby has been used for irrigation purposes partially on lands riparian to the Temecula-Santa Margarita river, and partially on lands in the Murrieta watershed.

In addition, for many years, appellants have maintained 4 artesian wells in different parts of the basin by means of which about 1 second-foot of water is withdrawn from the underground waters.

The trial court found (finding 17) that the waters diverted by appellants were applied and used upon the Vail ranch "in a relatively modern and scientific manner, for beneficial uses and purposes, including the irrigation of crops, the watering of livestock, and domestic purposes; that the proper cultivation and irrigation of said lands required the use of said waters at the times when and in the amounts so used". It was also found that until 1923 the appellants only diverted and used the amount of water to which they were reasonably entitled, and that prior to 1923 sufficient water remained in the stream to supply all of respondent's then reasonable needs. In the year 1923 the appellants greatly increased their diversions, particularly from the Bridge and Cantarini pumping plants, and, in the summer months, have conveyed away and threaten to continue to convey away 60 to 85 per cent. of all of the water of the Temecula-Santa Margarita river measured at Temecula gorge and naturally flowing therein during the irrigation season.

The main diversion on respondent's property is at Lake O'Neill reservoir. This reservoir has a capacity of about 1140 acre-feet and is located near the point where Fallbrook creek joins the Temecula-Santa Margarita river. By means of a temporary earthen dam constructed in the river the surface flow is diverted during the dry season into this reservoir. Since 1886 it has been the custom of respondent not to construct this dam until about the middle of March of each year after the spring rains. The dam remains in the river until washed out during the next heavy rainy season.

There are also several wells and pumping plants operated by respondent. The appellants charged that these were crude and inefficient, and that a majority of them had been abandoned, and that respondent's methods of use were wasteful and inefficient. The trial court found (finding 19) that "It is not true that the methods employed by the plaintiff and its predecessors in interest for the diversion or storage of said waters have at all times, or at any time, been crude or inefficient, or that the shortage of water experienced on said Santa Margarita ranch during the summer and irrigation season of the year 1923 and years subsequent thereto was in consequence of any unscientific, crude, careless or negligent structure or conduct employed on the part of or used by the plaintiff for the diversion of said waters into said reservoir. * * * but such shortage of water was due entirely to said unreasonable diversions of the defendants during the summer and irrigation season of said years. * * *" In finding 20 it is stated that "one or two, but not a majority, of the wells and pumping plants on said Rancho Santa Margarita have fallen into disuse and into a condition of a lack of repair * * * but several well ordered and equipped pumping plants are now, and for several years last past have been, maintained and operated" to withdraw the underground waters for useful and beneficial purposes on riparian land.

The trial court also found, and this finding is admittedly supported by the evidence, that the normal flow of the Temecula-Santa Margarita river is not sufficient to supply all the riparian needs of all of the riparian lands of either respondent or appellants, and that there is only enough water available for the irrigation of a portion of their riparian lands and for the uses thereon which are most valuable and profitable. This was practically stipulated to by the parties, and was one of the basic facts upon which the action was tried.

After the appellants enlarged their diversions in 1923, the Temecula-Santa Margarita river was caused thereby to disappear as a surface stream on the Santa Margarita ranch some 6 miles further upstream than had theretofore occurred. This caused the respondent to investigate and upon ascertaining the facts, to vigorously protest to appellants. Unable to agree, this action was seasonably instituted by respondent in 1924. It is unnecessary to set forth a summary of the pleadings. Suffice it to say that the main relief sought by respondent was twofold: (1) For a determination of the relative rights of the parties as riparian owners in and to the waters of the Temecula-Santa Margarita river and its tributaries. In this connection respondent claimed it was entitled to 6/7 of the water of the stream; and (2) for an injunction to prohibit diversions by appellants beyond the extent of 1/7 of the total flow. The answer of appellants raised many other issues than the two above discussed. Appellants claimed a large portion of the waters of the stream by prescription; claimed respondent's action was barred by laches; claimed that underlying a large proportion of the Vail ranch was a common underground water table, and raised many other issues, all of which were decided adversely to their contentions, and have been abandoned on this appeal. In addition appellants put squarely in issue the extent of the parties' riparian acreage, the extent thereof that could be profitably irrigated, the quantity of water available, and challenged respondent's right to the injunction. Appellants claimed the right to 5/7 of the total flow of the river.

As already indicated, the trial court decided many of the issues raised by the pleadings in favor of respondent, and many of these important issues have been abandoned on this appeal by appellants. Speaking generally, so far as the issues raised on this appeal are concerned, it was incumbent upon the trial court to ascertain first the extent of the riparian acreage of each of the parties and the quantity of water available. In view of the admitted fact that there is insufficient water to irrigate all of said lands or for the other uses of the parties, it was also necessary to ascertain the extent of such riparian acreage suitable for and capable of profitable irrigation. It was then incumbent upon the court to declare the rights of the parties in and to the water in dispute. Secondly, the court had to determine, considering all the factors required by the law to be considered, whether an injunction should be issued, and if so what its terms or conditions should be.

The trial court determined these issues in a series of exhaustive findings, and entered its judgment accordingly. Speaking generally, based on its findings as to riparian acreage, and extent thereof suitable for irrigation, and the quantity of water available, the court declared that respondent was entitled to ¾ of the surface flow of the Temecula-Santa Margarita river, exclusive of the flow of the Murrieta, and that appellants were entitled to ¼ of such flow plus 100 per cent. of the flow of the Murrieta and its tributaries, all diversions from the underground basin by appellants to be considered as surface diversions, and further, that during the summer months appellants should be enjoined from diverting more than the quantity awarded them.

In connection with the declaratory features of the case the trial court found that the Santa Margarita ranch contains 133,-

440 acres, of which 38,739 described acres are riparian to the Temecula-Santa Margarita river; that the normal flow of the river is insufficient for all of the riparian needs of respondent; that there is sufficient water available for the irrigation of only a portion of the riparian lands and for those uses thereon which are most profitable and valuable; that of the total riparian acreage of respondent there are 12,375 described acres capable of and adapted to practical and profitable irrigation; that this described area is particularly suitable for the growing of citrus fruits and other crops; that for the proper irrigation of said area 30,289 acre-feet of water per annum is useful, valuable and necessary; that of the 12,375 riparian acres suitable for irrigation 10,190 acres are so located as to be free of frost and the growing season extends over the entire year; that the remaining 2,185 riparian acres suitable for irrigation are so located as to be annually visited by frosts and the growing season thereon extends over but 10 months; that of respondent's total riparian acreage 15,290 acres are rough and rugged and not susceptible of practical or profitable irrigation; that certain described areas are so saturated with water as to be not suitable for the growth of crops, and other small areas require drainage; that 180 acres of said land are supersaturated, resulting in an alkali soil condition rendering the area totally unfit for the growing of crops. In connection with the actual present and past use of water by respondent (as distinguished from potential uses or needs discussed above) the trial court found that the surface waters of the Temecula-Santa Margarita river naturally diffuse themselves into and through the riparian lands contiguous to the stream, saturating large deposits of underground sands and forming and supporting underground stores of water; that in divers depressions in the riparian lands the water has always collected in surface pools, to which pools cattle and livestock of respondent have always been accustomed to resort for drinking; that for the past 40 years respondent and its predecessors have devoted the ranch largely to the raising and pasturing of cattle; that several thousand head of cattle are usually maintained thereon; that for 40 years past respondent and its predecessors during the summer months have taken the full flow of the surface stream for the purpose of watering livestock and to some extent for irrigation; that the amount of land actually irrigated by respondent in the past has been (finding 5) "from about one hundred (100) to eight hundred (800) acres in different years" (the evidence showing that in most years the area irrigated has been around 500 acres); that respondent's livestock that pasture along the river from Lake O'Neill reservoir upstream for a distance of 8 miles are dependent upon the surface flow of the river for a reasonable drinking supply; that the continued natural flow of the stream as fixed in the judgment is necessary for the watering of respondent's livestock and for respondent's domestic and irrigation uses.

As to appellants' lands, the court found that the Vail ranch totals 79,177 acres (finding 7) "contacting throughout, and lying within the general watershed of the Temecula-Santa Margarita river and its tributaries"; that each of the 5 tracts owned by appellants was acquired by distinct lines of title and independent conveyances from the original sources of title; that Little Temecula grant was partitioned in 1892 into 6 parcels numbered lots A, B, C, D, E, and F; that appellants own lots A, B, C, D; that lots A and B abut on the stream and contain 1,277 acres riparian to the Temecula-Santa Margarita river; that lots C and D do not abut on the main stream or any of its tributaries; that although originally all of Little Temecula grant was riparian to the river, in the decree of partition no reference at all was made to riparian rights of either the abutting or nonabutting lots; that lots C and D (containing 450 acres) are not riparian to the main river or any of its tributaries.

As to Temecula grant, as has already been mentioned, appellants own a little less than one half of the original grant, and within the boundaries of this half are various parcels not owned by them. One of these parcels is the site of the unincorporated town of Temecula. It will also be remembered that the Temecula-Santa Margarita river and its tributary Murrieta creek, join within the Temecula grant, and that there is a well defined crest line dividing the drainage areas of the two streams. The trial court found that these were separate watersheds. It found that appellants own 2,798 acres in Temecula grant riparian to the Temecula-Santa Margarita river, being all the lands of appellants in that grant lying south of the Temecula-Murrieta crest line; that appellants own 1,362 acres in

Temecula grant riparian to Murrieta creek, being part of appellants' lands in the grant lying north of the crest line.

The court was not consistent in its conclusion that the lands of appellants in the Murrieta watershed were not riparian to the main river. It found that immediately north of the confluence of the Murrieta with the main stream, and north of the crest line, and within the Murrieta drainage area, in Temecula grant, the appellants own two parcels of land designated as lots 32 and 33—one of 106 acres lying east of Murrieta creek and one of 87 acres lying west of the creek; that as to the 106-acre parcel it is so located with reference to the Temecula-Santa Margarita river and the other riparian lands of appellants within Temecula grant (finding 9) "that the surface drainage from said land is *directly into said Murrieta Creek,* and thence along the course of the surface channel of said Murrieta Creek *directly into said Temecula Creek* (Temecula-Santa Margarita River) entirely within and upon riparian lands of the defendants in said Temecula grant, and without passing, during any part of its course, over lands non-riparian to said Murrieta Creek or through or over lands not in the ownership of parties other than defendants.

"That other than said parcel of one hundred six (106) acres, there is no land of the defendants within the watershed of said Murrieta Creek and lying within either the Pauba or Temecula grants, from which the surface drainage reaches the Temecula River or Creek without first passing through lands nonriparian to said Temecula Creek and in the ownership of parties not of record in this action" except the 87-acre parcel above mentioned which is "rocky, rugged and precipitous" and which "is not suitable or adaptable to cultivation either with or without irrigation". Under this and the preceding findings, except as to these two parcels which are an integral part of the Temecula grant, all the lands in that grant riparian to the Murrieta are held nonriparian to the main river, but these two parcels based on what appellants call the "surface drainage theory", are held riparian to both streams.

Pauba grant is contiguous to both the Temecula-Santa Margarita river and to Santa Gertrudis creek, a tributary of the Murrieta. The two drainage areas are separated by the Temecula-Murrieta crest line. The trial court separated the two watersheds. It found that appellants own in Pauba grant 17,375 acres riparian to the main river, being all of the Pauba grant south of the crest line. As to the balance of Pauba grant north of the crest line and lying within the Murrieta drainage area no finding was made as to riparian acreage.

The Santa Rosa grant is not contiguous to either the Temecula-Santa Margarita river or to Murrieta creek, and appellants concede that the trial court correctly found that no part of said grant is riparian to those streams. The trial court found (finding 9) that 9,535 described acres are riparian to Deluz creek "but no part thereof is susceptible of practical and profitable cultivation under irrigation with the waters of said creek", and that 10,270 described acres within the grant are riparian to Sandia creek "but no part thereof is susceptible of practical and profitable irrigation with the waters of said creek." Other lands in this grant, without describing the acreage, are found riparian to Cottonwood creek, a tributary of the Murrieta.

As to the Vail government lands appellants concede that this acreage is not riparian to the main river. The trial court found that it was not riparian to any of the tributaries of the main river. This finding is challenged by appellants, their contention being that the acreage is riparian to Penjango creek.

After thus describing the riparian acreage of the appellants, the court found that of the acreage found riparian to the Temecula-Santa Margarita river, the following acreages within each grant (finding 10) were "capable of and adapted to profitable and practical irrigation with water of and from said Temecula creek or river * * * and suitable for habitancy and domestic irrigation and other uses and purposes" and required the following quantities of water:

Temecula grant—1,234 acres reasonably requiring 3,550 acre-feet per annum.

Little Temecula grant—947 acres reasonably requiring 1,584 acre-feet per annum.

Pauba grant—1,740 acres reasonably requiring 4,994 acre-feet per annum.

The court next finds that of the riparian lands of appellants within the Murrieta watershed within Temecula grant, 1,022 acres are capable of and adapted to practical and profitable irrigation, reasonably requiring 2,191 acre-feet per annum; that all of the lands of appellants found susceptible of profitable irrigation are suitable for the growing of various designated crops, but are so situated that they are annually visited by killing frosts, and the growing season thereon normally extends over but 8 months of the year.

On the subject of damage the trial court found that appellants' various pumping plants and diversion works are capable of pumping, and that it was appellants' intention to pump, from the surface flow and from the underground basin 2½ to 3½ times the amount of water to which appellants are lawfully entitled; that from 1923 to the time of trial appellants have taken 60 to 85 per cent of the total flow of all of the water in the river measured at Temecula gorge; that the effect of the increased withdrawals by appellants starting in 1923 has been to injure respondent in the irrigating seasons of 1923, 1924, 1925 and 1928 by causing the main river to cease to flow across the easterly portion of the Santa Margarita ranch as a surface stream approximately 6 miles further upstream than it had done prior to 1923; that as a result the stream ceased to afford water sufficient for respondent's cattle pasturing on the riparian lands and ceased to afford water sufficient for respondent's cattle to drink from the surface flow of said stream where they had previously been accustomed to drink; that in the irrigating seasons 1923–1928 (excluding the seasons of 1926–1927) from June 1st on in each of the above years respondent could not and did not receive sufficient water to fill its Lake O'Neill reservoir and as a result respondent had insufficient water to irrigate its riparian lands; that no shortage occurred in 1926 or in 1927, but in the spring of those years heavy unprecedented and unusual rainstorms occurred in the Temecula-Santa Margarita river watershed.

The court also found that on both respondent's and appellants' properties the banks and channel of the river at places are covered with willows, and that at places on both ranches the river flows in an extremely wide and shallow channel exposed to the sunlight, resulting in large evaporation and transpiration losses.

After finding that the parties have correlative rights in the stream, the court finds that for the practical division of the waters of the stream the parties should maintain 6 measuring stations, describing them in detail, and that appellants must maintain measuring meters at their various pumping plants and wells; that by reason of the situation and condition of respondent's 12,375 riparian acres susceptible of practical and profitable irrigation requiring 30,289 acre-feet of water per annum (finding 33) "the plaintiff *owns* and reasonably claims the right, and is entitled to take and use on its lands riparian to said stream in Santa Margarita Ranch, as herein defined, seventy five one hundredths (75/100th) part of the water of said Temecula-Santa Margarita River, which naturally, when not artificially diverted or abstracted, flows and descends" in the main river as measured at station 6, located on respondent's property, after first deducting the flow of the Murrieta; that by reason of the situation and location of appellants' 3,853 riparian acres susceptible of practical and profitable irrigation requiring 10,128 acre-feet of water per annum "the defendants *own* and reasonably claim the right and are entitled to take and use on their lands riparian to said stream in said Vail Ranch, as herein defined, twenty-five one-hundredths (25/100 ths) part of the water of said Temecula-Santa Margarita River which naturally, when not artificially diverted or abstracted, flows and descends in the channel" of the river as measured at station 6, after first deducting the full flow of the Murrieta; that this 25/100 of the flow of the river awarded to appellants is awarded to the separate grants of appellants as follows:

Temecula grant—8 8/10 of the total flow; Little Temecula grant—3 9/10 of the total flow; Pauba grant—12 3/10 of the total flow.

The court then finds that by reason of the situation and location of appellants' 1,022 acres riparian to the Murrieta susceptible of practical and profitable irrigation, requiring 2,191 acre-feet of water per annum, the appellants own and are entitled "to take and use on their lands riparian to said stream in said Vail Ranch one hundred (100) per cent" of the flow of the Murrieta and all of its tributaries; that the flow of the Murrieta during the irrigating season (which the evidence shows is about 20 inches) is insufficient in volume, if attempted to be allocated between the parties, to be susceptible of practical apportionment or division. Similar findings are made as to Santa Gertrudis and Cottonwood creeks. It is also provided that the small quantity awarded to intervenors shall be deducted from respondent's share of the water.

It should be noted that in the above summarized portions of the findings, the trial court in declaring the rights of the parties first ascertained the riparian acreage susceptible to practical irrigation, then ascertained the quantity of water required for that acreage and declared the rights of the parties based on that relation of those figures. Both as to irrigable acreages and as to duty of water as found by the court, the respondent is found to own 3 times as much irrigable riparian land and to require 3 times as much water as appellants own and require. It is not contended that either party has ever irrigated or intends to irrigate their entire irrigable riparian acreage. The findings and evidence clearly show the contrary.

In its conclusions of law and judgment the trial court provided that all waters taken from the Temecula alluvial basin by appellants by means of their wells and pumping plants should be treated as surface diversions; that appellants are not entitled to use water awarded to one grant on any other grant; and that defendants are not entitled to convey any water across the Temecula-Murrieta crest line except as to the two parcels located near the confluence.

After thus disposing of the declaratory features of the case the court found that respondent was entitled to an injunction, and in its judgment granted respondent an injunction:

1. Enjoining appellants from using the water awarded any one grant interchangeably upon any other grant.

2. Enjoining appellants from diverting any water to or using any portion of the waters upon lots C and D of the Little Temecula grant or upon the Vail government lands; and

3. Enjoining appellants from diverting from the surface flow or from the basin from May 1 to Oct. 31 of each year more than 25 per cent of the total flow of the stream measured at Temecula gorge. It is to be noted that the injunction prohibits appellants from diverting during the summer months approximately (the measuring points being different) the same quantity of water awarded to respondent in the declaratory portion of the judgment.

On this appeal appellants urge 5 main points:

1. The trial court erred in determining the amount of appellants' lands riparian to the Temecula-Santa Margarita river and to Murrieta creek and its tributaries, and in allocating the waters of these streams on the basis of such erroneous determination;

2. The court erred in including within the lands of respondent found to be riparian 1,200 acres of land not within the watershed of the Santa Margarita river;

3. Respondent is not entitled to any injunction.

4. The trial court erred in refusing to consider the sub-surface flow of the stream and the underground basins in respondent's lands, and in sustaining objections to testimony regarding such sub-surface flow and underground basins; and

5. The method imposed by the judgment for the measurement and division of the water between the parties is erroneous and violates substantial rights of appellants.

The first 4 of these contentions will be considered in order. Inasmuch as we are of the opinion, for reasons hereafter appearing, that a reversal is called for, the fifth point will not be discussed. The alleged errors claimed to have been committed in this regard, if any in fact exist (of which we have grave doubts) are not likely to occur on the new trial in view of the conclusions reached on the other points.

The appellants' first main contention is that the court erred in determining the riparian acreage owned by them. It is contended that as to each of appellant's 5 tracts of land the trial court either as a matter of fact, or by an erroneous holding as to the law, improperly excluded a material portion of their holdings from the riparian status. That a material error in this respect is prejudicial to appellants is obvious from the summary of the findings already made. As there appears, the trial court first found the extent of the riparian acreage of each of the parties. Then it found the number of those riparian acres that were capable of profitable irrigation. The available water was then awarded on the basis of the number of irrigable riparian acres owned by the parties, and the water requirement of those acres. It is obvious that if the trial court made an appreciable error in computing the riparian acreage owned by either party the proportion of irrigable riparian acres owned by each would undoubtedly have been different, and the award of water to each of the parties would necessarily have been different.

First as to Temecula grant. It is appellants' contention that the trial court committed prejudicial error in computing their riparian acreage in this grant in two respects:

1. In holding that the portion of the Temecula grant owned by them within the Murrieta drainage area was not within the Temecula-Santa Margarita watershed; and

2. In its finding as to the number of acres within Temecula grant owned by appellants that are riparian to Murrieta creek. Both of these contentions, to a certain extent, involve the same question of law.

The trial court expressly held that as to respondent, the drainage area of the Murrieta and the drainage area of the Temecula-Santa Margarita river were separate and distinct watersheds. The appellants were specifically enjoined, for that reason, from transporting any water from either river across the Temecula-Murrieta crest line dividing the 2 drainage areas, except as to lots 32 and 33 at the confluence of the two streams.

It will be remembered that the Murrieta is a tributary of the Temecula-Santa Margarita river, and that it joins the main river on appellants' property within the boundaries of Temecula grant. As already pointed out, the trial court found that all of the Temecula grant owned by appellants south of the crest line was riparian to the main river (totaling 2,798 acres of which 1,234 were found irrigable) and that north of the crest line appellants owned 1,362 described acres in Temecula grant riparian to the Murrieta, of which 1,022 acres were found to be irrigable. The court also found that the 106 and 87-acre parcels at the confluence of the two streams, but located entirely within the Murrieta drainage area, were riparian to the main stream for the reason (finding 9) that these two parcels were "so located with reference to said Temecula Creek (Temecula-Santa Margarita River) and other riparian lands of the defendants lying within said Temecula grant that the surface drainage from said land is directly into said Murrieta Creek, and thence along the course of the surface channel of said Murrieta Creek directly into said Temecula Creek, entirely within and upon riparian lands of the defendants in said Temecula grant, and without passing, during any part of its course, over lands non-riparian to said Murrieta Creek or through or over lands not in the ownership of parties other than the defendants;" that other than these two parcels (one of which is found to be nonirrigable) there is no other land of the appellants within the watershed of the Murrieta and lying within either Pauba or Temecula grants "from which the surface drainage reaches the Temecula river or creek without first passing through lands non-riparian to said Temecula Creek and in the ownership of parties not of record in this action".

Under these and other findings it was the theory of the trial court that, as to respondent, located more than 10 miles downstream from the confluence of the main river and the Murrieta, the lands of appellants in Temecula grant located in the Murrieta drainage area were not, except as to the two parcels already mentioned, riparian to the main river. The two parcels located north of the confluence differ from the balance of Temecula grant in the Murrieta drainage area owned by appellants (according to the findings) only in that surface drainage from these two tracts drains directly from them into the Murrieta, thence to the confluence entirely within the lands of appellants. As to the balance of the riparian area in Temecula grant in the Murrieta drainage area surface drainage is either directly into the Murrieta on appellants' lands or into the Murrieta across one of the small "islands" of land deeded away by appellants. One of these deeded out "islands" is the townsite of Temecula located on both sides of the Murrieta immediately north of the two parcels located north of the confluence. The result is that all surface drainage from the area now under consideration drains into the Murrieta, but before reaching the main river must cross the townsite of Temecula not owned by appellants, and in some cases crosses either of these deeded out parcels. As far as the findings are concerned, it was apparently on this theory, referred to by appellants as the "surface drainage theory", and first advanced in the trial court by respondent's expert witness Finkle, that the trial court distinguished between the two parcels heretofore mentioned, and the balance of Temecula grant located within the Murrieta drainage area. Apparently, if the appellants had not deeded away the townsite of Temecula and other small islands of land within the Temecula grant, the trial court would have held that all of the grant north of the crest line was riparian to the main river. As already stated, all of Temecula grant now owned by appellants was acquired by them as part of a single grant, and large areas of it have access to both rivers, and for about ½ mile below the confluence the grant is contiguous to the stream.

[1-4] We think that the trial court was in error in holding, as to a downstream owner such as respondent, that the riparian lands of appellants in the Murrieta drainage area were not riparian to the main river. It is well settled that the extent of lands having riparian status is determined by 3 criteria:

1. The land in question must be contiguous to or abut on the stream, except in certain cases not now involved. The length of frontage is an immaterial factor. Thus in Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706, a 40-acre tract with but a 250-foot contact with the stream was held to be riparian to the stream. An examination of the diagram contained in the opinion of that case demonstrates that the major portion of the surface drainage of the 40-acre parcel held to be riparian designated as parcel D, in order to reach the stream necessarily had to cross parcels B or C which had been deprived of riparian rights. See, also, Omnes v. Crawford, 202 Cal. 766, 767, 262 P. 722. Clearly under these cases, and others that could be cited, it is access to the stream, and not whether all surface drainage from the area in question drains directly into the stream at the point of access, that determines the riparian status of the land. These cases clearly refute the so-called "surface drainage theory". In the present case Temecula grant has access to both banks of the Temecula-Santa Margarita river for ½ mile below the confluence of the two streams and for 1½ miles above the confluence.

2. The riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner. Boehmer v. Big Rock Irrigation District, 117 Cal. 19, 48 P. 908. In the instant case all of Temecula grant owned by appellants is held under a title derived from a single source.

3. The land, in order to be riparian, must be within the watershed of the stream. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A., N.S., 1062.

It is with requirement 3 that we are now particularly concerned. Specifically, the question presented is as to the correct definition of a watershed as to a riparian owner downstream from where two converging streams join; or, as stated another way, as to such downstream owner, are lands located within the drainage area of a tributary within the watershed of the main stream?

[5] It is appellants' theory that all of the 10,402 acres of Temecula grant owned by them are riparian to the Temecula-Santa Margarita river, as against respondent, a downstream riparian owner, regardless of the fact that the major portion of the area is within the drainage area of the Murrieta creek. Appellants contend, and we agree with the contention (assuming the existence of requirements 1 and 2, supra) that as to any owner below the confluence of two branches of a stream, the drainage areas of both branches must be deemed to constitute a single watershed, where riparian land (at least in one single grant) is owned by the upper owner on both branches. Although there are many cases purporting to define the limits of a watershed, there is a paucity of authority on the subject in so far as the rights of the parties in lands bordering on converging streams are concerned. We have been cited to but two California cases (and independent research has disclosed no other) where the point was directly involved. The two cases are Holmes v. Nay, 186 Cal. 231, 199 P. 325 and Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A., N.S., 1062, both leading cases on various phases of our water law. The two cases, when considered together, establish the law applicable to the rights of riparians on converging streams.

[6] In the Holmes Case, Nay owned a 101-acre tract (which we will designate as tract No. 1) through which the main stream flowed. After crossing the downstream boundary of tract No. 1, the main stream became one of the boundaries of a second tract owned by Nay (which we will designate as tract No. 2). Immediately downstream from Nay's tract No. 2 were the lands of plaintiff Bernard, and below that some distance the lands of plaintiff Holmes, both areas being riparian to the main stream. Tract No. 2 was a separate tract from tract No. 1, and was a subdivision of a Mexican grant, as were likewise the properties of Holmes and Bernard. Flowing through tract No. 2 was a tributary of the main stream, which joined the main stream before the main

stream reached the upstream boundaries of plaintiff's properties. Separating the drainage area of the main stream from that of the tributary was a low divide or crest line. Purporting to act in the exercise of his riparian rights, Nay diverted water from the main stream in tract No. 1, conveyed it over the crest line, and used a part of it on that portion of tract No. 2 that was in the drainage area of the branch. So far as we are here interested the question thus presented was whether Nay in the exercise of his riparian right could lawfully divert water from the main stream and use it in the area within the drainage area of the branch as against lower riparians whose lands were located downstream from the confluence. Stated another way, against such lower riparians was the land within the drainage area of the branch riparian to the main stream? That is exactly the problem presented in the present case. The court in the Holmes Case held, in effect, that as to lower riparian owners whose lands are located below the confluence the drainage area of the main stream and that of the tributary must be considered one watershed. In this connection (at page 240, 199 P. at page 330) this court stated "It seems also that part of Nay's land lies between the main stream and a branch, the latter coming into the former before the stream reaches the land of either of the plaintiffs, so that some of Nay's land is in the watershed of the main stream above where the branch comes in and some is in the watershed of the branch. It seems also that Nay is taking the water from the main stream and using at least a portion of it on land in the watershed of the branch. This is complained of, but this he has the right to do. Both watersheds are but parts of the watershed of the stream as it passes the plaintiffs' lands, and the rule that the owner of a tract of riparian land may not convey and use the water without the watershed of the stream has no application. The water is not conveyed and used without the watershed of the stream which passes the plaintiffs' lands, and that stream is the stream in which the plaintiffs have rights. They have no rights in the main stream and the branch above as separate streams. The situation is the exact converse of that presented in Anaheim, etc., Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A. (N.S.) 1062, where the junction of the stream and the branch was below the lands of the complaining riparian owner. Any other rule would be wholly impracticable and would, in many cases, practically destroy the riparian rights of an upper owner." This constitutes a direct and unequivocal holding that as to riparian lands downstream from the confluence the two branches constitute but one watershed. As will be noted from the above quotation from the Holmes Case the court there held that the situation there under consideration was the exact converse of that presented in Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A., N.S., 1062. This last named case is heavily relied upon by respondent to support the holding of the trial court in the present case. An examination of that case demonstrates that nothing contained in the opinion is contrary to what was later enunciated in the Holmes Case—in fact, the rule of the Anaheim Case serves to strengthen and explain the rule of the Holmes Case. In the Anaheim Case the defendant owned two tracts of land, tract No. 1 contiguous and riparian to the Santa Ana river, and tract No. 2, adjoining tract No. 1, contiguous and riparian to Mill creek, a tributary of the Chino creek, which was a tributary of the Santa Ana river. Separating the drainage area of the main stream from that of its tributaries was a crest line. The plaintiff owned a tract of land contiguous and riparian to the Santa Ana river downstream from defendant, but *upstream* from the confluence of the river and Chino creek. The defendant desired to divert from the main river on tract No. 1 and to use the water on tract No. 2 within the drainage area of the tributary. Obviously, water so diverted would be entirely by-passed around plaintiff's riparian lands located upstream from the confluence. The court very properly held that, where two streams unite, *with regard to lands abutting thereon above the junction,* the drainage area of each stream is a separate watershed. After stating the elementary rule that land not within the watershed is not riparian, and after referring to the findings adverse to defendant's contentions, the court stated (page 330, 88 P. page 980): "The defendants claim that these findings are contrary to the evidence, and that this rule does not apply to the land they seek to irrigate, because, while it is wholly within the Mill creek watershed, it is also within the general watershed of the Santa Ana river, considered as an entirety including the valley [and the slopes leading thereto] from its sources to its mouth. This fact does not affect the case, *at least so far as the land of the plaintiffs is concerned.* The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is in consequence entitled, so to speak, to the use of its waters. Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream, *with regard to lands abutting thereon above the junction,* and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed, or drainage basin, should not affect the rule, nor should it be changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low tableland, or *'mesa,'* as it is called in evidence, and not by a sharp or well-defined ridge, range of hills, or mountains. The reasons for the rule are the same in either case. In some cases it may be difficult to distinguish the line of separation. This seems to have been a case of that sort. Nevertheless, we think there is evidence sufficient to support the finding of the court that there is a dividing line between the two watersheds, and that the land irrigated by defendants lies upon the slope which descends into Mill creek." (Italics added.) There is nothing contrary in this case to what was held in the Holmes Case. In the Holmes Case the protesting lower riparian, as in the instant case, owned land below the junction, while the party that desired to divert from the drainage area of the main stream to that of the tributary owned land on both branches above the confluence. In the Anaheim Case both parties owned land on the same branch above the confluence. The two cases, when considered together, supply a complete picture of the rights of riparians on converging streams. We find nothing in any other case directly touching upon the point now under discussion. Bathgate v. Irvine, 126 Cal. 135, 58 P. 442, 77 Am. St.Rep. 158, the other case relied upon by respondent, is not helpful. While containing an interesting discussion of the reasons for confining riparian rights to lands within a watershed, it did not involve, nor did it discuss, the extent of a watershed where two streams join. While not directly in point, the cases of Faulkner v. Rondoni, 104 Cal. 140, 37 P. 883; Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 658, 93 P. 1021, and Cheda v. Southern Pacific Co., 22 Cal.App. 373, 134 P. 717, contain language which support the conclusions herein reached. From what has been said it must be held that, as to respondent, all of appellants' riparian lands in Temecula grant within the Murrieta drainage area are within the watershed of and riparian to the Temecula-Santa Margarita river, and that the trial court's holding to the contrary was erroneous.

[7, 8] As already pointed out the trial court properly applied the rule of the Holmes Case to a small part of Temecula grant within the Murrieta drainage area, that is to the two small parcels north of the confluence. These two lots are an integral part of Temecula grant. So far as the findings are concerned, the trial court distinguishes these two parcels from the balance of Temecula grant within the Murrieta drainage area, only in that surface drainage therefrom reaches the main stream via the Murrieta without crossing lands in the ownership of persons not parties to this action. This so-called "surface drainage theory" is unsound. It is predicated upon the concept that return drainage must reach the river entirely upon the riparian tract. As was said in Pabst v. Finmand, 190 Cal. 124, 130, 211 P. 11, 13, "The fact that the water used upon riparian lands must be returned to the original stream is not a test of the riparian character of the land. It is but an incident of the riparian use." The test suggested by the trial court would mean that frontage on the stream would be the controlling factor in determining the amount of riparian land. The cases clearly hold that if a tract has any access to the stream at all (and the other requirements exist) the entire tract is riparian. Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706; Omnes v. Crawford, 202 Cal. 766, 767, 262 P. 722.

[9-13] Respondent contends that the trial court considered several other factors in addition to the "surface drainage theory," and also contends that these factors serve to distinguish the instant case from Holmes v. Nay, supra. Respondent urges that in the Holmes Case the court was considering two

small tracts of land in two small drainage areas, while the instant case involves two large tracts and two large drainage areas. Obviously the size of the drainage area has nothing to do with riparian rights. It is the situation of land within the watershed that is material. In determining the riparian status of land the same rules of law apply regardless of the size of the tract, the extent of the watershed or the amount of the run off. Respondent also seeks to support its contention by a reference to the admitted fact that there is not sufficient water for the riparian needs of either party. The amount of water in the stream has no bearing whatever in determining whether a particular tract is riparian. This argument is closely connected with another argument urged by respondent—that if appellants divert water from the main river to their riparian lands in the Murrieta drainage area the evidence shows that because of certain physical facts such waters will be entirely consumed in the Murrieta watershed. Assuming that the evidence is susceptible of this interpretation, that fact has no relevancy on the subject of the status of riparian land. Nor does the fact that appellants were awarded the full flow of the Murrieta in any way affect the question now under discussion. We are here discussing the status of land, not the quantity of water available. None of the other arguments advanced by respondent is convincing.

[14, 15] Most of the arguments advanced by appellants would be of considerable weight in determining whether the diversion by appellants from the main river for use on their riparian lands in the Murrieta watershed would be a reasonable beneficial use. As between riparians each is, of course, limited to a reasonable use. It might well be, under the facts here presented, that the diversion of water across the crest line would be an unreasonable use, and if so, could be properly enjoined. The trial court did not pass on this issue, nor predicate its judgment thereon. It rested its judgment upon the holding that that portion of the Temecula grant within the Murrieta watershed was not riparian to the main river. That conclusion was erroneous, and for reasons already pointed out, prejudicial.

Respondent also urges that appellant Mahlon Vail, and one of appellants' witnesses, W. S. Jones, made certain admissions against interest sufficient to sustain the findings as to the Murrieta drainage area constituting a separate watershed. The point requires but passing mention. A reading of the record demonstrates that no such admissions were in fact made. Respondent has misconstrued certain statements made in reference to an entirely different problem to apply to the problem now under discussion.

It is the next contention of appellants that the trial court committed reversible error in fixing the area owned by them in Temecula grant that is riparian to Murrieta creek. With this contention we also agree.

The parties materially disagree as to the proper interpretation of the findings on this issue. It is conceded that north of the Temecula-Murrieta crest line within Temecula grant appellants own 7,604 acres. Appellants contend, and respondent admits, that this entire acreage is riparian to Murrieta creek. Under the holding discussed supra, as a matter of law, this makes this area also riparian to the main river. It is appellants' contention that, based on the "surface drainage theory" the trial court found that but 1,362 acres of Temecula grant were riparian to the Murrieta, and that the balance of over 6,000 acres, by necessary implication, were held to be nonriparian. Respondent contends that, properly interpreted, the findings provide that all of the Temecula grant north of the crest is riparian to the creek (thus abandoning the "surface drainage theory"), and further, that under the judgment appellants can use 100 per cent of the flow of the Murrieta upon any portion of this area. In fact, in volume 1 of its brief, page 335, respondent states: "The plaintiff-respondent so understands the judgment and *concedes* that by its judgment the trial court awarded to the defendants-appellants, as against the plaintiff-respondent, all of the waters of Murrieta Creek and all its tributaries for use upon all their lands lying within the watershed of Murrieta Creek." We cannot agree with respondent's interpretation of the findings and judgment.

As we read the findings, the court found that appellants own but 1,362 acres north of the crest line and within Temecula grant that are riparian to Murrieta creek, and, of these 1,362 acres, but 1,022 acres are capable of and adapted to practical and profitable irrigation. As we read the judgment the trial court limited the use of Murrieta creek waters to the 1,362 acres above mentioned, plus the acreage of the two lots located at the confluence. The correctness of the finding as to the extent of riparian acreage is obviously of fundamental importance. The trial court awarded the water on the basis of the comparative ownership of the parties of irrigable riparian land. The extent of *irrigable* riparian land is necessarily limited by the extent of the area found to be riparian. If 1,022 acres out of 1,362 riparian acres are irrigable, it is a reasonable assumption that, if in fact 7,000 plus acres are riparian, the number of irrigable riparian acres is materially larger than the 1,022 acres found by the trial court. A material change in the appellants' irrigable acreage, under the theory of the trial court, would have resulted in a material increase in the award of water to appellant.

We turn, then, to an examination of the pertinent findings. In finding No. 9 the trial court first finds the acreage riparian to the main river south of the crest line, and then finds that north of the crest line in Murrieta watershed within Temecula grant appellants own "one thousand three hundred sixty-two (1362) acres riparian to said Murrieta Creek for a distance of about two (2) miles, and being those lands of the defendants shown on plaintiff's exhibits Nos. 191 and 201 as parcels or areas numbered 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41, respectively." To have any effect this finding must be construed to mean that the 1,362 acres constitute the extent of the riparian acreage owned by appellants in Temecula grant north of the crest line. By necessary implication the balance of over 6,000 acres owned by appellants in that area must be nonriparian. In finding 10 it is stated that: "Within the boundaries and being that portion of defendants' *riparian lands* (obviously referring back to finding 9 above quoted) capable of and adapted to practical and profitable irrigation with water of and from said Murrieta River or Creek * * * is, and always has been a body of land capable of and adapted to practical and profitable irrigation with water of and from said Murrieta River or Creek of about one thousand and twenty-two (1022) acres in area." In other findings the court fixed 2,191 acre-feet per annum as the quantity of water reasonably necessary to irrigate these 1,022 acres. In finding 33 it is provided that appellants own "and are entitled to take and use *on their lands riparian to said stream* in said Vail Ranch one hundred (100) per cent of the water of said Murrieta River or Creek, and all its tributaries * * *" Under paragraph 7 of the judgment appellants are restricted in their use of the 100 per cent of the flow of the Murrieta awarded to them to their lands "lying within the Temecula grant, Riverside County, California, *riparian to the Murrieta Creek, as delineated and defined in the findings herein.*"

In view of these various provisions it must be held that by the findings and judgment the trial court fixed 1,362 acres as the area that is riparian to Murrieta creek, and limited appellants in their use of the waters of this creek, to these 1,362 described acres, thus depriving the balance of the area, totaling over 6,000 acres of its riparian status —6,000 acres that respondent admits are in fact riparian.

A reference to the various exhibits, particularly to certain topographical maps, indicates that the trial court apparently based its 1,362 acres finding on the "surface drainage theory," because it appears from those maps that the 1,362 acres described in finding 9 are the only acres north of the crest line within Temecula grant where the surface drainage therefrom is directly from such land into the creek. The balance of 6,000 plus acres drains into the creek, but the surface drainage therefrom must cross one of the deeded out parcels not owned by appellants and heretofore mentioned. This theory has already been held unsound.

We now turn our attention to Pauba grant. This grant is traversed by two streams. The Temecula-Santa Margarita river flows across this grant for a distance of about 11 miles. The northern portion of the grant is traversed by Santa Gertrudis creek, a tributary of the Murrieta. The trial court found that the 17,375 acres of this grant south of the crest line and within the drainage area of the main river are riparian to that river and that of these 17,375 riparian acres, 1,740 acres were capable of and adapted to practical and profitable irrigation reasonably requiring 4,994 acre-feet of water per annum. The balance of the grant, consisting of 10,287 acres is within the drainage area of the Santa Gertrudis creek. As to this area appellants were awarded 100 per cent of the flow of the creek, but were denied the use of any water from the main river, on the theory that such area was not riparian to the main river. Under the doctrine of Holmes v. Nay, supra, already discussed in detail, this was clearly error. We again repeat what was said concerning a similar problem in reference to Temecula grant—we are here considering only the riparian status of the land involved, and are not considering whether it would be a reasonable beneficial use of the water of the main river to convey the same across the crest line and use it on land riparian to the tributary. This last problem was not passed on by the trial court and will have to be passed upon on the retrial.

We next turn our attention to Little Temecula grant. Admittedly, this entire Mexican grant was originally riparian to the Temecula-Santa Margarita river. Thereafter, the rancho passed from the original patentee in successive transfers and conveyances as a single tract. In 1892 the grant was owned by 6 people as tenants in common. In that year, pursuant to a decree of partition, the grant was partitioned into 6 parcels labeled parcels A, B, C, D, E and F, one parcel being allotted to each of the tenants in common. Appellants subsequently acquired parcels A, B, C and D. Parcels A and B are contiguous to the river. Parcels C and D do not abut on the river or on any tributary. In finding 7 the trial court found: "that in said decree of partition no provision is made for riparian rights as to any of said lots, and said decree is silent relative thereto; that said lots C and D do not abut upon, are not contiguous to, do not remain and are not riparian to said stream or any of its tributaries * * *." The two parcels each contain 225 acres. The evidence shows that in the past these two parcels have been irrigated from the Temecula-Santa Margarita river by appellants.

[16] The question thus presented can be stated as follows: When a riparian tract is partitioned by decree, and the decree is entirely silent as to riparian rights, do the noncontiguous parcels lose their riparian status? The trial court answered this question in the affirmative. In support of the trial court, respondent urges that there is no distinction, in legal effect, between a grant deed and a decree of partition, and relies on the well settled rule that where the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 331, 88 P. 978, 11 L.R.A.,N.S., 1062. The appellants urge that this rule applicable to grant deeds has no application to a partition decree. With this contention we agree. There is a fundamental distinction between a grant deed and a partition decree. In a grant, the grantor has title to the land subject to the grant. The proposed grantee has nothing, and therefore the grantee secures only such title as is granted. When the grant is silent as to riparian rights obviously such rights have not been conveyed and remain with the grantor for the benefit of his retained lands and for the benefit of other riparians. If the grant deed conveys the riparian rights to the noncontiguous parcel, that parcel retains its riparian status. But a partition decree involves an entirely different legal situation. In a partition, there is no change of title between the tenants in common—it is simply a dividing up of what the parties already own. After the partition each tenant in common has exactly the same proportional interest in the property that he had prior thereto. The only difference is that now his interest is in severalty, while prior to the partition it was in common.

Although not dealing directly with the subject of riparian rights, there are many cases recognizing these principles. In the early case of Wade v. Deray, 50 Cal. 376, 380, this court, in discussing the essential nature of a partition decree, stated: "It is well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title. After the partition each had precisely the same title which he had before; but that which before was a joint possession was converted into a several one." In Bennett v. Potter, 180 Cal. 736, 742, 183 P. 156, 158, in discussing this same point it was stated: "A simple partition does not change the title, nor transfer it from one to the other, nor return or restore to either party anything lost by him, or of which he had been deprived. It merely transforms the right of common possession of the whole tract into a right to the exclusive possession of the same interest or share, as represented by the parcel set off to him in severalty. He thereafter holds in severalty that interest which he previously held in undivided form. He does not recover the segregated parcel, nor even the possession thereof, but keeps such possession, and thereafter excludes the other tenants from that parcel." In Rose v. Mesmer, 142 Cal. 322, 328, 75 P. 905, it was recognized that these general principles were applicable to a partition of riparian lands. The exact holding of the court was, that where a partition decree specifically refers to the riparian right and confers such right upon certain designated parcels (some of which were nonabutting), the parcels that were not mentioned as to riparian rights, by necessary implication, were deprived of such rights. It was also held that the owners of the ranch before partition held riparian rights in the creek extending to the entire area of the ranch and that at that time each tenant in common owned an undivided portion of the riparian right. The court stated (page 907): "A judgment in partition is a mere severance of the unity of possession and community of interest, and does not in any other respect affect the character of the title or estate, unless it expressly so declares. Christy v. Spring Valley Water-Works, 68 Cal. [73], 75, 8 P. 849; Wade v. Deray, 50 Cal. [376], 380."

[17] Under these cases we think that it necessarily follows that upon the partition of riparian lands, the decree being silent as to the division of riparian rights, each parcel retains its water right. Prior to the partition each tenant in common owned a proportional interest in all of the land which included a share of the riparian right. The riparian status extended to the entire tract. After the partition each tenant in common owns in severalty what he formerly owned in common. The riparian right could be severed from any parcel if the parties so intend, but where the decree is silent on the division of riparian rights, it is reasonable to assume that the parties intend that each tenant in common should keep all rights attached to his parcel.

In 25 California Jurisprudence, 1087, section 94, these principles are recognized in the following language:

"Effect of Partition—Upon partition of a riparian tract each parcel retains an undivided interest in the riparian right of the entire tract, even though it may not abut on the stream, *and no specific mention of water rights is made in the decree.* But of course the rule is otherwise where the decree by express language deprives any parcel of its former interest in the water rights. A judicial partition does not change the character of the water right belonging to land from riparian right to one appurtenant, even if some of the parcels do not abut upon the stream."

Respondent contends that the italicized portion of the above quotation is not supported by the authorities cited. It is true that the cases cited in the article do not directly support the conclusion in question. There appears to be no case in California where the subject now under discussion has been directly passed upon. However, we are of the opinion that the cases cited in California Jurisprudence, supra, as well as the cases heretofore quoted discussing the nature of a partition proceeding lead inevitably to the conclusion found in the above quotation.

Respondent places considerable reliance on the case of Strong v. Baldwin, 154 Cal. 150, 97 P. 178, 129 Am.St.Rep. 149, as establishing its contention that the rules applicable to grant deeds are likewise applicable to partition decrees. In that case, in the partition decree, riparian rights were awarded to the various parcels as therein specified. In addition, deeds were executed which also specifically mentioned the riparian rights. The court held that both under the decree and the deeds the riparian rights were preserved even as to nonabutting parcels. Respondent contends that by this holding it has been established that the legal effect of a partition decree and a grant deed are identical on the problem here presented. This is a clear non sequitur. A holding that where either by deed or decree riparian rights are *expressly preserved* to noncontiguous land the two are identical in legal effect does not constitute a holding that both have the same legal effect when they are *silent* as to riparian rights. As to this situation as already pointed out, there are cogent and convincing reasons why in the case of a partition decree the riparian rights should be preserved, while a contrary conclusion should be reached in the case of a grant deed.

[18] From the above analysis it follows that lots C and D in Little Temecula grant did not lose their riparian status by the partition of 1892, and that the trial court committed prejudicial error in holding to the contrary.

We now turn our attention to the 460-acre parcel of appellants' ranch known as the Vail government lands. In finding 7 the trial court found: "That no part of said Vail government lands is riparian to said Temecula-Santa Margarita river or any of its tributaries." By paragraph 16 of the judgment appellants were enjoined "from diverting or abstracting * * * the surface or sub-surface flow, or any part thereof, of the Temecula-Santa Margarita River or the Murrieta Creek or any of their or either of their tributaries, or the underground waters, or any portion thereof, of the Temecula alluvial basin or the Murrieta Alluvial basin, and transporting said waters to or upon or using said waters for any purpose, beneficial or otherwise, upon the whole or any part of * * * that certain * * * tract commonly known as Vail government lands." Appellants urge that the finding is unsupported and that the evidence shows that this tract is riparian to Penjango creek. The trial court found that Penjango creek or dry wash is a tributary of the Temecula-Santa Margarita river. Appellants contend that this creek has a winter flow of water; that the creek flows through a sandy and porous area and that there are substantial quantities of water in the underground sands. Appellants concede that this tract is not riparian to the main stream, but contend that they have been deprived of their legal right to use the underground waters of the creek on this area. The record discloses that at the trial it was appellants' main theory that underlying this tract and the lands contiguous to the main river was a common underground water plane. This theory was found not in accordance with the facts by the trial court, and appellants have abandoned the contention on this appeal. The only "evidence" referred to by appellants (aside from various statements as to what the record shows unsupported by transcript references) to support its contention that this tract is in fact riparian to Penjango creek, are certain maps which were introduced on an entirely different subject, and which, among other things, show Penjango creek is the southerly boundary of the tract. Other maps show that the creek bed does not extend to the Vail government lands. Other maps are not clear on the point. Respondent refers us to evidence to the effect that the stream bed is not porous, and that whatever underground water exists is lost by evaporation. The point is a relatively minor one, involving only the water in Penjango creek and its underground basin, if any. In the present state of the record we would be inclined to affirm the trial court on this issue, but in view of the necessity of a retrial on other issues, this issue of fact should also be reconsidered on the retrial, so that the parties can cure the present unsatisfactory and confusing state of the record on this issue.

[19-21] In connection with the Santa Rosa grant it is conceded by appellants (p. 138, Opening Brief) that "no part of the Santa Rosa grant is contiguous to the Temecula-Santa Margarita River, and appellants do not claim the right as riparian owners to put any water of the Temecula river upon this grant." The trial court found (finding 9) that of the Santa Rosa grant 9,535 acres are riparian to De Luz creek and 10,270 acres are riparian to Sandia creek, both tributaries of the main river, but that no part of either of these two riparian areas is "susceptible of practical and profitable irrigation." It is conceded that there was no direct evidence at all introduced by either of the parties to this appeal to support this quoted portion of the finding. Respondent, however, contends that under the pleadings on this issue the burden of proof was on the appellants, and that since appellants introduced no evidence thereon, the trial court properly found against appellants. To use respondent's own language its theory is (Res.Brief, vol. I, p. 365) that "Where a party makes an affirmative allegation in an answer and offers no evidence in support thereof, the trial court must make a finding against the affirmative allegation." Respondent cites 10 cases which it contends supports the rule. An examination of the cited cases and others demonstrates that the statement of the rule by respondent is much too broad. The true rule, supported by the authorities cited by respondent, and others, is that (a) new matter set up in the answer, which creates a new issue, causes the burden of proof to shift to defendant; and (b) that if no evidence is introduced upon any issue the finding will be against the party having the burden of proof. Vanderslice v. Matthews, 79 Cal. 273, 278, 21 P. 748; Monterey County v. Cushing, 83 Cal. 507, 509, 23 P. 700. The test is not whether the answer contains an affirmative allegation, but whether the new matter which creates a new issue is contained in the answer. A plea controverting the original cause of action and tendering no new issue is a mere traverse and cannot be properly described as a plea setting up new matter. Frisch v. Caler, 21 Cal. 71, 75.

[22, 23] In the instant case the plaintiff-respondent alleged in its complaint that on the basis of the amount of irrigable and riparian land owned by each party it was entitled to 6 times as much water as appellants. The burden of proof on this issue was on respondent. The answer of appellants denied that the amount of irrigable riparian land owned by respondent was 6 times, or at all, greater than that of appellants, and set forth affirmatively the amount and location of the lands claimed by them to be riparian and irrigable. In this connection appellants alleged that certain lands were riparian to the two creeks. Nothing in appellants' answer created any new issue on the subject of the irrigability of these areas. That issue was created by the complaint. We think the respondent assumed the burden on this issue, and that therefore the finding is unsupported.

Respondent makes some effort to show that although it introduced no evidence on the issue, appellants' own evidence tends indirectly to support the finding. The appellants contend, with some logic, that the evidence is not susceptible of the inferences indulged in by respondent. We do not find it necessary to pass on this contention. For present purposes it suffices to state that the burden of proof on this issue on the retrial is on respondent. Although the acreage involved on this point is large, the amount of water in the two creeks is very small. In fact in the summer months both creeks are dry. There was no evidence that any portion of the two areas found riparian to the creeks has ever been cultivated or irrigated by appellants. In view of the necessity for a retrial on more important issues, the issue of the extent of the irrigability of these lands found to be riparian can be ascertained on such retrial. This is the only issue in reference to Santa Rosa grant that need be retried.

Before proceeding to the second major contention of appellants, the various holdings on appellants' first contention (that error was committed in determining the extent of appellants' riparian and irrigable acreage) can be summarized as follows:

1. The trial court committed error in holding that as to Temecula and Pauba grants the portions of said grants riparian to the Murrieta or its tributaries were not riparian to the main stream.

2. The trial court erroneously determined that but 1,362 acres (plus the two small parcels at the confluence) of the Temecula grant were riparian to the Murrieta.

On the retrial the extent of the riparian acreage in these two grants north of the Temecula-Murrieta crestline will have to be redetermined, and likewise the trial court will have to determine the extent of such acreage that is irrigable.

3. The trial court erroneously determined that lots C and D of Little Temecula grant were not riparian to the Temecula-Santa Margarita river. As a matter of law these two parcels are riparian to the river. On the retrial the extent of the irrigable acreage in the two parcels will have to be ascertained.

4. In view of the unsatisfactory condition of the record on the issue, the exact course of Penjango creek should be determined, and it should be ascertained whether the Vail government lands are riparian thereto. This issue involves solely the waters of the creek, and in no way affects appellants' rights in the waters of the main river.

5. For reasons already stated the trial court should retry the issue as to the extent of the irrigable acreage owned by appellants riparian to De Luz and Sandia creeks, keeping in mind that the burden of proof is on respondent. This issue involves solely the waters of the two creeks, and in no way affects appellants' rights in the waters of the main river.

[24] Points 1, 2, and 3, supra, are of particular importance. While it is true, in view of the stipulated and admitted fact that there is not sufficient water in the main river for the reasonable beneficial uses of either of the parties, that the main issue on the declaratory phase of the case is not as to the extent of the riparian acreage of the parties, but is as to the extent of their *irrigable* riparian acreage, nevertheless a material error as to riparian acreage is obviously prejudicial because we have no way of knowing how much of the land erroneously held to be nonriparian may be irrigable. A material difference in the relative ownerships of irrigable acreage, under the theory of the trial court, would call for a different division of the waters.

In this connection, on the retrial, the court should determine not only the irrigable riparian acreage, but also should pass upon the question as to whether, under all the circumstances, the conveying of the waters of the main river across the crest line for use on Temecula or Pauba grants in Murrieta watershed would constitute a reasonable, beneficial use of such waters.

The second major contention of appellants is that the trial court erred in including within the lands of respondent found to be riparian some 1,200 acres of table land which appellants maintain are not within the watershed of the Temecula-Santa Margarita river.

The trial court found that respondent owned 38,739 acres of land riparian to the Temecula-Santa Margarita river of which 12,375 acres are capable of and adapted to practical and profitable irrigation. Appellants challenge these findings only in so far as they include certain table lands situated north of the mouth of the river and contiguous to the Pacific ocean. This table land was found to be riparian and irrigable. It is appellants' contention that this area, which they contend includes about 1,200 acres, according to respondent's own evidence, slopes and drains not towards and into the river, but towards and into the Pacific ocean, and for that reason is not within the watershed of the Temecula-Santa Margarita river.

A reading of the record presented for review demonstrates that during the trial there was presented, as one of the controverted issues, the question as to the exact location of the crest line dividing this mesa land from the drainage areas to the north and northwest. On this subject much expert and lay testimony and many maps and exhibits were introduced. This appellants concede. A reading of this mass of technical testimony indicates that some portion of this table land (probably considerably less than the 1,200 acres claimed by appellants) does not slope or drain directly towards the river, but slopes roughly parallel thereto, and that, whatever drainage exists, is towards the beach bordering the Pacific ocean over the cliffs or palisades immediately adjacent thereto. As to a portion of this table land there is material, competent evidence to support respondent's contention that the drainage is towards and into the river.

One of respondent's principal expert witnesses—Mr. Finkle—testified that some of the area involved (the exact limits of which we are unable to ascertain) in ordinary winters had no drainage at all, but that in years of heavy rainfall what drainage there was ran parallel to the river over the cliffs or palisades down to the beach; that along the beach there exists what he called a "barrier beach", that is a rough depression built up by the winds, waves and drainage; that, although some of the water draining over the cliffs from the mesa above seeps through the barrier beach into the ocean, whenever any appreciable water drains over the cliffs, the barrier beach causes it to drain towards and into the mouth of the Temecula-Santa Margarita river; that the line of this drainage along the barrier beach is not along a "living stream"—it is along a ravine, or draw, or depression—but it is not a stream; that this ravine, or draw or depression only contains water on rare occasions when there is a flood.

Finkle testified as to the existence of this barrier beach, and as to his theory as to why this beach rendered the table land riparian to the main river, early in February, 1927. Later that month, and while the trial was still in progress, there occurred an unusually heavy rainstorm. An examination made immediately thereafter disclosed that the storm had broken the alleged barrier beach in many places, so that the drainage from the table land was directly into the Pacific ocean. This, of course, completely refuted Finkle's statement that whatever drainage there was from the table land was over the cliffs and along the barrier beach into the river. Finkle explained this on the theory that in the 1927 storm the wind blew from the south; that a wind from that direction would have a tendency to destroy the barrier beach; that normally along the beach the wind blows from the north; that such a wind would have a tendency to build up and strengthen the barrier beach; that "this north barrier beach is one so immature that disturbances due to winds and storms have a very vital effect on it, and for that reason no one can state anything about it except for the time when the observation was made".

[25] From an analysis of this, and the other testimony, it seems clear that whatever the area may be that slopes towards the ocean and drainage therefrom drains over the cliffs, that area cannot be held to be riparian on the theory that the water drains along the beach into the mouth of the river. To hold in accordance with respondent's contention would mean that in one year when the wind was from the south the area would be nonriparian, but in another year when the wind was from the north, the area would be riparian. Ri-

parian rights do not depend upon such an unstable and changeable factor as wind direction, but upon the three factors already fully discussed, supra.

[26] Respondent, however, does not rely entirely on the barrier beach theory to establish the alleged riparian character of the table land in question. It presented geological testimony that in past geologic ages this mesa or table land was created by action of the river. In other words, its geologists testified that this mesa land was originally delta land, and that through the ages it has now become mesa land. Based on this premise, respondent contends that such delta land, on the authority of Half Moon Bay v. Cowell, 173 Cal. 543, 160 P. 675, even though it slopes away from the river and is now many feet higher than the river, nevertheless is riparian thereto. An examination of that case discloses that its holding cannot be distorted so as to sustain such a contention. In that case the court was considering the status of 66 acres of *existing* delta land near the outlet of the stream. The evidence showed that, because of the action of the floods in bringing debris and silt down the stream, during the course of time, the bed of the stream had become slightly higher than the surrounding delta, and that such area was periodically flooded by waters from the stream. In holding that this delta land was riparian to the stream, although sloping away therefrom, this court (page 547, 160 P. page 677) stated: "This 66 acres of the plaintiff's land lies in the flat territory bordering upon the ocean near the outlet of the creek. It can scarcely be said to have any grade or slope. The proof indicates that its general slope is toward the ocean and from a fourth to a half of 1 per cent. from horizontal. In delta land situated at the lower end of a stream, the water in the bed of the stream is often higher than the adjacent land, and that was the situation in the case at bar. This occurs to land properly within the watershed and from natural causes. The torrential flow from the steeper grades carries the debris down to the flat land, where it is deposited, raising the bed above the level of the land adjoining. It would be an extremely unwise and unjust adherence to a supposed rule to declare that land thus made to slope away from the stream, is thereby deprived of the riparian character and rights." The rule thus announced is a correct and salutary one, but only applies to a present and existing delta. The mesa land here involved is at the top of the palisades many feet above the river bed. Water from the river, even in the heaviest floods, could not conceivably ever overflow this area. The rule of the Half Moon Bay Case, applying to a present, existing delta, cannot be properly applied to mesa which in past geologic ages may have been delta land. In past ages this mesa land may have been delta land, and may have been riparian to the river, but riparian rights are not determined by past geologic formations but from the present natural topography.

We are unable to accurately determine from the record the exact location and area of the land that drains over the cliffs and onto the beach, and which for reasons already stated, should have been held to be nonriparian. This matter can be cleared up on the retrial. Inasmuch as appellants do not challenge the findings as to extent of respondent's riparian acreage, or the extent thereof that is irrigable, except as to this table land, no further trial is necessary on this issue except as to that area. As to the balance of the area the findings are amply supported.

We now turn our attention to appellants' third main contention, viz., that under the facts, respondent is not entitled to an injunction. So far we have discussed the extent of each party's riparian acreage, and the extent thereof that is susceptible to profitable irrigation. Based on the irrigable riparian acreage owned by the two parties, and upon the duty of water, the trial court determined, as already pointed out, that respondent was entitled to 75 per cent of the surface flow of the Temecula-Santa Margarita river (less the small quantity awarded to intervenors) and that appellants were entitled to 25 per cent of the flow of that river, plus 100 per cent of the flow of the Murrieta and its tributaries. If the riparian (and irrigable) acreages as found by the trial court had been correct as to amount (but as already held they were not) the declaratory portions of the judgment would have been proper. In addition to declaring the rights of the parties the trial court likewise enjoined appellants, during the irrigation months, from using more than the quantity of water awarded to them by the declaratory portions of the judgment. In so doing, it is appellants' contention, that the trial court confused the declaratory and injunctive features of the case, and based the injunction not on the actual present needs of the parties, but upon the areas owned by each susceptible to irrigation. It is appellants' main contention on this phase of the appeal that, considering the surface and sub-surface water available in and from the Temecula-Santa Margarita river, respondent has never suffered any shortage of water; that there exist three large underground basins of water on respondent's land filled to the brim, but that respondent has made little or no use of such available supply; that considering this supply, respondent has not suffered any shortage, there being ample water therein for respondent's present needs; that the main use respondent has made of the available water in the past is for watering cattle from the surface stream; that under the circumstances here disclosed, considering all pertinent factors, the maintenance of the underground basins full of water for the purpose of supporting the surface stream in order that cattle may be watered from the surface stream is a wasteful and unreasonable use of the waters of the stream; that since respondent is not making a reasonable use of the entire stream, including the underground basins, no legal basis exists for the granting of the injunction.

The portion of the injunction here complained of is found in paragraph seventeenth of the judgment. By it appellants are enjoined "from diverting or abstracting, from either or both the surface flow of the Temecula-Santa Margarita river (the Murrieta creek flow excepted) and the underground waters of the Temecula alluvial basin during the dry or irrigation season of the year, to wit, from the first day of May until the 31st day of October of the same calendar year, in excess of twenty-five (25) per cent of the total flow of said Temecula-Santa Margarita river measured at Temecula Gorge. * * *"

[27-29] Obviously, the findings heretofore referred to, that respondent owns 3 times as much irrigable riparian acreage as do appellants, do not support an injunction prohibiting the use of the water by appellants on their riparian lands for reasonable and beneficial purposes when and while respondent is not using it. It is true that appellants alleged in their answer their intent to take from the stream far more water than they are lawfully entitled to, and it is likewise true that respondent is entitled to an injunction prohibiting appellants from taking water so as to improperly injure respondent. But whether respondent has in fact been injured depends upon its present needs and uses, and not upon the extent of its ownership of irrigable riparian lands.

It is respondent's position that the findings established that during the irrigation season of the year it has an actual and present need for 75 per cent of the summer surface flow of the river, and that respondent is now putting that portion of the surface flow to a reasonable beneficial use. These contentions are admittedly founded on respondent's position that, when not interfered with by appellants, the Temecula-Santa Margarita river is a perennial surface stream, and that respondent, as a downstream riparian owner, is legally entitled to the preservation of that surface stream and cannot be compelled to resort to pumping or reservoiring in order to assist appellants.

If respondent is entitled, as a matter of law, to the maintenance of the stream as a surface stream, regardless of appellants' needs, and regardless of the ease with which water can be extracted from the underground basins, there can be little doubt that the findings support the injunction.

In finding 4 the trial court found: "The soil of the said Santa Margarita ranch riparian and immediately contiguous to the said stream and lying in the valley thereof has always been naturally moistened by the water of the said stream, when not artificially diverted therefrom by the said defendants as herein found, and will, if not so diverted, continue to be moistened and made productive of natural forage, plants, and other useful vegetation, and the growth of artificially planted crops on the same has always been promoted, and will, if the said water is not so diverted, continue to be promoted by the flow of said stream in its natural course, as well as by the flow of the stream when applied by artificial means on the said riparian lands. That the water of the said stream does naturally diffuse, and always has diffused, itself into and through the lands contiguous and neighboring to the banks of said stream, saturating large deposits of underground sands and other material in the valley of the stream and neighboring thereto, thus forming and supporting underground stores of water from which the plaintiff and its predecessors in the ownership of said Santa Margarita ranch have always been accustomed to obtain water by pumping and other means for beneficial purposes on said ranch. At divers depressions in the said riparian lands of the plaintiff, the water flowing in said stream, as well as diffused from said stream in the material of the valley riparian thereto, has always collected, and will continue to collect, in surface pools, if the said stream is not diverted from its natural channel by the defendants before it reaches the plaintiff's said ranch, and to such collections of water the cattle and other live stock of the plaintiff and its said predecessors have always been accustomed to resort for drinking."

In finding 5 the court found that for the past 40 years respondent and its predecessors have taken "all the water of said stream in the dry or irrigating season of the year naturally descending to the said Santa Margarita ranch and not absorbed in the channel and banks of the stream and diversion ditches leading therefrom, and has applied and devoted, and plaintiff yet applies and devotes such water to the watering of livestock owned and maintained by such successive owners of the said ranch, to the number of several thousand head, and to the irrigation of lands of the said Santa Margarita ranch riparian to the said stream, and the production of alfalfa, vegetables and other crops, to the extent, in all, of from about one hundred (100) to eight hundred (800) acres in different years". The court, it will be remembered, found that respondent owned in all 38,739 riparian acres, of which 12,375 acres are susceptible of profitable irrigation. Also in finding 5 the court found: "All the livestock of the plaintiff pasturing on its said lands above the Lake O'Neill reservoir and along said river channel for a distance of approximately eight (8) miles are dependent upon the flow of water of said stream in the channel thereof for a reasonable supply of water for drinking. That said predecessors of plaintiff were accustomed, and after the plaintiff has been accustomed, to use said water for domestic and other beneficial purposes on said riparian lands in said ranch. The water of said stream was and is obtained for the uses of plaintiff (when not prevented by the diversions of defendants) from the surface channel flow thereof, and also by pumping from saturated lands riparian to said stream, into which such water naturally seeps and percolates from the channel of said stream and also from pools in such channel and in lands riparian thereto."

There are several other findings in reference to the practice of respondent or its predecessors, for many years of pasturing and watering its livestock from the surface stream and from Lake O'Neill reservoir, and that these sources are "virtually the sole source of supply of water for the uses and purposes to and for which the said lands of the plaintiff in the said watershed are susceptible". There are other findings to the effect that for the watering of livestock and irrigation by respondent during the dry months the full flow of 75 per cent of the surface stream is necessary.

The findings also disclose that in 1923 and thereafter, after appellants had increased their diversions in that year, there occurred a failure and deficiency in the surface stream to the injury of respondent. Finding 16 states that "plaintiff, about the month of July, 1923, observed for the first time a failure and deficiency in the quantity of water flowing in the channel of said stream * * *." Apparently no injury at all was suffered prior to 1923 and the injury then and thereafter occurring was a deficiency in the surface flow. The court also found that in 1923, 1924, 1925, and 1928, the surface stream, by reason of appellants' excessive diversions, dried up 6 miles further upstream than formerly, so that cattle could not secure water from the surface flow. There was no injury at all during the years 1926 and 1927, years of heavy rainfall. In the years that damage did occur, in finding 19 it is stated: "By reason of the diversions of water made by said defendants on and to said Pauba grant, Temecula grant, Little Temecula grant and Vail government lands as herein found, and their practice of winter irrigation during the autumn, winter and spring of the seasonal years 1923–24, 1924–25, 1925–26 and 1927–28, the defendants so reduced the natural flow of said stream that, beginning about June 1st of each of said calendar years 1923, 1924, 1925 and 1928, the plaintiff could not receive and did not receive from the natural flow of said stream sufficient water to fill its said reservoir and to furnish water for livestock pasturing upon plaintiff's riparian land adjacent to and in the vicinity of the easterly boundary line of plaintiff's lands; and in consequence plaintiff had not enough water in said reservoir to irrigate the lands it had been accustomed to irrigate with water from said reservoir, and its irrigated crops in the summer of the years 1923, 1924, 1925 and 1928 were impaired as to quantity, but not as to quality, because of such deprivation of water, and plaintiff was compelled to and did resort, in each of said years 1923 to 1928, inclusive, excepting 1926 and 1927, to artificial means for securing water for said livestock pasturing as herein found on that portion of said Ranch Santa Margarita in the vicinity of the eastern boundary line thereof. That the same insufficiency of water to fill said reservoir and to supply said livestock, and the consequences thereof, will continue in the future if the defendants are permitted to maintain their diversions from said stream as heretofore in said years 1923 to 1928, inclusive, and as threatened and intended by them, as herein found."

The evidence shows that the "artificial means" to which respondent "was compelled to and did resort" in the years mentioned to water its cattle consisted in scraping out shallow water holes about 50 feet square in the bed of the stream where the water level was about 1 foot below the bed of the stream.

No useful purpose would be served in further reviewing the findings pertaining to damage. An examination of all of them discloses that the damage and injury relied upon to sustain the granting of the injunction consists of two factors: (1) That from 1923 to 1928, but not including 1926 and 1927, there has been a deficiency in the surface stream so that along certain portions thereof cattle have not been able to water directly therefrom, and (2) the respondent has been unable in those years to fill Lake O'Neill reservoir from the surface flow and has suffered a lack of water for irrigation purposes. There is not one word in the findings that there has ever existed a deficiency in the underground basins on respondent's property which are filled by the flow of the Temecula-Santa Margarita river. As to the first element of damage, above set forth, the evidence does show that for 40 years cattle have been watered directly from the surface stream on respondent's property, with occasional assistance of pumping plants, and that from 1923 to 1928 (not including 1926 and 1927) the surface stream has dried up further upstream than formerly and respondent has been forced to scrape out water holes in the bed of the stream, where according to respondent's own witnesses, water could be found a foot from the surface. As to the reservoir, the court found that the dam creating it is not erected until the middle of March, and the evidence shows that large quantities of water are allowed to run into the sea prior to the middle of March of each year.

[30-33] Throughout its findings and judgment the trial court uses the expression that the respondent "owns" and is entitled to take and use upon its riparian lands seventy-five per cent of the total flow of the river. The quoted expression is used not only in the portion of the findings and judgment referring to the rights of the parties, but also in the portions dealing with the injunction. This, at least, was an unfortunate use of terms. The riparian does not "own" the water of a stream, he "owns" a usufructory right—the right of reasonable use of the water on his riparian land when he needs it. Gould v. Eaton, 117 Cal. 539, 49 P. 577, 38 L.R.A. 181. If one riparian has no present need for water the others may use it all. The lower riparian cannot secure an injunction against the upper riparian unless the upper owner is using an excessive portion of the waters of the stream resulting in actual damage to the lower proprietor. Coleman v. LeFrank, 137 Cal. 214, 69 P. 1011; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A.,N.S., 1062; Oliver v. Robnett, 190 Cal. 51, 210 P. 408. The same principles apply to underground waters. Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St. Rep. 35; Peake v. Harris, 48 Cal.App. 363, 192 P. 310. Moreover, it is also well established that the underground and surface portions of the stream constitute one common supply. Hudson v. Dailey, 156 Cal. 617, 105 P. 748; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585.

The trial court was undoubtedly aware of these principles. However, it seems to have been the theory of the trial court that the respondent, under the circumstances, was entitled to the continuation of the surface stream and could not be compelled to resort to the underground basins fed by the stream to supply its needs as against appellants. The trial court was consistent on this issue throughout the trial. It clearly took the position that the quantity of water available to respondent in the underground basins was an immaterial factor. In fact, as will appear under point 4, infra, the trial court excluded evidence offered by appellants as to the extent of these basins. According to several of appellants' exhibits offered for other purposes the basins have a storage capacity of over 50,000 acre-feet above sea level, and the water level ranges from 1 to 7 feet from the surface.

Respondent takes the position that it, as a lower riparian, is entitled to its portion of the surface flow of the stream regardless of the needs of the upper riparians, regardless of the quantity of water available in the underground basins fed by the river, and regardless of the ease with which water can be extracted from these basins, and that it cannot be compelled as against appellants to resort to its underground basins to fill, in whole or in part, its reasonable needs. Stated in another way, respondent contends that the underground basins filled to the brim serve a reasonable beneficial purpose in supporting the surface flow.

[34] We cannot say as a matter of law, applicable to every case, that the use of underground basins simply to support the surface flow in order that use may be made of the surface flow, is or is not a reasonable beneficial use. That is a question of fact that must be passed upon in each case. The important factor in the present case is that the trial court ruled, in effect, that it would not pass on this question of fact, but would hold that as a matter of law the quantity available in the basins was a totally immaterial factor.

[35-37] In a case like the present one, with a relatively small quantity of water available far insufficient to meet all the needs therefor, the court should not grant an injunction until every reasonable physical solution, and every reasonable source of supply, has been thoroughly investigated. Neither respondent nor appellants are entitled, as a matter of law to supply their needs entirely from the surface stream if they can economically secure water from the underground basins. The rule is that, as between riparians each party must make a reasonable use of all of the water of the stream, and as already pointed out, that includes both surface and sub-surface flow, and likewise includes water in the underground basins. The respondent recognizes this rule of reasonable use, but contends that as between riparians it is a reasonable beneficial use to require the basins to be kept full in order to hold up the surface flow and relies squarely on Herminghaus v. So. Calif. Edison Co., 200 Cal. 81, 107, 252 P. 607, to support its position. Since the decision in that case a new section has been added to the constitution of the state —article 14, section 3, the effect of which has been to materially change the water law of this state. The effect of this amendment has recently and exhaustively been discussed by this court in several cases—Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972; City of Lodi v. East Bay Mun. Utility Dist., 7 Cal.2d 316, 60 P.2d 439. In the Peabody Case, one of the uses to which the water was being put was to use the full flow of the surface stream to maintain the underground and percolating water supply by pressing water into the riparian lands as an aid in maintaining the level of the underground supply. After holding that the doctrine of reasonable use was applicable to contests between riparians and appropriators, the court pointed out that the rule of Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L.R.A.,N.S., 772, approved in the Herminghaus Case, supra, to the effect that the use of the full flow of the stream to maintain the underground supply was a proper use, had been modified by the constitutional provision above referred to, and that under the facts this use was not a reasonable beneficial use. In the City of Lodi Case, supra, the existing law on this subject was summarized as follows (page 338, 60 P.2d page 449): "But Miller v. Bay Cities Water Co., [supra,] in so far as it held that the full flow of a stream may be used to force a relatively small quantity of water into adjoining underground basins, and that a prior appropriator is entitled to an injunction to maintain this natural condition even where the prior appropriator's right may be fully protected by the use of a much smaller quantity of water, is no longer the law of this state. In Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486, after discussing the major changes in the water law of this state made necessary by the 1928 constitutional amendment, and after pointing out the theory and effect of that amendment on riparian rights and after pointing out that overlying owners or appropriators, under the theory of Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35, possess rights anal-

ogous to those possessed by riparian owners, and after discussing at length the rules of law set forth in Miller v. Bay Cities Water Co., [supra], this court stated:

[38] "'Notwithstanding the common law rule to the contrary, this court, in the cases referred to, accorded to the underlying and percolating water right a status analogous to the riparian right. The attitude of some of the plaintiffs herein in effect is that, possessing that status they are entitled to have the underground waters flow and percolate as in a state of nature regardless of the quantity of the supply or the reasonableness of use. But since the riparian right as against an appropriator has by the new state policy been subjected to the doctrine of reasonable use, no good reason has been advanced why the asserted underground and percolating water right should not be subjected to the same regulation as against an appropriator. In whatever respects the Miller Case, or any other case, may be said to hold otherwise, they must be deemed to yield to the new constitutional policy with reference to the use of the waters of the state.'" Under the facts of these cases it was held not to be a reasonable beneficial use to use the full flow of the stream to maintain the underground supply. That is, of course, not exactly the situation here presented. In the present case it is respondent's contention, that it is entitled to maintain its underground basins full in order to support the surface stream in order that it can water its cattle from the surface. However, the two situations are comparable. We cannot say as a matter of law that in all cases the maintenance of full underground basins to maintain a surface supply would or would not be a reasonable beneficial use. However, it seems quite clear that, in ascertaining whether a lower riparian has suffered damage by reason of an upper riparian's diversion sufficient to warrant an injunction, the trial court should take into consideration all of the water available to either party from the river, and then determine, considering the entire supply, the needs of the parties, their methods of use and methods of diversion and other necessary factors, whether the lower riparian has in fact suffered damage. This the trial court failed to do. The trial court proceeded on the theory that it had only to deal with the surface stream, and that it was not necessary for it to deal with the extent of the supply available to respondent for reasonable use in the underground basins.

[39-41] Another point that should be mentioned is that, in considering whether an injunction should be granted in such a case, it is the duty of the trial court to ascertain whether there is a physical solution of the problem that will avoid waste and which will not unreasonably or adversely affect the rights of the parties. No injunction should be granted if its effect will be to waste water than can be used. Article 14, section 3 of the Constitution provides that: "It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." Under this section it has been held that it is not only within the power, but it is the duty of the trial court, to work out, if possible, a physical solution, and if none is suggested by the parties to work out one independently of the parties. In this connection, if the trial court needs or desires expert assistance or evidence on this, or any other phase of the case, it possesses the statutory power either to refer the matter to the division of water rights, or to appoint it as an expert. Peabody v. City of Vallejo, supra, page 374, 40 P.2d 486; Tulare Dist. v. Lindsay-Strathmore Dist., supra, page 575, 45 P.2d 972; City of Lodi v. East Bay Mun. Utility Dist., supra, page 341, 60 P.2d 439. The instant case presents an excellent illustration of the benefits to be secured from the exercise of this power. The evidence in this case discloses that the water commission is already aware of some of the problems of these litigants. As early as 1919 appellants filed applications with the commission for permission to build a dam and diversion works on its properties to conserve some of the winter run off. Respondent protested the application. In 1925 appellants filed another such application. The appointment of the commission as a referee or expert.

under such circumstances, might well facilitate the work of the trial court.

These prior applications may contain the germ of a physical solution of the problem here presented. It may be that there are storage and reservoir sites so located on appellants' ranch, that by the diversion and storage of winter waters that now go to waste, supplemented perhaps by a small portion of the summer flow, appellants can secure all the water they reasonably need. Perhaps by regulating the releases from such reservoirs in the summer months surface flow can be made available to respondent. On the other hand, there may also be reservoir and storage sites on respondent's property whereby, by the expenditure of reasonable sums of money, winter water can be conserved and released in the summer months. In fact in finding 20 the trial court, after finding that respondent is making a reasonably scientific use of the available water found that during periods of heavy rainfall large amounts of water flow into the sea and that "such waters as now flow and have heretofore flowed into the Pacific Ocean are largely, but not entirely, capable of being impounded on the lands of the plaintiff and stored for distribution for useful and beneficial purposes on said lands". In the same finding, after referring to Lake O'Neill reservoir the court found "that by the expenditure of reasonable sums of money the artificial dam at said Lake O'Neill reservoir may be increased in height and the point of diversion of the ditch leading into said reservoir may be moved upstream and the capacity of said reservoir increased, and the amount of water capable of being stored therein for beneficial uses on said ranch also increased". It may also be possible to install pumping plants upstream from the reservoir so as to provide drinking places for respondent's cattle.

[42-45] These suggestions are made simply to point out that from the findings and evidence it would appear that there is a strong possibility of working out some physical solution, at reasonable cost, that may be of benefit to both parties. With the small quantity of water available in this stream in the summer months, the trial court should thoroughly investigate the possibility of some such physical solution, before granting an injunction that may be ruinous to either or both parties. It must be remembered that in this type of case the trial court is sitting as a court of equity, and as such, possesses broad powers to see that justice is done in the case. The state has a definite interest in seeing that none of the valuable waters from any of the streams of the state should go to waste. Each case must turn on its own facts, and the power of the court extends to working out a fair and just solution, if one can be worked out, of those facts.

[46-50] In the present case the trial court on the retrial may determine that considering all the factors above mentioned, respondent is entitled to the maintenance of the surface flow as provided in its present judgment. Obviously the watering of cattle is a reasonable beneficial use, and if they can only be watered from the surface stream without unreasonable expenditure, respondent may be entitled to such an injunction. On the other hand, it would be an unreasonable use to require the flow of the surface stream if such cattle can reasonably be watered at reasonable expense by some artificial means. As several times already pointed out, neither riparian is entitled to the full flow of the stream as it existed in a state of nature. Each is required to make a reasonable use of the waters of the stream, and either or both can be required to endure a reasonable inconvenience or incur a reasonable expense in order that water may be reasonably used by the other. Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal.App. 213, 194 P. 757; Peabody v. City of Vallejo, supra, page 376, 40 P.2d 486. However, considering all the required factors, the lower owner cannot be expected or required to endure an unreasonable inconvenience or to incur an unreasonable expense in order to make more water available for the use of the upper riparian. If on the new trial it shall develop that the only feasible physical solution will involve the expenditure of large sums of money by respondent, and that the sum required, when all the facts, including the necessities and uses of the parties, are considered, is unreasonable, the trial court has full power to make its injunctive order conditional so as to require appellants to bear a portion of the expense. In other words the trial court, if the facts warrant it, can grant an injunction in favor of respondent unless appellants agree to bear a fair proportion of the expense necessary to construct the required improvements on respondent's ranch. This would appear to be a fair, just and equitable rule. If appellants, as upstream owners, desire to use more than their fair share of the available flow, and

if they desire to require respondent to supply its needs in whole or in part from the underground basins or from storage, and if this would impose an unreasonable expense on respondent, appellants should be required, if they want the water, to bear their reasonable share of the expense in making it available. All these matters can be thoroughly investigated on the retrial.

That the trial court failed to give consideration to the underground basins on respondent's property is demonstrated when appellant's fourth contention is considered. Appellants contend that the trial court erroneously sustained objections to testimony offered by them on this issue. In order to understand the contentions of the parties on this point a reference must be made to what the record discloses in reference thereto.

[51] It is there disclosed that while one of appellants' expert witnesses was on the stand appellants' counsel asked the witness a question concerning tests made by the witness of certain wells in the San Luis Rey valley—a valley adjoining respondent's ranch. Respondent's counsel objected to the question on two grounds: (1) That a proper foundation had not been laid in that it was not proved that there was any similarity between the San Luis Rey basin and the Santa Margarita basin; and (2) that even if such similarity existed, any evidence regarding the underground water resources on the Santa Margarita ranch was incompetent, irrelevant and immaterial. This objection precipitated a lengthy argument consuming several full trial days. An examination of the portion of the argument contained in the bill of exceptions discloses that the parties at the suggestion of the trial court devoted the major portion of the discussion to the second objection. This was so for obvious reasons. The first objection could be easily cured by proffering the evidence necessary to lay the proper foundation, but the second objection, if sustained, would prohibit the introduction of evidence on one of appellants' main theories. The respondent's counsel took the position that on the issues presented, the quantity of water available in the underground basins on respondent's property was a totally immaterial factor. The following quotation from respondent's discussion before the trial court fairly discloses the position there taken by it (vol. 4, Trans., pp. 1644–1646), "Now, carrying the analogy to the matter of underground basins, if we have a large underground basin, or, as might be reasonably supposed, the defendants are contending a number of underground basins, two or three, let us say, are we entitled to any lesser or greater proportion of the water that flows in the stream because of the existence or non-existence of these basins? I do not think so. I do not think there is anything in the decisions which justifies the conclusion that the facility or practicability or ease or difficulty of one of the parties to the litigation conserving his proportionate share of the water in any manner determines what his proportionate share shall be. I think there are not in these decisions which schedule, enumerate the criteria or indicia which should guide the court in determining the allotment or apportionment of water. I think that in none of these decisions is there scheduled the facility of the party to impound his proportionate share. I think that these decisions do not mention that at all. If our land has an underground basin from which we may pump water, that is a benefit, a natural benefit which that land enjoys. That has not anything to do with the amount of water which should be apportioned to us at our ranch line. In other words, the question of riparian right is involved. There is not in the decisions as I read them, any statement which justifies the court in substituting for the riparian right which the land enjoys, the duty, the necessity, the expense and inconvenience of resorting to pumps, or to some means other than the natural diversion of the flow of the stream. I think that the most recent announcement of the Supreme Court on the subject is diametrically opposed to any such contention, and even at the expense of taking up ten or fifteen minutes of the court's time, I would like to read a paragraph or two from the Herminghaus Case on this point." From the record it appears that the relevancy of such testimony had been presented to the trial court on several prior occasions. For that reason the trial court welcomed a full discussion of the subject. After the argument the trial court sustained the objection. The court recognized that it could make its ruling solely on the first objection, but stated that he welcomed the broader discussion, and clearly and unequivocally indicated that the objection was being sustained on the second ground. In that connection the record discloses that the court first stated that in its opinion a proper foundation had not been laid and then stated (vol. 3, Trans., pp. 1654, 1655): "But I would prefer, inasmuch as the argument has been quite considerable,

and has developed a feature of the case which we have to consider sooner or later, and we have certainly been considering it during the last day, I would prefer to consider it, consider the objection on the broader ground that counsel have adverted to and have given most of their time and attention to, that it is entirely incompetent and irrelevant and immaterial to the issues that are presented. With the contention I am constrained to agree, although it is not by any means a simple matter for me to do so. I am constrained to agree with counsel for the plaintiff in their contention, for this reason, it seems to me that were I to hold otherwise I would place myself in direct conflict with the law of riparian ownership as I understand it to be, and as I think that it is rather definitely established in this latest decision which we have already had under discussion during the last day, the Herminghaus Case." The court explained its position at some length and concluded "For the reasons that I have stated the objection is sustained." Respondent does not seriously contend that the evidence was incompetent, but urges that ground one of the objection was good; that both grounds were sustained by the trial court; that where any ground of an objection is good the action of the trial court must be sustained. That is, of course, a sound rule of law, but it is not applicable here. A reading of the court's ruling clearly indicates that the objection was sustained solely on ground two. It is true that immediately after the objection was sustained appellants' counsel stated that he intended later in the trial to make a formal tender so that a "proper" objection and a "proper" ruling could be made, but the record also clearly discloses that both of the litigants thereafter in the trial, and the court, recognized that the ruling above mentioned was a final ruling on the matter. Later in the trial another witness was asked by appellants' counsel concerning the availability of water on the Santa Margarita ranch. Immediately Mr. Cosgrove, attorney for respondent, objected, stating (vol. 5, Trans., pp. 2376–2377): "We object to the question on the ground it is incompetent, irrelevant and immaterial, and has no tendency to prove any of the issues in this case. We argued out at considerable length, as I unterstood it, this question of whether or not the amount of water that could be developed down in the Santa Margarita Ranch from the underground basins, was relevant to the issues in this case, and as I understand the ruling of the court, after having the matter under advisement, and hearing argument at some considerable length, the ruling of the court was, that it is not admissible. We respectfully submit that the question of the porosity of the ground in the Santa Margarita has nothing to do with this matter at all. There is not involved in this case, as I understand it, anything about how much water can be developed by pumps in the Santa Margarita, or how much we can store." Counsel for appellants then stated his position as follows (Trans., vol. 5, pp. 2377, 2378): "I understand why counsel would object, but that is not the purpose at all. I apprehended they would probably think that was the purpose, but the purpose is to show how much water they will need to keep that basin filled up to where they can grow their wild grasses, as they say they have a right to, and where they can water their stock. That is something they cannot get away from, they put in reams and reams of testimony on that subject, and we have a right to show how much water they will require for that purpose, and that is what this tabulation means; I am not going to ask how much water can be withdrawn from that basin at all; I have taken Your Honor's ruling on that, we have the benefit of the exceptions which the law gives us, but we do have a right to show how much water it will take to keep their water plane up for their wild grasses, and where the river will run, and furnish them water for their stock, as they claim they are entitled to."

[52] This was error of a most serious nature. The evidence, for reasons already stated, was clearly admissible on one of the basic issues involved in the litigation.

The appellants' fifth and last contention is that the method imposed by the judgment for the measurement of the water is unsupported by the evidence, is erroneous, and in various particulars, violates substantial rights of appellants. In view of the reversal this point need not be discussed. The alleged errors in reference thereto, if any exist, are not likely to occur on the retrial.

From what has heretofore been stated in this opinion it is obvious that a reversal of the judgment is necessary. However, the new trial need not be a protracted one. Appellants have not challenged many of the findings. There is no need for a new trial on those issues. It would appear that on the new trial it will be necessary: (1) To ascertain the extent of appellants' riparian and irrigable acreage as set forth in the body of this opinion; (2) to ascertain the extent of respondent's riparian and irrigable acreage only in so far as it involves the table land, discussed in the body of this opinion; and (3) to ascertain whether an injunction should be granted under the rules set forth in the body of this opinion, and if so, what its terms should be.

With this direction to the trial court, the judgment appealed from is reversed.

11 Cal.2d 566

McNEIL et al. v. BLUMENTHAL et al.

L. A. 16665.

Supreme Court of California.

July 19, 1938.

1. Judgment 🔑139

Motions for relief from default on ground of inadvertence or excusable neglect of counsel are addressed to the sound discretion of the trial court. Code Civ.Proc. § 473.

2. Appeal and error 🔑957(1)

An appellate tribunal will not interfere with the trial court's exercise of discretion in granting or refusing a motion for relief from a default caused by inadvertence or excusable neglect of counsel, in the absence of a clear showing of abuse. Code Civ.Proc. § 473.

3. Judgment 🔑143(3)

Where demurrer to complaint was sustained, and shortly before time expired for filing amended complaint, plaintiffs engaged associate counsel who asked to examine the pleading before it was filed but was unable to contact defendants' counsel in order to secure extension of time, whereupon judgment of dismissal was entered, court did not abuse discretion in setting aside judgment and permitting plaintiffs to file amended complaint. Code Civ.Proc. § 473.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action to rescind a contract for sale of oil interests by Charles McNeil and another against Maurice Blumenthal and others. From an order setting aside a judgment of dismissal and permitting plaintiffs to file an amended complaint, defendants appeal.

Affirmed.

R. D. McLaughlin, Walter I. Lyon, Walter T. Casey, and Albert Lee Casey, all of Los Angeles, for appellants.

Entenza & Gramer and Don L. Gilman, all of Los Angeles, for respondents.

PER CURIAM.

This is an action for rescission of a contract to sell oil interests and for an accounting. On August 10, 1937, the trial court sustained defendants' demurrer to the complaint, allowing plaintiffs twenty days within which to amend. On November 2, 1937, no amended complaint having been filed, defendants moved to dismiss the action. This motion was granted. Thereafter plaintiffs moved to set aside the dismissal on grounds of mistake, inadvertence, and excusable neglect of counsel (sec. 473, Code Civ.Proc.), supporting the motion by affidavit of counsel and proffering a proposed amended pleading. Defendants' attorneys filed a counteraffidavit, and on November 24, 1937, the matter was heard. The trial court granted the motion, ordering that the judgment of dismissal be set aside and that plaintiffs be permitted to file their amended complaint. Defendants appealed from this order. Plaintiffs now move to dismiss the appeal or affirm the order.

[1, 2] The appeal presents no substantial question. It is a settled principle of law that motions for relief from default under the remedial provisions of section 473, supra, are addressed to the sound discretion of the trial court, and the exercise of that discretion, in the absence of a clear showing of abuse, will not be interfered with by an appellate tribunal. Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687; Greenamyer v. Board of Lugo, etc., 116 Cal.App. 319, 2 P.2d 848. The record in this case contains no showing of abuse of discretion.

The time for filing of the amended complaint was twice extended by written stipulation. The first stipulation was made at the instance of defendants' counsel, and extended the period to September 13th; the second stipulation was for a further extension to November 1st. Prior to that date, so plaintiffs' attorney avers, the amended complaint was prepared and ready for filing, but on October 29th plaintiffs engaged associate counsel who asked to examine the pleading before it was filed. Affiant therefore telephoned defendants' counsel on October 29th and again on Monday, November 1st, for the purpose of requesting a few days additional time, but was unable to reach them. Affiant avers that his secretary was ill and that he was busily engaged in court over this period, and thus the time was inadvertently allowed to lapse without securing an extension. Defendants' application for a dismissal was made immediately upon expiration of the period fixed by the stipulation, November 2d. Thereafter plaintiffs moved promptly for relief from the judgment.

[3] Upon this showing and that made in the counteraffidavit it became a matter within the exercise of the sound discretion of the trial court to either grant or deny relief under section 473, supra. The court found that it was a proper case for the granting of relief, and this conclusion will not be disturbed.

The order is affirmed.

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11 Cal.2d 780

Hazel LE DUC, Plaintiff and Respondent, v. Maurice BLUMENTHAL et al., Defendants; Maurice Blumenthal et al., Appellants.

Joseph G. SAUCEDO and Minnie Saucedo, Plaintiffs and Respondents, v. Maurice BLUMENTHAL et al., Defendants; Maurice Blumenthal et al., Appellants.

George A. ROLLE, Plaintiff and Respondent, v. Maurice BLUMENTHAL et al., Defendants; Maurice Blumenthal et al., Appellants.

L. A. 16666–16668.

Supreme Court of California.

July 19, 1938.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

R. D. McLaughlin, Walter I. Lyon, Walter T. Casey, and Albert Lee Casey, all of Los Angeles, for appellants.

Don L. Gilman and Entenza & Gramer, all of Los Angeles, for respondents.

PER CURIAM.

These three cases are companion cases to McNeil v. Blumenthal, Cal.Sup., 81 P.2d 566, this day decided. They are before this court on motion of plaintiffs to dismiss the appeal of defendants from an order of the trial court granting relief pursuant to section 473 of the Code of Civil Procedure, or to affirm the order. The question presented is identical with that determined in the McNeil Case. Therefore, on that authority, the respective orders appealed from in these three cases are, and each of them is, hereby affirmed.

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27 Cal.App.2d 722

PEOPLE v. MILLER.

Cr. 3123.

District Court of Appeal, Second District, Division 1, California.

July 25, 1938.

Hearing Denied by Supreme Court Aug. 22, 1938.

1. Infants ⚷20

Minor inconsistencies in story of prosecutrix in prosecution for committing lewd acts against child did not render her testimony inherently improbable, where circumstances of defendant's arrest afforded abundant corroboration of testimony. Penal Code, §§ 288, 288a.

2. Criminal law ⚷409

Where defendant charged with committing lewd acts against a child remained silent when complaining witness made accusations against him to arresting officers, fact that at a subsequent time he denied accusatory statements constituted no explanation of reason for failure to deny at previous time. Penal Code, §§ 288, 288a.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Frank J. Miller was convicted for committing lewd and lascivious acts against a child, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

On January 18, 1938, appellant was charged by an information containing two counts with the violation of sections 288 and 288a of the Penal Code. The jury before which appellant was tried returned its verdict of guilty as to each of said counts. Appellant appeals from the judgments entered pursuant to said verdict of the jury, from the order by which his motion for a new trial was denied, and also attempts to appeal from the sentence.

Appellant here contends that "the testimony of the prosecutrix is so inherently improbable as to form the basis of a conviction"; that the court erroneously ruled on the admission and exclusion of evidence, and erred in refusing to give certain instructions to the jury.

From the record it appears that a few days before Christmas, 1937, the complaining witness, a girl of the age of nine years, while on the beach at Venice, was accosted by appellant who was driving an automobile, and asked her where Windward street was. When she attempted to point out the way, appellant told her to get into his car which she did. He then drove past the witness' home and she told him to stop, but he merely said he would in just a minute. He then drove her into the Del Rey hills, a few miles from Venice, and while on the way there and after their arrival, the acts complained of occurred, in violation of sections 288 and 288a of the Penal Code.

[1] Appellant was virtually caught in the act by the arresting officers, and the mere fact that there may be minor inconsistencies in the story of the prosecutrix does not render her testimony inherently improbable, when viewed in the light of the testimony of said officers. The record shows a complete demonstration of guilt on the part of appellant.

[2] In connection with his second point, appellant urges error on the part of the trial court in sustaining the objection of the People to questions asked by appellant's counsel of one of the arresting officers in regard to conversations between said officer and appellant at times subsequent to the arrest. When the complaining witness made the accusations against appellant to the arresting officers, appellant remained silent. Clearly the fact that at a subsequent time he did deny the accusatory statements would not in any degree offer an explanation of the reason for his failure to deny at the previous time. People v. Brown, 59 Cal. 345, 356; People v. McCoy, 127 Cal. App. 195, 15 P.2d 543. The testimony which appellant sought to elicit from the arresting officer would not serve in any way to explain his previous conduct when first faced with the accusation of the prosecutrix.

The circumstances of appellant's arrest afford abundant corroboration of the testimony of the prosecutrix, and therefore the court properly refused to give certain cautionary instructions requested by appellant.

The judgments and order appealed from are affirmed; the attempted appeal from the sentence is dismissed.

I concur: DORAN, J.

WHITE, J., deeming himself disqualified, does not participate in this decision.

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27 Cal.App.2d 664

In re INGHILLERI'S ESTATE.

NORCIA v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 6101.

District Court of Appeal, Third District, California.

July 21, 1938.

1. Executors and administrators 🔑66

Where same bank was named as trustee in voluntary trust instrument and as executor of trustor's will, probate court properly refused to require bank to inventory the trust fund as property of estate on ground that the trust instrument was testamentary in character and void, since probate court had no jurisdiction to try title to trust fund.

2. Courts ⚬200½

The probate court has jurisdiction, upon application of an heir or interested person, to determine title to property allegedly belonging to the estate only where such property is claimed by the executor or other representative of the estate in his individual capacity, not where such representative claims as trustee.

◆

Appeal from Superior Court, City and County of Sacramento; Peter J. Shields, Judge.

Proceeding in the matter of the estate of Francesco Inghilleri, also known as F. Inghilleri, also known as Frank Inghilleri, also known as Frank Glero, also known as F. Jughelleri, deceased. Matilda Inghilleri filed petition praying for an order requiring the Bank of America National Trust & Savings Association, executor of the estate, to include certain property in inventory of the estate. From an order denying the petition, Josephine Norcia, as executrix of the last will and testament of Matilda Inghilleri, deceased, substituted in the place and stead of petitioner, appeals.

Affirmed.

Albert E. Sheets, of Sacramento, for appellant.

Inman & West, of Sacramento, and Louis Ferrari and I. A. Cereghino, both of San Francisco (Kenneth M. Johnson, of San Francisco, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

From an order refusing to direct the executor of the estate of Francesco Inghilleri, deceased, to include in the inventory as property of the estate a fund belonging to a voluntary trust, the petitioner has appealed.

It is contended the declaration of trust is testamentary in character and void and that the fund created thereby is the property of the estate of said deceased.

Francesco and Rose Inghilleri were husband and wife. April 9, 1927, he executed a voluntary trust agreement for the handling of a fund of $8,100, by the terms of which the Bank of Italy National Trust and Savings Association, now the Bank of America National Trust and Savings Association, was constituted trustee. This money was the separate property of the decedent. The trust was ratified and approved in writing by Rose Inghilleri and accepted by the bank. July 29, 1927, the trustor executed a will, by the terms of which he devised and bequeathed all of his property to his wife, Rose, in the event that she survived him. Otherwise the property was bequeathed to other named relatives. The Bank of Italy National Trust and Savings Association was also named as executor of the will. May 5, 1933, Rose Inghilleri died. On September 2, 1934, Francesco married Matilda Inghilleri. Francesco executed no other will. January 18, 1937, he died. Upon application therefor, the will was admitted to probate, and the bank was appointed and duly qualified as executor thereof. In due time an inventory was filed in his estate which did not include the fund involved in the declaration of trust, which is in the form of cash in the amount of $9,230.13. Matilda Inghilleri filed in the above entitled estate her petition reciting the foregoing facts and praying for an order requiring the executor to file his amended inventory including therein, as the property of the estate, said trust fund amounting to the sum of $9,230.13. To that petition the executor filed an answer denying that said sum belongs to the estate of said deceased or that it ever came into the possession of the executor. The petition was heard by the probate court and denied. From that order the petitioner appealed.

[1, 2] The court correctly refused to direct the executor of the estate of Francesco Inghilleri, deceased, to include in the inventory as the property of the estate the trust fund. The probate court was without jurisdiction to try the title to that property. In re Estate and Guardianship of Vucinich, a Minor, 3 Cal.2d 235, 243, 44 P. 2d 567; McPike v. Superior Court, 220 Cal. 254, 30 P.2d 17; Ex parte Casey, 71 Cal. 269, 12 P. 118; 11a Cal.Jur. 94, sec. 41. It is only when the property in question is claimed by the executor or other representative of the estate *in his individual capacity* that the Probate Court has jurisdiction to determine the title thereto upon the application of an heir of the decedent or of a person interested in the estate. Bauer v. Bauer, 201 Cal. 267, 256 P. 820; In re Estate of Bruck, 140 Cal.App. 300, 309, 35 P.2d 431.

In the Vucinich Guardianship matter, supra, the court said (page 570):

"The power to determine as against the executor what money or other property belonging to the estate has come into his hands is implied in the power to settle his accounts and determine what remains in his hands to be distributed. Estate of Burdick, 112 Cal. 387, 44 P. 734; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512. This power, however, is limited, in cases where title thereto is in controversy, to those where the executor or other personal representative claims the property in his individual capacity. Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Roach, 208 Cal. 394, 281 P. 607. It is undoubtedly the rule that the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. Ex parte Casey, 71 Cal. 269, 12 P. 118; Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327. It will be readily noted from these citations that the line of demarcation between jurisdiction and nonjurisdiction of the probate court to determine what money or property, title to which is disputed, belongs to the estate, is determined by the status of the claimant. If it is claimed by the executor in his individual capacity, the probate court has power to consider and determine the validity of that claim. But if claimed by or on behalf of a stranger to the estate, the probate court has no jurisdiction to determine the controversy."

In the present case the proceeding to require the executor to include in the inventory of the estate the trust fund as property belonging to the estate, involved a determination of the title to that money. The title to that fund could be determined only by construing the terms of the Declaration of Trust. The trust money was not in the hands of the executor as a representative of the estate. Nor does the representative of the estate claim title to the fund in his individual capacity, or otherwise.

The declaration of trust which is involved in this controversy specifically conveyed to the trustee, bank, a fund of $8,100 to "own, hold and manage * * * as the trustee shall deem for the best interests of the Trust" for the benefit of the trustor. The agreement does provide that the trustor may "give any *reasonable direction* in writing" with respect to the sale, exchange, hypothecation or investment of the securities or funds. It is also provided that the trustor may, in writing, modify or revoke the trust agreement. In the event of a revocation of the trust prior to the death of the trustor the property remaining in the hands of the trustee is to be conveyed in kind to the trustor. Finally, it is provided that if the trust is not sooner revoked, upon the death of the trustor, it shall terminate, and all money and property remaining in the trustee's possession, shall be paid and delivered to Rose Inghilleri, the wife of the trustor, and in the event of her death prior thereto, it is to be distributed in amounts specified to a brother, sister, brother-in-law and nephews of the trustor, who are named in the instrument.

Upon the hearing of this petition to require the executor to include in the inventory as the property of the estate this trust fund, the probate court on sound reasoning, supported by adequate authorities, held that the written agreement constitutes a valid trust, and that the funds thereof in the hands of the trustee do not belong to the estate of the decedent.

In view of what we have previously said, it is not necessary for this court to determine the validity of the declaration of trust. For the reason that the probate court was without jurisdiction to try the title to the trust fund in the hands of the trustee to which the executor in his individual capacity makes no claim, the order is affirmed.

I concur: PULLEN, P. J.

27 Cal.App.2d 647

PEOPLE v. TUTTLE et al.

Cr. 3120.

District Court of Appeal, Second District,
Division 2, California.
July 21, 1938.

1. Gaming 🔑98(5)

In prosecution for keeping a gambling room, condition of room in or near which defendants were arrested, including announcement of races and presence of racing sheets and forms, together with defendants' incriminating statements, *held* to authorize conviction. Pen.Code, § 337a, subd. 2; § 971.

2. Gaming 🔑98(5)

In prosecution for keeping a gambling room, prosecution must prove that room was kept for the purpose described in statute, but need not make such proof by direct evidence. Pen.Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

In prosecution for keeping a gambling room, intent may be gathered from all the circumstances shown in evidence, without direct proof. Pen.Code, § 337a, subd. 2.

4. Criminal law 🔑680(2)

In order to warrant receiving evidence of admissions or confessions, the corpus delicti need not be proved beyond a reasonable doubt, and a prima facie showing only is necessary.

5. Criminal law 🔑406(3)

Preliminary proof that admissions were freely and voluntarily made is not necessary to admissibility thereof in evidence.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Henry A. Tuttle and Allan H. McDonald were convicted of violation of Penal Code, § 337a, subd. 2, and they appeal.

Affirmed.

Chotiner & Chotiner, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendants were charged with the crime of violation of section 337a, subdivision 2, of the Penal Code, in that they "did wilfully and unlawfully keep and occupy a room, * * * with * * * books, * * * and papers, apparatus, device and paraphernalia, for the purpose of recording and registering * * * bets on the skill, speed and power of endurance between beasts, to-wit horses". At a trial before the court without a jury both defendants were found guilty. They prosecute this appeal from the order denying their motion for a new trial.

Defendants argue that the evidence is insufficient to justify the conviction. A police officer testified that on February 5, 1938, in a room of the building at 328 Doheny drive, city of Los Angeles, he saw defendant McDonald standing in front of a table. Announcement of horse racing results was coming over a loud speaker. On the table there were sheets of paper known as overnight run sheets, particularly "Official over night entry, Louisiana Fair Ground, Louisiana". These sheets contained information on horse races and racing tracks throughout the United States. Near the table there were pigeon holes containing card records of wagers. The officer testified that he was familiar with the paraphernalia ordinarily found in establishments of book makers; that some of the cards contained "markers"; that figures on some of the papers represented the horse, Just Hi, running in the second race at the Fair Grounds at Louisiana on February 5, 1938. The officer testified that he heard over the loud speaker the results of a horse race in Florida. The officer gave further testimony concerning the markings on the cards indicating clearly that they were for use in making horse race wagers. In response to questions by the officer defendant McDonald stated that he had been operating the place about two days, that he had two boys working for him, one of whom was defendant Tuttle, who was paid $5 per day; that the betting markers dated February 5 were for bets on horses of that day and that he was booking those bets.

Defendant Tuttle was arrested while sitting in an automobile about sixty feet from the entrance to the building at 328 Doheny drive. He had on the shelf of the car directly behind him two editions of the Pacific Daily Racing Form both dated February 5, and a national scratch sheet was lying beside him on the seat. He had a number of betting "markers" in his possession. The officer told Tuttle that he wanted to place a bet on the horse Star Flower. Tuttle took the officer's money, recorded the bet and gave a receipt. Tuttle told the officer that he was working for defendant McDonald and had been working for him about three days; that McDonald's office was "in that back room of that office, about sixty feet from there"; that when the bets were made that either he or someone else took them to McDonald, who kept track of the bets and brought the results to Tuttle.

[1-3] The evidence is ample to justify the convictions. Although it was incumbent upon the prosecution to prove that the room was kept for the purpose set forth in the code provision it was not necessary to make this proof by direct evidence. The intent with which the act was done may be gathered from all the circumstances shown in evidence. People v. McRoberts, 1 Cal. App. 25, 81 P. 734; People v. Marshall, 59 Cal. 386; People v. Walker, 15 Cal.App. 400, 114 P. 1009. The condition of the room at the time of the arrest, the announcement of races coming over the loud speaker, the presence of racing sheets and racing forms on the table, the card record of bets and the presence of "markers" were all facts and circumstances which point directly to the conclusion that the room was occupied for the purposes charged in the information. These facts and the incriminating statements of the defendants justified the court in rendering the judgments from which the appeal is taken. People v. Sutherland, 59 Cal.App. 462, 210 P. 965; People v. Hatfield, 77 Cal.App. 212, 246 P. 95; People v. Hinkle, 64 Cal.App. 375, 221 P. 693. Defendant Tuttle aided and abetted in the commission of the crime. It is provided in section 971 of the Penal Code that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal".

[4, 5] Defendants contend that the trial court erred in admitting the statements of the two defendants made to the officers, claiming that the corpus delicti had not been established. It is not necessary for the prosecution to prove the corpus delicti beyond a reasonable doubt before receiving evidence of admissions or confessions. A prima facie showing only is necessary. People v. Black, 111 Cal.App. 90, 97, 295 P. 87. The trial court did not err in receiving the testimony concerning the statements of the defendants, nor did it err in receiving the testimony without a preliminary showing that the statements were freely and voluntarily made. The statements come under the classification of admissions. It is not necessary to make preliminary proof that admissions were voluntarily made. People v. Fowler, 178 Cal. 657, 174 P. 892.

The order denying the motion for a new trial is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

* * *

27 Cal.App.2d 499

PACIFIC INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11803.

District Court of Appeal, Second District,
Division 2, California.

July 11, 1938.

1. **Workmen's compensation** 🔑604

An industrial injury is compensable only when the injury is received while the employee is doing the duties he is employed to perform and as a natural incident of the work. St.1917, p. 831.

2. **Workmen's compensation** 🔑604

The mere fact of employment and permission to use the premises of the employer does not give rise to a right to compensation under the Workmen's Compensation Act for an injury resulting to an employee. St. 1917, p. 831.

3. **Workmen's compensation** 🔑665

An injury received by a seaming machine operator while on the employer's premises attending a meeting of a union called by union committee which had been designated by seaming machine operator to represent her in negotiations with employer under National Labor Relations Act, from which meeting the employer and its representatives were excluded, was not compensable as "arising out of and occurring in the course of the employment" of the seaming machine operator. National Labor Relations Act §§ 8(2), 9(a), 29 U.S.C.A. §§ 158(2), 159(a); St.1917, p. 831.

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

Original proceeding on a writ of review by the Pacific Indemnity Company and the Union Manufacturing Company to review an award of the Industrial Accident Commission in favor of Emma Kendall, employee.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

McCOMB, Justice.

This is a writ of review to review an award of the Industrial Accident Commission.

Viewing the evidence most favorable to respondents, the essential facts are:

On October 11, 1937, respondent Emma Kendall was in the employ of Union Manufacturing Company as a seaming machine operator, being paid on a piece work basis for her services. Prior thereto and in conformity with the provisions of subsection (a) of section 159 of the National Labor Relations Act, U.S.C.A., title 29 (labor), respondent Kendall had signed an instrument designating certain of her fellow employees as a "union committee" empowered to represent her and other employees in negotiations with their employer, Union Manufacturing Company, hereinafter designated as "employer".

This union committee posted notices that a meeting of the members of the union, which meeting all employees were required by the union to attend, would be held at 8 a. m., October 11, 1937, and the employees were informed that the power which operated their machines would not be turned on until the conclusion of the meeting.

The members of the union committee asked the employer if the meeting might be held on the premises of the employer, but the employer out of a scrupulous endeavor to comply with the spirit as well as the letter of the National Labor Relations Act 29 U.S.C.A. § 151 et seq., refused this permission. Thereafter the union committee, having failed to find an appropriate meeting place in the vicinity of the factory, again asked the employer if they might not hold the meeting on its premises and were informed that, if they would consult with the union's attorney and he ruled that it was not in violation of the National Labor Relations Act, space might be granted for the meeting. Thereafter the union committee's attorney prepared a form of agreement which was duly executed by the union committee and the employer permitting the holding of the meeting on the premises of the employer. The attorney for the union committee also prepared an amendment to this agreement, which was duly executed by the members of the union committee and the employer and which read as follows:

"Amendment To Agreement

"This amendment to an agreement entered into between committee representing employees of the Union Manufacturing Company and the owners of the Union Manufacturing Company entered into on June 3, 1937:

"Wherein it is hereby mutually agreed and understood by and between both parties that permission *is hereby granted* the above mentioned committee, or any other committee duly representing the employees of the Union Manufacturing Company, to use the sewing room on top floors of the M. Harris Building *for purposes of any employees group or committee meeting;* and in consideration of such use it is to be distinctly understood and agreed by and between both parties that at the time of and during such meetings *no representative of the management of the Union Manufacturing Company or its foreman or forelady is to be present.* At such meetings doors are to be kept closed and only employees *disassociated from the ownership or management are to be present.*

"Mabel Ridley
"Elizabeth Beneze
"Mary Colburn
"Muriel Fife
"Viola Vogt

"Union Mfg. Co.
"By H. D. Kroll

"This amendment to the agreement has been prepared, drawn up and agreed to at Los Angeles, California, this 7th day of October in the year 1937." (Italics added.)

While attending the union committee meeting held in rooms on the top floor of the employer's building shortly after 8 a. m., October 11, 1937, respondent Kendall attempted to boost herself up to sit on a table. Her hand slipped from the table and she fell injuring herself.

This is the sole question to be determined:

Was there substantial evidence to sustain this finding of the Industrial Accident Commission:

"1. Emma Kendall, whose date of birth was April 3, 1887, while employed on October 11, 1937, at Los Angeles, California, by Union Manufacturing Company, as a seaming machine operator, received an injury arising out of and occurring in the course of her employment when she fell from a table while attending an employees' meeting"?

[1] This question must be answered in the negative. The law is settled that an industrial injury is compensable only when the injury is received (1) while the employee is doing the duty he is employed to perform, and (2) as a natural incident of the work. Associated Oil Co. v. Industrial Accident Commission, 191 Cal. 557, 562, 217 P. 744.

In Associated Oil Co. v. Industrial Accident Commission, supra, our Supreme Court at page 561, 217 P. at page 745, said:

"Subdivision 7 of section 3 of the Workmen's Compensation Law of New York (Consol.Laws, c. 67), limits compensation to 'accidental injuries arising out of and in the course of employment.' Construing this language the court of that state said: 'The statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words "arising out of and in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work.' Daly v. Bates & Roberts, 224 N.Y. 126, 127, 120 N.E. 118. The law in this state is the same."

In Lumbermen's, etc., Co. v. Industrial Accident Commission, 1933, 134 Cal.App. 131, 25 P.2d 22, it is said at page 133, 25 P.2d at page 23:

"The right to an award is not alone founded upon the fact that such is the case, but upon the fact that the service the employee is rendering at the time of the injury grows out of and is incidental to the employment. * * * It was not intended by the Compensation Act that the employer who comes within its provisions shall be the insurer of his employee at all times during the period of his employment. The employer is liable for compensation only when an injury occurs to the employee while performing some act for the employer in the course of his employment, or incidental to it."

[2] It is likewise settled that the mere fact of employment and permission to use the premises of the employer does not give rise to a right to compensation under the Workmen's Compensation Act, St. 1917, p. 831, for an injury resulting to an employee. (Campbell's Workmen's Compensation, vol. 1, 197, sec. 205.)

The rule is thus stated in volume 1, Campbell's Workmen's Compensation (1935) 197:

"The mere fact of employment and permissive use of the premises incidental thereto does not give rise to a blanket protection under the act."

Again, at page 202 of the same work, it is said:

"Mere permission or favor granted by the employer does not make such acts industrial."

In Judson Manufacturing Co. v. Industrial Accident Commission, 181 Cal. 300, at page 302, 184 P. 1, at page 2, our Supreme Court said:

"It seems to us, however, that when an employe has arrived at the premises of his employer, *and is thereon for the purpose of immediately commencing his actual work,* he is performing service incidental to his employment." (Italics added.)

[3] In the instant proceeding it appears without contradiction that respondent Kendall was attending a union meeting from which her employer and his representatives were expressly excluded. At the time respondent Kendall was injured she was not acting for her employer nor engaged in his service. She was exercising a personal privilege for her own personal benefit in attending a meeting of an organization of which she was a member and the purposes

of which were clearly for her own interests and not necessarily in any way for the benefit of her employer. The meeting was to be held behind closed doors and its purposes were not communicated or made known to the employer. For aught that appears the meeting may have been held for the purpose of declaring a sit-down strike, demanding an increase in wages, or demanding shorter hours of employment. Certainly it cannot be said that any of these things were in furtherance of, or any such acts could come under the heading of, the work she was employed to perform, that is, operating a sewing machine, or were a natural incident of the work she was employed to perform. Such acts would clearly have been contrary to the interests of the employer. The very purpose of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., was to permit employees to deal at arm's length with their employer and to obtain from the employer concessions which in many instances would have a tendency to increase the employer's overhead and cost of operation. Such purposes, though perfectly justifiable in themselves, cannot be said to be for the benefit or in furtherance of the employer's work.

It is to be borne in mind that subsection (2) of section 158 of the National Labor Relations Act, title 29, U.S.C.A. prohibits the employer from interfering with the formation or administration of any labor organization. It is thus obvious that at the time respondent Kendall was injured she was engaged in an activity clearly beyond the scope of her employment, and that no duty rested upon the employer to direct her activities. On the contrary, he was by law prohibited from interfering with her actions.

The principles applicable to this proceeding are well summarized in the biblical aphorism:

"No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." (St. Luke, 16:13.)

Respondent Kendall at the time she was injured was her own servant and not her employer's.

From the foregoing discussion it is manifest that there was no evidence to sustain the finding of respondent commission that respondent Kendall "received an injury arising out of and occurring in the course of her employment".

For the foregoing reasons the award is annulled.

We concur: CRAIL, P. J.; WOOD, J.

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27 Cal.App.2d 651

TEXAS CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 11863.

District Court of Appeal, Second District, Division 2, California.

July 21, 1938.

Hearing Denied by Supreme Court Sept. 17, 1938.

1. Mandamus 🔑172

Affidavits, which were not on file with appellate court, were not part of record on petition for mandate to compel superior court to place upon its calendar and determine issues raised by a demurrer, and hence could not be considered by appellate court.

2. Mandamus 🔑10, 28

Generally, writ of mandate will not issue to compel action on part of judge unless it be shown that duty to do thing asked for is plain and unmixed with discretionary power or exercise of judgment. Code Civ. Proc. § 1085.

3. Mandamus 🔑31

A writ of mandate will issue to compel a court to act if it erroneously refuses to accept jurisdiction. Code Civ.Proc. § 1085.

4. Mandamus 🔑26

A court has duty to accept jurisdiction in matters properly coming before it and to decide issues duly presented to the best of its ability, whether it be erroneously or correctly, and having done so, a higher court will not issue a writ of mandate to compel lower court to change its decision. Code Civ.Proc. § 1085.

5. Mandamus 🔑39

Mandamus did not lie to compel superior court to place upon its calendar and determine issues raised by demurrer to an original complaint, where superior court accepted jurisdiction to pass upon motion to restore demurrer to original complaint and, in passing upon such motion and motion

to dismiss amended complaint, court acted within its jurisdiction and made judicial determination of issues of fact and law, correctness of which could not be determined by writ of mandate. Code Civ.Proc. § 1085.

◆

Petition for writ of mandate by the Texas Company against the Superior Court of the State of California, in and for the County of Los Angeles, to compel the respondent to place upon its calendar and hear and determine issues raised by petitioner's demurrer to an original complaint.

Alternative writ dismissed and peremptory writ denied.

Charles C. Stanley, R. K. Barrows, J. A. Tucker, and E. S. Williams, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and Clock, McWhinney & Clock, all of Los Angeles, J. E. Pawson, of Long Beach, and Robert M. Clarke, Lane & Lane, and John W. Preston, all of Los Angeles, for respondent.

WOOD Justice.

Petitioner seeks a writ of mandate to compel the Superior Court to place upon its calendar and hear and determine the issues raised by its demurrer to the original complaint.

An action was commenced in the Superior Court on April 9, 1934, in which Barney Brown and more than 650 others are the plaintiffs and the Texas Company, petitioner herein, is the defendant. The plaintiffs, claiming to be tenants in common owning and holding certain interests in an oil lease of which the defendant is assignee, seek to recover of the defendant a large sum of money for failure to properly and diligently drill for oil. The action was filed by Raymond J. Kirkpatrick as attorney for the plaintiffs. On September 28, 1934, an order was made by the court by which Avery M. Blount was substituted as attorney of record in the place and stead of Raymond J. Kirkpatrick. The order recites that it was made on the motion of J. Perry Lucas who "appeared in person and as attorney in fact for the other plaintiffs". On September 29, 1934, a demurrer to the complaint was filed and set for hearing. It was taken off calendar on October 4, 1934, upon stipulation of Mr. Blount and the attorneys for the defendant. On May 16, 1938, the defendant served notice upon Mr. Blount as attorney for the plaintiffs that it would present a motion to the court on May 18, 1938, to restore to the calendar the demurrer which had been filed on September 29, 1934, stating as one of the grounds for the motion that the attorney for the plaintiffs had refused to stipulate for the restoration of the demurrer to the calendar. The motion was presented to the court and denied. In its petition in this court petitioner alleges: "No amendment to the said complaint filed April 9, 1934, and no amended complaint or other pleading superseding or taking the place of said complaint has ever been filed in said action by the plaintiffs, or any of them, or by any attorney or attorneys of record for the plaintiffs or any of them." Upon this allegation we issued an alternative writ.

From the answer filed by the respondent court and from undisputed statements made by counsel upon the hearing before this court it appears that in June, 1936, Lane & Lane and J. E. Pawson were substituted as attorneys for the plaintiffs in the place and stead of Avery M. Blount. The substitution was signed by "J. Perry Lucas attorney in fact for plaintiffs". The written substitution bears the consent of Mr. Blount dated May, 1936, and the consent of Lane & Lane and Pawson dated June, 1936. The substitution was approved by order of the court made February 16, 1938, and filed on the day of its approval. It was further made to appear that J. Perry Lucas died during the year 1936 and that on May 16, 1938, one of the attorneys for the defendant requested Mr. Blount to stipulate that the demurrer filed September 29, 1934, be restored to the calendar and that Mr. Blount had refused to do so. A new plaintiff, Western Trust & Savings Bank, was brought into the action by order of the court, and on March 12, 1938, an amended complaint was filed bearing the signatures of Lane & Lane and Pawson but not the signature of Mr. Blount. The amended complaint was verified by E. D. Wilcox, one of the plaintiffs. Defendant filed a motion to strike the amended complaint, which came on for hearing on April 4, 1938, and was denied by the court on April 25, 1938. A demurrer to the amended complaint was filed before April 26, 1938. On April 29, 1938, a motion to dismiss the action for want of prosecution was filed and this motion was denied by the court on May 31, 1938.

[1] Petitioner argues that the court could not recognize attorneys Lane & Lane and Pawson under the written substitution on file without the placing on record of a power of attorney in favor of Mr. Lucas, and that the death of Mr. Lucas before the written substitution was filed with the clerk made the substitution of no effect. Although counsel for respondent argue that neither of these propositions is tenable, they contend that, regardless of the questions concerning the correctness of the court's rulings in denying the motion to restore the demurrer to the calendar and the motion to strike the amended complaint, the remedy of petitioner is by appeal and that the facts before the court do not present a proper case for the issuance of a writ of mandate. In its answer respondent alleges that petitioner is estopped from obtaining a writ of mandate by its action in electing to file motions to dismiss the amended complaint and to dismiss the action for want of prosecution and by its action in filing a demurrer to the amended complaint prior to making a motion to have the demurrer to the original complaint heard and determined. The respondent further alleges that petitioner is guilty of laches in that from October 3, 1934, to March 15, 1938, it did not request any attorney of record for the plaintiffs to restore the demurrer to the calendar. In its briefs on file herein respondent asserts that the motion to restore to the calendar and the motion to dismiss the amended complaint were heard and considered by the lower court upon contradictory affidavits. Since the affidavits are not on file with this court they are not a part of the record before us and therefore may not be considered. We are satisfied, however, that, without the presentation of the affidavits, the undisputed facts compel a denial of the petition.

[2-4] A writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office. Code Civ.Proc., sec. 1085. It is a general rule that a writ of mandate will not issue to compel action on the part of a judge unless it be shown that the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment. Tomkin v. Harris, 90 Cal. 201, 27 P. 202. "The writ of mandate cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion." Strong v. Grant, 99 Cal. 100, 33 P. 733, 734. In Lewis v. Barclay, 35 Cal. 213, the court was asked to issue a writ of mandate to compel the lower court to reinstate a case after an appeal from a justices' court had been dismissed. The court stated: "Mandamus lies to compel an inferior tribunal to perform a duty enjoined by law, if it refuses to do so; but if the duty is judicial, the writ cannot prescribe what the decision of the inferior tribunal shall be. The duty to be performed by the respondent in this case was strictly judicial, and there was no refusal on his part to perform it. He may or may not have erred in the disposition of the case, but whether he did or did not, his action cannot be reviewed by mandamus * * *." A writ of mandate will issue to compel a court to act if it erroneously refuses to accept jurisdiction. It is the duty of the court to accept jurisdiction in matters properly coming before it and to decide the issues duly presented to the best of its ability, whether it be erroneously or correctly. Having done so, a higher court will not issue a writ of mandate to compel the lower court to change its decision. Thomas v. Superior Court, 4 Cal.App.2d 356, 41 P.2d 220.

[5] The respondent court accepted jurisdiction to pass upon the motion of petitioner to restore the demurrer to the original complaint to its calendar. In passing upon this motion, as also the motion to dismiss the amended complaint, the court acted within its jurisdiction. The court discharged its duty when it passed upon the motion. It was the duty of the court to determine whether the original complaint had been superseded by the amended complaint, whether there had been a valid substitution of attorneys, and whether petitioner was estopped from presenting its motion after the motion to dismiss and the demurrer to the amended complaint had been filed. In passing upon these matters respondent court made judicial determination of the issues of fact and law involved. A writ of mandate may not be used to determine whether its rulings in these matters were correct.

The alternative writ is dismissed and the peremptory writ denied.

We concur: CRAIL, P. J.; McCOMB, J.

27 Cal.App.2d 693

SALA et al. v. SECURITY TITLE INS. & GUARANTEE CO.

Civ. 11427.

District Court of Appeal, Second District, Division 1, California.

July 22, 1938.

Hearing Denied by Supreme Court Sept. 17, 1938.

1. Insurance ⚿507½

The failure of policy of title insurance, obtained by plaintiffs at time of their purchase of property, to mention a lis pendens recorded in connection with action to rescind transfer to plaintiffs' vendor did not render statement in policy concerning title untrue and incorrect.

2. Insurance ⚿507½

As respects title insurance, a record of the lis pendens in action to rescind a deed to property on ground of failure of consideration did not constitute a defect in title to property, since such an action to rescind did not lie and amendment changing cause of action by basing it on fraud invalidated the lis pendens.

3. Insurance ⚿426½

A title insurance company in issuing policy of title insurance had right to include or omit a reference in policy to a lis pendens, where it appeared that the lis pendens did not constitute a defect in title to property.

4. Insurance ⚿507½

A title insurance company which, after issuance of policy insuring title, participated in suit involving such title, was not guilty of unreasonable delay in clearing title where death of two of parties, illness of chief counsel for one of parties, and other circumstances accounted for delay.

5. Insurance ⚿507½

A policy of title insurance is a contract of indemnity, and to determine rights and liabilities of parties it is necessary to determine extent of their promises and whether those agreements have been performed, since such policies are subject to same rules of construction as other insurance policies.

6. Insurance ⚿507½

Under policy of title insurance providing that insurer insured a marketable title to estate or interest of insured and that insurer would defend insured in all proceedings founded on a record claim of title or incumbrance prior in date to policy and therein insured against, insurer did not on day policy was issued become liable in damages for difference between value of estate with marketable title and its value with an unmarketable title, but insurer had right, if it elected to do so, to clear the title.

7. Insurance ⚿507½

The failure of title insurer to commence action in name of insured to clear title to property did not constitute breach of insurance contract, where insurer, pursuant to provision authorizing it to otherwise defend to a final determination any adverse claim, participated in trial of action involving title and eventually cleared title to property.

8. Limitation of actions ⚿30, 37(2)

An action on policy of title insurance brought two years and five months after plaintiffs' loss of property at foreclosure sale was barred by limitations, whether action was one in tort growing out of insurer's alleged negligence or whether it was based on fraud in connection with issuance of policy about six years prior to institution of suit.

9. Appeal and error ⚿110, 782

No appeal could be taken from order denying motion for new trial, and dismissal of attempted appeal therefrom was required.

◆

Appeal from Superior Court, Los Angeles County; Chas. S. Burnell, Judge.

Action by A. G. Sala and another against the Security Title Insurance & Guarantee Company to recover on a policy of title insurance. From the judgment rendered, from an order denying defendant's motion for judgment notwithstanding the verdict, and from an order denying a motion for new trial, the defendant appeals.

Judgment reversed with directions, and appeal from order denying motion for a new trial dismissed.

George H. Woodruff and Chapman & Chapman, all of Los Angeles, for appellant.

Harry C. Mabry and Laurence B. Martin, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by defendant from the judgment and from the order denying defendant's motion for judgment notwithstanding the verdict, as well as from the order denying a motion for a new trial, in an action on a policy of title insurance. The facts will appear in the opinion.

A. G. Sala and Harry M. Seigler, respondents herein, purchased certain land consisting of acreage in the vicinity of Clearwater, Los Angeles county, California, in February of 1928. The property had been lost through foreclosure, by the former owner, one W. L. Bessolo, and respondents acquired the property by sheriff's deed after having purchased Bessolo's equity of redemption. The purchase price was $12,000, which was obtained by Sala and Seigler from the Bank of Italy National Trust and Savings Association on a loan secured by a trust deed on the property so purchased. Incidental to the transaction a policy of title insurance was purchased from the Security Title Insurance and Guarantee Company, (hereinafter referred to as "title company"), appellant herein, insuring the title to said property in the sum of $20,000. Thereafter, to wit, on May 14, 1929, one-half of the property was sold by Sala and Seigler, subject to the trust deed above mentioned, to the Collins Concrete Pipe Company of California for $15,000. This transaction was represented by a down payment and a contract of sale providing for the balance due to be paid in monthly installments of $300. In August of 1930, the Collins Concrete Pipe Company defaulted, repudiated the contract and discontinued further payments thereunder, after having paid to Sala and Seigler approximately $4,500 on account of the transaction. About the same time plaintiffs and respondents, Sala and Seigler, discontinued interest payments to the Bank of Italy on account of the trust deed note, and after repeated demands by the bank the trust deed was foreclosed. The property was purchased by the bank at the foreclosure sale in March, 1932, for the total amount of the accrued debt in the sum of $14,000. Two years and five months later, to wit on August 31, 1934, Sala and Seigler filed the action herein against the title company on the above mentioned policy of title insurance.

In attempting to fabricate and complete a cause of action against the title company, respondents Sala and Seigler rely upon the following additional facts. For some time prior to July 19, 1923, the land involved herein was owned by Frank Zamboni and Joe H. Masero, who sold the same to Bessolo, who in turn sold it to Sala and Seigler. On July 19, 1923, an action, (hereinafter referred to as the "Zamboni action"), was commenced by Zamboni and Masero against Bessolo, wherein it was sought to rescind the transfer to Bessolo on the grounds of a total failure of consideration. In connection with this action a lis pendens was recorded. When the cause came on for trial a nonsuit was granted which was followed by the entry of the judgment on November 10, 1926. An appeal from the judgment resulted in a reversal on December 3, 1927. It should be noted at this point that in reversing the judgment the court declared that although it is the law that rescission of a deed of real estate cannot be had on account of the subsequent failure of the grantee to comply with his agreement, nevertheless the trial court should have directed an amendment and then proceeded to award plaintiffs the relief to which the evidence showed them to be entitled. See Masero et al. v. Bessolo, 87 Cal.App. 262, 262 P. 61. The remittitur which was filed February 3, 1928, was in part as follows: "and the trial court is hereby directed to allow plaintiffs to amend their complaint, if so advised, so as to present all the issues which may be properly tendered and tried in this case, to the intent that the plaintiffs may be awarded such relief as may be consonant with equity and justice". It should also be noted at this point that the negotiations for the purchase of the land by Sala and Seigler, from Bessolo, commenced in February, 1928. In this connection it appears that the land in question had been sold to satisfy a judgment against Bessolo and that the period of redemption was about to expire. Sala and Seigler entered into an agreement with Bessolo, under date of February 25, 1928, which provided that whereas the property was subject to a sale made to the First National Bank of Compton on February 28, 1927, pursuant to an execution against Bessolo, that Bessolos were not able to redeem and were therefore willing that Sala and Seigler should acquire the title on certain conditions therein stated.

On May 15, 1928, a motion for leave to amend the complaint was filed in the Zamboni action, to which was attached a copy of the proposed second amended complaint; the proposed amended complaint alleged, for the first time in said litigation, a purported cause of action for rescission based on fraud. Two days later, to wit on May 17, 1928, the policy of title insurance, upon which the action herein is based, was issued by appellant under the circumstances hereinbefore mentioned. The pertinent parts of the insurance policy are as follows:

"The Company by this policy of title insurance * * * does hereby insure A. G. Sala and Harry M. Seigler * * * (as to an interest in fee simple), * * * and Bank of Italy National Trust and Savings Association * * * (as beneficiary under Exception No. 6 herein), * * * against loss or damage not exceeding in all the sum of Twenty Thousand Dollars, which the said Insured shall sustain by reason of any incorrect statement in this policy concerning the title to the real property hereinafter described, * * * which said statement of title and conditions and stipulations are hereby made a part of this policy. * * *

"Subject only to the following:

Exceptions And Encumbrances

* * *

"Taxes for the fiscal year 1928-1929.

"A Deed of Trust, with power of sale, dated May 11, 1928, to National Bankitaly Company, a corporation, trustee, executed by A. G. Sala and Paula Sala, his wife, and Harry M. Seigler and Josephine Seigler, his wife, to secure the payment of Twelve Thousand Dollars ($12,000.00), with interest thereon, according to the terms of their promissory note or notes * * *

* * *

"II. Liability of the Company: Except as otherwise shown by the statement of title contained herein, and subject to the terms hereof, the Company hereby insures a marketable title to the estate or interest of the Insured, * * * The Company may and will, at its own cost and expense, defend the Insured in all actions or proceedings founded on a record claim of title or encumbrance prior in date and time to this policy and hereby insured against. The Company will not be liable to anyone by reason of defects, liens or encumbrances by such person created or suffered, or created subsequent to the date hereof, or resulting in no pecuniary loss to the Insured; nor for any sum in costs, expenses and loss in excess of the amount of this policy. * * *

* * *

"IV. Notice—Right of Action: In case any action or proceeding is begun as mentioned in Paragraph II, and the Insured shall be made a party thereto, or in case actual knowledge shall come to the Insured of such adverse claim of title or interest, the Insured shall at once notify the Company thereof in writing and secure to it, in the name of the Insured, the right to pay, satisfy, compromise, or, at the option of the Company, resist and defend such adverse claim to final determination. If such notice shall not be given to the Company within thirty days after actual notice to the Insured of the pendency of such action then this policy shall be void, but only as to the Insured receiving such notice and failing to notify the Company within said time, otherwise in full force. Right of action against the Company shall accrue under this policy (1) when and if, after receiving such notice, it shall fail within a reasonable time, in the name of the Insured, to institute and faithfully prosecute proper action to remove, or otherwise pay, satisfy, compromise or defend to final determination, such adverse claim of title or interest, and (2) when there has been a final determination by a court of competent jurisdiction adverse to the title as insured.

* * *

"VI. As to Payment: The Company reserves the option to settle any claim insured against by this policy, or to pay this policy in full; and the payment to the full amount of this policy shall terminate all liability of the Company hereunder. * * *"

Before the second trial of the Zamboni action, appellant herein, the title company, became associated with the defendant Bessolo's attorneys, and participated, as such, in the second trial. The above mentioned second amended complaint, based on fraud, was permitted to be filed over the defendant Bessolo's objection and after demurrer thereto. At the conclusion of the trial the judgment was adverse to Bessolo who thereafter perfected an appeal, but before the determination thereof, through the efforts of the title company, the action was settled. A judgment was entered in favor of Bessolo which effectively cleared the title to the property, which, it should be remembered, is the same property Sala and Seigler had purchased.

In substance, it is contended by respondents Sala and Seigler in connection with the within appeal, and alleged in the complaint as well, that the insurance policy guaranteed and insured a marketable title; that it made no mention of the lis pendens which was a defect in the title; that it did not contain a true and correct statement concerning the title to said property; that the title company knew of the lis pendens at the time the policy was issued but that the same was ignored; that if the title to the property had not been misrepresented in the policy of insurance respondents would not have purchased it or secured the loan of $12,000. It is further alleged in the complaint and contended by respondents that notwithstanding plaintiffs' persistent demands that some action be taken by the title company as required by the terms of the policy in plaintiffs' behalf to protect the title, nothing was done for a long period of time, as a result of which delay, and on account of the defective title, the Collins Concrete Pipe Company defaulted and plaintiffs herein, being unable to pay the purchase price, lost the property. It is also alleged and contended that the title company acted in bad faith and was in collusion with the Bank of Italy, all of which bad faith and unreasonable delay, it is alleged, was for the purpose of avoiding liability to plaintiffs.

The theory of the trial court may be gathered from the remarks of the judge who presided at the trial, as follows: "It seems to me we are getting pretty far from what is really rather a simple issue; first, whether there was a policy of insurance issued; that seems to be admitted by everyone; second, whether there was a defect in the title; third, whether that defect rendered the title bad or unmarketable, and fourth, what, if anything, was the difference in value between the property if the title had been good as it was assured to be, and what it was with any defect, if any existed, assuming that the value was there. That is all there is to this case, as I see it." And again: "* * * I think, in this type of case, the measure of damages is the difference between the value of the property, if it had a good, marketable title, which the company assured that it did have, and the value of the property if the title was not marketable, and if that non-marketability was by reason of some defect, which was a matter of record, which the company failed to show in its certificate of title." And, in a later observation: "It seems to me, the more I think of it, the more I am convinced it is correct that the only possible measure of damages for the breach of an obligation of this kind, is the difference in value between the thing as represented, and the thing as it was."

Before analyzing the respondents' contentions and the theory of the trial court, above noted, the facts may be summed up as follows: During the second trial of the Zamboni action, as indeed was the case at all times, respondents Sala and Seigler were in this position: There being a lis pendens on record, the outcome of the Zamboni trial would affect the title of the property which was the subject of the lawsuit, although the record title thereof was in the name of respondents Sala and Seigler, who were not parties to that action. At the conclusion of the Zamboni trial when the judgment was adverse to the interests of respondents Sala and Seigler, it was evident that respondents would lose the property by virtue of the judgment, unless such judgment could be set aside or reversed, or unless a settlement could be reached, the effect of which would clear the title. After the adverse judgment in said action an appeal was taken and perfected and appellant's opening brief was filed. Pending the appeal in that action, respondents herein lost the property as a result of the foreclosure of the trust deed, which foreclosure vested the title to the property in the Bank of Italy. At the same time the foreclosure relieved respondents Sala and Seigler of the total amount of the debt secured by the trust deed. Thereupon, according to its terms, the benefits of the policy inured to the Bank of Italy, the new title holder of the property. Manifestly, if the judgment in the Zamboni case could not be reversed on appeal and a different judgment obtained that would clear the title, or the same result achieved by settlement, then, and in that event, a cause of action would follow in favor of the Bank of Italy, and against the title company. Under such circumstances would respondents Sala and Seigler also have a cause of action against the title company by virtue of the same policy of insurance? And if so, for what?

Returning now to the contentions of respondents, from a review of the record and in the light of the foregoing summary, each and all of such contentions are without merit.

[1, 2] In connection with respondents' claim that the insurance policy did not contain a true and correct statement concerning the title, exaggerated and unwarranted importance is attributed to the failure of the title company to mention the lis pendens in the insurance policy, when, in truth, the failure to so mention the lis pendens is of no consequence. The insurance policy did not purport to recite, nor did the title company undertake to sell, to respondents a list of possible encumbrances in connection with which opinions might differ as to the legal effect thereof. Respondents were in no position at the time

the insurance was purchased to dictate to the title company the form and substance which its obligations should assume, nor are they in a position now to complain because the insurance policy did not contain something which the insurance company in the conduct of its business and in its best judgment saw fit to omit. Although it is unnecessary to decide the question in connection with the appeal herein, there is abundant authority to support appellant's contention that the record of the lis pendens did not at any time constitute a defect of the title to the property. It is conceded that the title company intentionally ignored the lis pendens because the action upon which it was based, as heretofore noted, was an action to rescind a deed on the grounds of failure of consideration. It is elementary that such an action does not lie. Moreover, it is evident, from a review of the record, that the title company had every reason to assume that an amendment to the complaint in the Zamboni action which would change the character of said action would not be permitted, and that if it were permitted such amendment would ipso facto invalidate the lis pendens, for it has been held, as the Supreme Court has hitherto observed, that "An amendment to the bill or complaint, after a purchase or the acquisition of other rights pendente lite, which does not alter the cause of action, does not affect the lis pendens, since it relates back to the filing of the original bill. On the other hand, if the cause of action is changed by the amendment, or a new cause added, the lis pendens does not relate back, but dates from the filing of the amended complaint." Dobbins v. Economic Gas Co., 182 Cal. 616, 628, 189 P. 1073, 1078. Manifestly, the amendment in the Zamboni case which set up a cause of action based on fraud changed the character of the action from an action ex contractu to an action ex delicto.

[3] The title company had the right to include or omit a reference to the lis pendens in the insurance policy as it chose, and by no process of logical reasoning, in the light of the record, can any causal connection be established between such omission and the loss of the hereinbefore described property by respondents.

With regard to respondents' contention above mentioned, namely, that if the title to the property had not been misrepresented in the policy of insurance respondents would not have purchased the property or secured the loan of $12,000, it is at once apparent that such argument is unsound, and from the standpoint of logic merely consists of one of a series of "ifs", which can be multiplied on the one hand by appellant as readily as they can be increased on the other by respondents, and so on ad infinitum. Moreover, appellant owed no duty to include any reference to the lis pendens in the contract of insurance, and the failure so to do in no sense was a misrepresentation either directly or in effect.

[4] With regard to respondents' contentions that the Collins Concrete Pipe Company defaulted on account of the defective title, and that the title company acted in bad faith and was in collusion with the Bank of Italy, it is sufficient to note that the record is destitute of any legal evidence in support of such contentions, nor is there any evidence in the record in support of respondents' contention that the title company was guilty of unreasonable delay in clearing the title. To the contrary, the record reveals that two of the parties to the Zamboni action died, which of necessity required the appointment of administrators and substitutions in order to carry on the litigation. And, also, the chief counsel for one of the parties was in a sanitarium for six months, which, together with other facts and circumstances in connection with the progress of the litigation, accounts for the delay in every respect, and leaves the title company free from warranted criticism in this regard.

[5] The theory of the trial judge, as above outlined, apparently results from a misconception of the legal effect of the insurance policy in question. Its legal effect may be determined by familiar rules, for example, as pointed out by respondents, "Obviously, the parties may contract in any particular policy, as they see fit", and further quoting from respondents' brief, "A policy of title insurance is a contract of indemnity. * * * To determine the rights and liabilities of the parties to the contract it is necessary to determine the extent of their respective promises and whether those agreements have been performed. In deciding what the parties have promised, the courts are at liberty to, and do, exercise certain well settled principles of interpretation. Policies of title insurance are subject to the same rules of construction as all other insurance policies."

[6] The theory of the trial court, and the contention of respondents as well, fails to take into account the contract in its entirety, and by thus disregarding the rights of the title company under the terms of the contract, assumes that the title company breached the contract as of the day the insurance policy was issued and that therefore and on said date was liable in damages for the difference between the value of the land with a marketable title and its value with an unmarketable title. Such a theory is obviously unsound for the reason that it forecloses the title company, if it elects so to do, from exercising its right, according to the terms of the policy, to clear the title. Manifestly, the insurance policy must be construed in its entirety, and it was as much the right of the insurance company to perform the contract according to its terms as it was the right of the assured to expect payment in the event of a failure upon the part of the title company so to do.

[7] Respondents complain bitterly because the title company did not commence "in the name of the Insured" an action to clear the title, which omission, it is argued, constituted a breach of the insurance contract on the part of the title company, and from which breach the alleged cause of action herein in part accrued. The complaint is trivial; it is based on the clause in paragraph IV of the insurance contract wherein, as above noted, it is provided that a right of action against the company shall accrue when the company shall fail within a reasonable time in the name of the insured to institute and faithfully prosecute proper action to remove the adverse claim. But the same clause further provides, "or otherwise pay, satisfy, compromise or defend to final determination, such adverse claim", and this is precisely what the title company did, in fact, do. Assuming that a cause of action existed against the title company, the clause in question merely determined when such action could be commenced. The fact remains that the title company performed the contract of insurance fully and expeditiously and cleared the title to the land in question, and there is no evidence in the record to establish a causal connection between any act or omission on the part of the title company and the loss of the property by respondents. The respondents are in no position under the circumstances herein to complain about the course pursued and the methods employed to bring about the result.

[8] With regard to the plea by defendant of the bar of the statute of limitations, it is appropriately recited in appellant's brief, that "if it is an action in tort growing out of defendant's negligence, the right of recovery was barred, at least after two years from the time their property was lost through foreclosure, and no claim of lack of knowledge of the existence of the cause of action would suspend the running of the statute. On the other hand, if the cause of action was based on fraud, the complaint was deficient in several respects, but especially in failing to set forth facts excusing their alleged failure to discover the fraud within a period of three years prior to the commencement of the action." It is sufficient to note in this connection that, in the light of the record, upon whatever theory plaintiffs seek to base a cause of action against the title company, such attempt is effectively barred by the statute of limitations.

The evidence reveals that Sala and Seigler had known each other for many years and had been in many real estate transactions together. The only logical, reasonable deduction from the evidence indicates that respondents purchased the land in question with borrowed money, and being unable to pay the loan when due, lost the property. They may have profited more if they had been able to retain the land, but nevertheless neither the loss of the land nor the loss of contemplated profits can be attributed to any actionable act or omission of the title company or to the failure of the title company to perform its obligations under and according to the terms of the insurance contract.

The motion for a judgment notwithstanding the verdict should have been granted.

[9] For the reasons heretofore given the judgment is reversed with directions to enter judgment for the defendant. There being no appeal authorized from the order denying a motion for a new trial, the attempted appeal therefrom is dismissed.

We concur: YORK, P. J.; WHITE, J.

27 Cal.App.2d 725

PEOPLE v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 5940.

District Court of Appeal, Third District, California.

July 25, 1938.

1. Evidence 🔑558(9)

In condemnation proceeding, the greatest latitude is permitted on cross-examination to permit counsel and jury to know what factors were taken into consideration in fixing value to which a witness has testified.

2. Eminent domain 🔑262(5)

In proceeding to condemn purchasers' interest in realty, admission of deed from vendor to county calling for strip of land which was located with reference to road which entered property on left boundary and which ran to designated subdivision line, was not error as against contention that deed was void because of misdescription in that two roads entered property in question on west boundary and no road had ever left property on subdivision line designated, where finding of jury that there was existing road as set out in deed was supported by evidence.

3. Eminent domain 🔑202(1)

In proceeding to condemn purchaser's interest in realty, admission in evidence on cross-examination as to effect of right reserved by vendor, to flood land on payment of $10 per acre providing that vendor would not avail itself of such right until it proposed in good faith to go forward with construction of project which would occasion flooding of property, was not error as against contention that property in question could not be flooded without affecting adjoining property and that until vendors had acquired such property they had acquired no right to flood property of purchaser.

4. Evidence 🔑558(9)

In proceeding to condemn purchaser's interest in realty which, subsequent to commencement of condemnation proceeding and before trial thereof, purchasers had sold, reserving for themselves four acres of land situated in intersection of highway, admission on cross-examination as to listing price of four-acre tract reserved by purchaser on cross-examination of expert as to basis of opinion on value of property, was not error.

5. Evidence 🔑558(9)

Wide latitude should be allowed on cross-examination inquiring of expert witnesses the reason for their conclusions.

6. Evidence 🔑546

Primarily court must pass on qualifications of an expert witness.

7. Evidence 🔑543(3)

In condemnation proceeding, a state inheritance tax appraiser who for 12 years had been inheritance tax appraiser in county in which land was situated, and during that time had examined and appraised all types of property, and who had acted as bookkeeper for corporation which owned and operated cattle ranch, and who had driven across property in question and had walked over certain portions of it and viewed it from the highway, was qualified to give his opinion as expert on value of range land.

8. Eminent domain 🔑221

Weight to be given testimony of expert witness as to value of land in condemnation proceeding was for jury.

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Condemnation proceeding by the People of the State of California, acting by and through the Department of Public Works, against the Pacific Gas & Electric Company and others. From an adverse judgment, defendant George A. Clough, also known as Geo. A. Clough, and others appeal.

Affirmed.

Pugh & Pugh, of Red Bluff, and George A. Clough, of San Francisco, for appellants.

Clarence W. Morris and Clifford D. Good, both of San Francisco, for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought originally for the purpose of condemning the interest of appellants in certain lands formerly belonging to the Pacific Gas & Electric Company, a corporation, upon which George A. Clough held for himself, and as trustee for Nellie Brown Clough, his wife, A. H. Clough and Mabel B. Clough, his brother's wife, an executory contract to purchase.

After such action was commenced appellants took title from the Pacific Gas & Electric Company, and subsequent thereto and before the trial of this action, the Cloughs sold the property involved, reserving for themselves four acres of land situated in the intersection of the road from Red Bluff to Chester with the road from Chico to Chester, which latter road necessitated the instant action in condemnation.

Appellants herein, upon their sale of the land, also reserved unto themselves the right to prosecute this condemnation suit against the state of California, and the right to collect all moneys recovered therefrom.

The matter was submitted to a jury to determine the value of the interest of the Cloughs in the property sought to be condemned, the damage accruing to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by plaintiff, and how much that portion not sought to be condemned was benefited by the construction of the improvement.

In the deed from the Pacific Gas & Electric Company to George A. Clough was a reservation of an easement on behalf of the Pacific Gas & Electric Company permitting it to flood these lands upon payment to the Cloughs of the sum of $10 an acre, and for the payment of all buildings erected on the property by the Cloughs not to exceed $5,000. It was agreed, however, that the Pacific Gas & Electric Company would not avail itself of this privilege until such time as it or its assigns should propose in good faith to go forward with the construction of a project which would occasion the flooding of this property.

While the Pacific Gas & Electric Company had title to the property, and before any transaction was had with the Cloughs the Pacific Gas & Electric Company, on the 29th of May, 1931, deeded to the county of Butte, a right of way for construction, maintenance and use of a public highway 100 feet wide purporting to be in the same general vicinity as the highway now the subject of this condemnation.

The deed identified the right of way sought to be conveyed by reference to a monument, to-wit: an existing road entering at the west line of the property, and likewise by reference to a monument where the road was supposed to leave the property at the northerly side thereof.

The jury returned a verdict finding that the value of the land sought to be condemned, consisting of 14.09 acres, was $470, allowed $2,335 by reason of severance damage and found the benefit accruing to the property not sought to be condemned as $2,285. Upon this verdict a judgment was entered, from which these defendants appeal.

As grounds for appeal it is urged, first, that the deed from the Pacific Gas & Electric Company to Butte county is void because of defective description, and that the admission of such deed and testimony relating thereto was reversible error; that the court erred in admitting into the record evidence as to what effect the reservation of the right of the Pacific Gas & Electric Company to flood the land under the conditions specified in the deed had upon the value of the land, and the admission of evidence of value upon the assumption that the Pacific Gas & Electric Company had the right to repurchase at $10 an acre; admission of evidence of value based upon evidence of the listing price of a certain four-acre tract, and the refusal to strike out certain testimony of witness Hart as an expert on value.

[1] The first point urged, that the deed from the Pacific Gas & Electric Company to Butte county was void because of defective description was argued at considerable length. The deed called for a strip 100 feet wide lying 50 feet on each side of the center line of the old road, which entered the property here in question on the west boundary. It is claimed by appellants that there were two roads running through Deer Creek meadow and entering the property at about the same point, and that it was impossible to ascertain which of these two old roads was intended in the deed. The deed further provided that the strip in question ran from the point of beginning as indicated above to a point on the northerly boundary line in the southwest one-quarter of the northwest one-quarter of section 22. Appellants contend that there is not and never was a road leaving the property through the subdivision line called for in the deed.

Appellants claim that they were prejudiced by plaintiff parading this deed before the jury whereby the jury were given the false idea of the rights of the defendants to the ownership and condition of the property. Many specifications of error are based upon this evidence. It should be noted, however, that all matters referring to this road came up on cross-examination, and there is no doubt that the greatest latitude is permitted on cross-examination to permit counsel and the jury to know what factors were taken into consideration in fixing the values to which the witness testified. City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378. In each of these questions here complained of the cross-examiner was endeavoring to ascertain the factors which the experts for the defendants took into consideration in arriving at their valuation.

The point relied upon by appellants is that there were two "old roads" answering the description as set forth in the deed from the Pacific Gas & Electric Company to Butte county. That there was such a definite existing road as called for in the deed was established by the testimony of several witnesses. Erle Gans, a witness called by the defendants, testified that the property "was benefited by the highway; there was an old road there before." Roy Owen, a witness called on behalf of defendants, upon cross-examination, testified as follows: "Mr. Good: By the way there was an old road across there, wasn't there, before the highway went through? A. Yes." Mr. Frank P. Childs, a witness called upon behalf of defendants, testified that there was no old wagon road through the meadow until the forest service built one to Round valley. On cross-examination he was asked: "Did you ever go across this old road that comes in here at the old Lassen trail and winds its way across the meadow part of that property and eventually went out on the west side of it? A. Yes, I have been there when there wasn't any road; it was called the Lassen trail. There was no wagon road there until the Forest Service built the road into Little Round Valley." It appears from the record that this road was repaired by the forest service and in use prior to the deed to the county of Butte from the Pacific Gas & Electric Company.

Mr. A. H. Clough testified that about 1932, the forest service graded Lassen trail through the valley, fixed it up at the impassable places so that in case of forest fire, machines could go over it, but that it was very rough and no one traveled it beyond Lost Camp, about twenty-five miles from the valley. There were several gates across the road which had been maintained for at least twenty-two years.

Mr. McKenzie, a witness called on behalf of the defendants, testified, however, that there was a road across the old Lassen trail and that about ten years before the date of the trial he had driven across the trail and that it was open at that time, and that people had been driving sheep and cattle across the Lassen trail, which is substantially the same location with respect to the Clough property as the new highway, and that the Lassen trail had been in use for twenty years prior to the date of the trial, and to his recollection it was never closed.

Mr. George A. Clough, a witness on behalf of defendants, testified that there never was a county road through the property along the old Lassen trail, and the Lassen trail was not and never had been a county road, and had only been made passable for conveyances within the recent years. He also testified that there were two roads entering the property about 100 feet apart, and that they paralleled each other in a general course, although at times crossing and recrossing each other. He further testified that about 1931 or 1932 the forest service completed a road following in a general way the old Lassen trail all the way down to the valley. The Cloughs gave deeds to the forest service containing reservations which would prevent such road becoming a public or county road, and for the public to use said road it was necessary to obtain permission from the forest service, the Cone-Ward Company and the Cloughs.

There seemed to be some attempt on the part of the witness to construe the road referred to in the deed from the Pacific Gas & Electric Company as a county road, but the reference therein was to an existing road. That such a road was in existence is clearly evidenced by the foregoing testimony. Some reference is made by certain of the witnesses to another road, but other witnesses referred to but one road, and the jury having found that there was an existing road negatives the idea that there was another road. Furthermore, the court and jury viewed the premises and had visual evidence as to whether or not there was an existing road following the general course outlined in the deed in question.

[2] The court and jury, having heard the testimony as to the conflict as to the

existence of more than one road answering the calls in the deed, and having viewed the premises and determined that there was an existing road as set forth in the deed, that fact became established, and we cannot, from the record, say that such finding is not properly supported. Therefore, the deed was properly admitted in evidence.

[3] The next point urged by appellant is that the court erred in admitting in evidence the effect of the right to flood the meadows upon the values of the lands in question.

Upon cross-examination, witnesses for defendants were asked what effect such reservations would have on the value of the land taken by the highway. Defendants claim that Pacific Gas & Electric Company never had or could have the right to flood this property because certain lands in the meadow belonged to a Mr. Smith, not a party to the deed, and the Cloughs' property could not be flooded without affecting the Smith property, and until they had acquired that property they had no right to flood the property of the Cloughs. We believe, however, this line of examination was proper. The deed definitely gave to the Pacific Gas & Electric Company the right to flood the lands of the Cloughs upon the payment of $10 an acre providing the company did not avail itself of this right until such time as it or its assigns proposed in good faith to go forward with the construction of a project which would occasion the flooding of the property. The fact that other property in the meadow belonging to others would be flooded, is not material. The Pacific Gas & Electric Company is given the right of condemnation by the state of California. It could condemn the Smith property and Smith would receive as compensation whatever a jury might award. In the case of the Cloughs the compensation was by deed set at $10 an acre. Appellants cite City of Pasadena v. Union Trust Co., 138 Cal.App. 21, 31 P.2d 463, which decided that a defendant could not claim the highest and best use of his land was for reservoir purposes if the defendant did not own all of the land necessary for a reservoir site. That is not the question here involved. The Cloughs had by agreement bound themselves to convey an interest in the land to the Pacific Gas & Electric Company, at a fixed price, which fact the jury had a right to note and consider. It will be recalled, too, that all this was developed on cross-examination.

[4, 5] Objection is also made to the fact that evidence was admitted as to the listing price of a four-acre tract lying at the junction of the two highways. On cross-examination counsel asked a witness on value if he took into consideration in fixing the value the fact that Mr. Clough had reserved four acres at the intersection of the Chico-Deer creek highway with the Red Bluff-Chico highway, which he had listed for sale for $4,000. Of another witness the question was asked on cross-examination, if the witness thought that the particular four-acre tract in question had been benefited by the improvement. We do not believe that this line of examination was subject to objection. Wide latitude should be allowed on cross-examination inquiring of expert witnesses the reason for their conclusions. County of San Mateo v. Christen, 22 Cal.App.2d 375, 71 P.2d 88; In re Estate of Ross, 171 Cal. 64, 151 P. 1138; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681.

As stated in East Bay Municipal Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178, 180: "When an appellate court is called upon to decide whether such discretion has been abused, the inquiry is whether a sufficiently wide range has been allowed to test such credibility and weight rather than whether some particular question should have been allowed."

In regard to the listing price of certain property, it was held in the case of City of Los Angeles v. Deacon, supra, that upon cross-examination such matters were proper.

[6-8] E. L. Hart, a state inheritance tax appraiser of Tehama county, was called on behalf of plaintiff as a witness on value. Appellants charged he was not qualified as an expert on values of cattle ranches, and that the court erred in permitting him to testify. Reading the testimony of Mr. Hart, it appears that for twelve years he had been an inheritance tax appraiser of Tehama county, and during that time had examined and appraised all types of property—real property, personal property, city property and stock range property. It also appeared that he

had at one time acted as bookkeeper for a corporation which owned and operated a cattle ranch. In his investigation of the Clough property he had driven across the property and had walked over certain portions of it and also viewed the same from the highway. Primarily, the court must pass upon the qualifications of an expert witness; the trial court held he was qualified. The testimony shows that the witness was qualified to give his opinion as an expert on the values of range land, although the weight to be given that testimony was a matter for the jury. We find no error in the rulings of the court.

We believe that the foregoing has covered the principal points urged by appellants for reversal. We find no error, and the judgment should be affirmed. It is so ordered. Appellants to recover costs.

I concur: THOMPSON, J.

27 Cal.App.2d 631

PEOPLE v. HUMPHREY et al.

Cr. 3101.

District Court of Appeal, Second District, Division 1, California.

July 20, 1938.

Hearing Denied by Supreme Court Aug. 18, 1938.

1. Criminal law ⇨45

The gist of the offense of solicitation of grand theft is the solicitation, not the actual commission of theft. Penal Code, § 653f.

2. Indictment and Information ⇨109

Since amendment of statute permitting indictment or information to be drawn "in the words of the enactment" or "in any words sufficient to give the accused notice of the offense," greater liberality is allowed in determining the sufficiency of allegations, and particulars concerning manner, means, place, or circumstances need not generally be added to the statutory definition of an offense. Penal Code, § 952.

3. Indictment and Information ⇨110(3)

An indictment charging in statutory language that defendant did "wilfully, unlawfully and feloniously solicit" named persons "to commit and join in the commission of the crime of grand theft" was sufficiently specific, without detailing nature of the theft, where proof was that defendant, an attorney, filed complaints on behalf of such named persons for injuries allegedly sustained in an accident that never occurred. Penal Code, §§ 487, 653f, 952.

4. Criminal law ⇨372(5)

In prosecution of attorney for soliciting the commission of grand theft, by inducing clients to sue on fictitious claims, evidence that defendant had acted as attorney for other parties in identical cases was admissible to show general plan or scheme to defraud, as well as consciousness of guilt. Penal Code, § 653f.

5. Witnesses ⇨380(5)

In prosecution of attorney for soliciting commission of grand theft, by inducing clients to sue on false claims, wherein prosecution was surprised by its witness' testimony that attorney had not talked to her about being in a street car accident, though witness had made a contrary statement to grand jury, prosecution had right to impeach such witness by confronting her with her testimony before grand jury, as against contention that witness who has not testified against the party producing him cannot be impeached.

6. Criminal law ⇨511(4)

In prosecution of attorney for soliciting the commission of grand theft, by inducing clients to sue on false claims, that attorney prepared and filed a complaint on false claim was sufficient corroboration of clients' testimony. Penal Code, § 653f.

7. Criminal law ⇨511(2)

Evidence corroborating accomplices is sufficient, though entitled to but little consideration standing by itself, if it tends of itself to connect the accused with the commission of the offense.

8. Criminal law ⇨1159(2)

In order to require reversal of conviction for insufficiency of evidence, improbability of testimony must appear very clearly and amount to incredibility.

9. Criminal law ⇨1159(2)

In prosecution of attorney for soliciting the commission of grand theft by inducing clients to sue on false claims, clients' testimony *held* not so improbable as to require reversal of conviction. Penal Code, § 653f.

10. Criminal law ⟹730(1), 1171(1)

Impropriety of remarks of district attorney during trial and argument to jury did not require reversal of conviction, where proof of guilt was overwhelming and court admonished jury not to consider counsel's statements as evidence.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Criminal proceeding by the People of the State of California against Dr. W. Burlin Humphrey and Louis Feinstein, wherein Louis Feinstein was convicted of soliciting the crime of grand theft, and he appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

L. E. Dadmun, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

The grand jury of Los Angeles county returned an indictment containing two counts charging the appellant with violations of section 653f of the Penal Code. Count I charged that on or about January 29, 1937, appellant did wilfully, unlawfully and feloniously solicit one Leon Kent to commit and join in the crime of grand theft; count II charged that on or about the same date, appellant committed the same act with reference to one Dorothy Lucile Kent. The jury rendered its verdict finding appellant guilty as charged in each count of the indictment; motions in arrest of judgment and for new trial were denied by the court, and from the judgment of conviction which was thereafter entered pursuant to the verdict, this appeal is prosecuted.

Appellant urges (1) that the indictment does not state a cause of action; (2) that there was error on the part of the trial court in the admission of evidence; (3) that the evidence is insufficient to sustain the judgment; (4) that there was misconduct on the part of the trial judge; (5) misconduct on the part of the district attorney; (6) that the court committed error in instructing the jury; and (7) that it was error for the court to deny appellant's motion for new trial and the motion in arrest of judgment.

The factual situation out of which the instant cause arose is as follows: Appellant, who is an attorney at law, became acquainted with Leon Kent in 1936, when appellant represented Kent in connection with an injury sustained by the latter while employed by the Cudahy Packing Company. During the early part of February, 1937, Dorothy Lucile Kent, wife of Leon Kent, was ill and said Leon Kent borrowed $35 of appellant, who asked concerning Mrs. Kent's condition of health and said (as related by Kent): "You was not in an accident, was you?," to which Kent replied in the negative. Appellant then said, "It could have been an accident, could it not have?," to which Kent replied, "It could have." Appellant then said, "Suppose it had been a street car accident?" Kent stated that he and his wife had not been on a street car and appellant stated that there had been a street car accident between Seventh and Eighth on Central avenue on January 28, 1937, and instructed Kent to tell his wife that she was on the street car involved in the accident and was about to have a miscarriage; that from now on it was a street car accident and not a miscarriage, if Mrs. Kent would agree to it. Kent talked to his wife and a day or two later reported to appellant that Mrs. Kent would agree to the plan outlined, whereupon appellant sent defendant Dr. Humphrey to see Mrs. Kent, Dr. Humphrey told Mrs. Kent that if anyone should call and make inquiry to say that it was a street car accident and not a miscarriage. Shortly thereafter, to-wit, around February 17th, Kent took his wife to the general hospital, where a miscarriage occurred. As a matter of fact, Mrs. Kent had been confined to her bed for about a month prior to the 3d or 4th of February and on January 28 or 29, 1937, the day upon which the accident was supposed to have occurred, Mrs. Kent was in bed and neither she nor her husband was in the vicinity of Seventh and Central. Shortly thereafter Kent verified a complaint filed in the municipal court of Los Angeles in which he sought to recover $500 on account of doctor's bills alleged to have been paid by him as a result of his wife's injuries, and $2,000 damages for injuries sustained by Mrs. Kent. A deposition was taken in that case and prior thereto Kent and his wife met in appellant's office where appellant told them the details to which they should testify. Several weeks later, upon instruction from appellant, Kent wrote him a letter instructing him to dismiss the case, as the accident had not occurred "as it was supposed to have".

Thereafter Kent told appellant that he had slipped in the bathtub and injured himself and that he had an accident policy with the Mutual Life Insurance Company, whereupon appellant made a claim against said company based upon a report of the accident which Kent handed to him.

Mrs. Kent testified that in February, 1937, she was an expectant mother and Dr. Ruth Temple was attending her; that while confined to her bed at her home she had a conversation with her husband about appellant and then saw appellant sometime later. Meanwhile, Dr. Humphrey called on her and asked her what was wrong and she told him. She also said that she had not been in a street car accident and Dr. Humphrey told her that from then on it would be understood that she was in a street car accident which would be the cause of a miscarriage. Appellant then called on her and said, as related by Mrs. Kent: "You were on the street car going to town at six o'clock in the morning and the street car between 7th and 8th on Central had an impact with a truck there and the truck was going at a certain speed and the jamming down of the brakes of the car trying to keep from hitting the truck had caused us to fall. The car was going at a certain speed and the jamming down of the brakes, the motorman trying to keep from hitting the truck threw us all out of our seats." Mrs. Kent's deposition was then taken in connection with the alleged accident, in which she stated that she and her husband had boarded the street car at Forty-seventh street and Central avenue; that they were riding along on the "U" line until they got between Seventh and Eighth streets and all of a sudden there was an impact. The street car hit a truck there; that she and her husband were sitting on the rear end on the right-hand side of the car; that she did not remember whether she heard the sound of a bell, gong, or anything to warn the truck to move out of the way of the car because she was so excited over the accident; that her husband had gone to the front of the car to smoke, and that when she fell she lay there until her husband came back and picked her up; that she heard the motorman slamming down the brakes of the street car to keep from hitting the truck. None of the matters testified to by Dorothy Lucile Kent in her deposition actually happened. Before testifying and the taking of her deposition, she and her husband went to the office of appellant, who instructed them what to say.

Mr. Wood, the assistant general claim agent for the Los Angeles Railway, testified that sometime in February, after the filing of the Kent suit, he had a telephone conversation with appellant, who asked him what he thought about the case. Mr. Wood stated that he had received no report of any accident and that he had to be very suspicious of the claim. Appellant then stated that a passenger by the name of Brown claimed to have been on the car and that she had been contacted by the railway company. Subsequently, Mr. Wood located the record of the accident presented by Mrs. Brown and thereupon communicated to appellant that he had found the record but had also discovered that the car upon which Mrs. Brown claimed to be a passenger had just left the barn and that there was not a passenger on it. One J. E. Blackstrom, a conductor employed by the railway company, testified that on the 28th of January, 1937, his car was involved in a collision near Seventh and Central; that the car had just pulled out of the barn and had gone about two blocks; that there were no passengers on the car at any time previous to the collision that morning. The motorman, Ed. P. Snyder, gave substantially the same testimony.

Eunice Brown testified that she consulted Dr. Humphrey regarding an illness from which she was suffering on January 28, 1937, and told him that she was returning from work when the street car behind the car on which she was riding was struck by a truck. Dr. Humphrey told her if she was on the street car that was struck she could get some money from the railway company, but that she should have a lawyer. The next day Dr. Humphrey brought appellant to see her and appellant suggested suing the railway company. At that time she had an accident policy and signed a report. Appellant told her to report a street car accident.

Callie Elliott testified that in 1935 she fell and injured her elbow and called a Dr. Cooley; that about a week later she met a man named Dorris and a week after that met the appellant. Appellant asked if she was Mrs. Elliott and stated he had come from the doctor's office and wanted her to sign some papers. That night she, appellant and Dorris went to "where the accident was supposed to have happened", i. e., Seventh and Figueroa streets. The municipal court file in the action wherein she was named plaintiff was shown to her and she stated that the signature to the complaint did not appear to be in her writing.

J. E. Haley, attorney for the Mutual Benefit Health and Accident Company, identified a proof of loss signed by Leon Kent and a release to the company by Kent. The claim was presented in July, 1937, on account of injuries supposed to have been sustained by Kent. Healy dealt with appellant as attorney for Kent in connection with the claim. The injuries claimed were alleged to have been suffered by Kent as result of a fall in a bathtub on or about January 30, 1937. The claim was settled for $135.

Leon Kent further testified that in February, 1937, he saw appellant in the latter's office; that appellant told him the suit against the railway company had "blown up". Appellant then said he thought they could make some money out of the bathtub incident, and Kent delivered his policy to appellant. Thereafter appellant "took care of all of it", and Kent later signed the claim blank, which was all filled out when he signed it. As a matter of fact, Leon Kent had not fallen in a bathtub, although he did tell appellant he had suffered a fall.

In connection with his contention that the indictment does not state a cause of action, appellant urges first, that any indictment or information charging grand theft that fails or omits to state the description of the property taken, its value and by whom owned, does not charge a defendant with the commission of grand theft; and second, that the indictment here fails to state what appellant solicited Leon Kent and Dorothy Lucile Kent to do, hence no offense is charged. Appellant further contends that a particular description of the offense is necessary in order to enable defendant to prepare his defense or to interpose a plea of former jeopardy should he be further prosecuted for the same offense; and that section 487 of the Penal Code defining theft must be read with section 653f of the Penal Code in order to give the accused sufficient notice of the offense with which he is charged.

[1] The indictment herein charges that appellant "did willfully, unlawfully and feloniously *solicit* one Leon Kent (and one Dorothy Lucile Kent) to commit and join in the commission of the crime of grand theft", a violation of section 653f of the Penal Code. The gist of the offense is the *solicitation* of the commission of the crime of grand theft, and not the commission of grand theft. (Italics added.)

Section 653f of the Penal Code provides: "Every person who solicits another * * * to commit or join in the commission of * * * grand theft * * * is punishable by imprisonment in the county jail not longer than one year or in the state prison not longer than five years, or by fine of not more than five thousand dollars. Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

[2] By the terms of section 952 of the Penal Code, as amended in 1929, it is declared that the information or indictment may be drawn "in the words of the enactment" or "in any words sufficient to give the accused notice of the offense of which he is accused". Since that amendment, "greater liberality is allowed in determining the sufficiency of the allegations of an information or of an indictment". People v. Odom, 19 Cal.App.2d 641, 645, 66 P.2d 206, 208. In People v. Beesly, 119 Cal. App. 82, 6 P.2d 114, 970, it is stated at page 84, 6 P.2d at page 114: "The sufficiency of an indictment or information is not to be tested by the rule of common law nor by the rules which existed prior to the amendments of 1927 and 1929 of our statutes relating to pleading in criminal cases. * * * The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. At common law, where this information came solely from the indictment, much particularity was required. * * * As a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be (sections 870, 925, Pen.Code), and he is today better informed as to the case he must meet than was an accused under the detailed form of pleading required at common law." Again, in People v. Britton, 6 Cal.2d 1, at page 5, 56 P.2d 494, at page 496, the court said: "It is well settled in this state that an indictment or information need not allege the particular mode or means employed in the commission of an offense, except when of the essence there-

of. 14 Cal.Jur. 55, § 41, and authorities there cited. In other words, particulars as to manner, means, place, or circumstances need not in general be added to the statutory definition. People v. Giacamella, 71 Cal. 48, 49, 12 P. 302; People v. Russell, 81 Cal. 616, 617, 23 P. 418. The indictment or information need only charge the essential elements of the statutory offense. It then fairly apprises the defendant of what he is to meet at the trial."

[3] The indictment in the instant case follows the language of the statute and sufficiently states the crime with which appellant was charged, to-wit: solicitation of the commission of the crime of grand theft. The record discloses that appellant filed on behalf of Leon Kent and Dorothy Lucile Kent a complaint seeking damages in the sum of $2,000 for alleged injuries sustained by Mrs. Kent, and in the sum of $500 to cover doctor's bills, while as a matter of fact neither was involved in any accident.

In connection with his second point, appellant claims error on the part of the trial court in permitting the introduction into evidence of proof of other crimes committed by him; that intent per se is manifested by the act of solicitation and, therefore, it is unnecessary to show other crimes in order to prove intent.

It was the theory of the prosecution that the transaction here in question was not simply an action filed innocently by appellant upon the basis of misrepresentations made to him by his client which he did not know to be untrue, but that appellant had acted as counsel in two other cases identical in nature and in which two other parties, Eunice Brown and Callie Elliott, who were unknown to the Kents, appeared as plaintiffs, and that the basis of the claim in each case was for the recovery of damages alleged to have been suffered in a street car accident which in fact never occurred. Evidence of the accident insurance claim was offered and admitted to show a plan or scheme in which appellant was engaged, to present claims and file actions of the same nature for the purpose of defrauding the defendants in such actions, and thereby obtain money upon an alleged cause of action which did not in fact exist.

[4] The testimony complained of was evidence of the common design of the criminal enterprise charged in the indictment and was admissible to prove a general plan or scheme to defraud, as well as to prove consciousness of guilt. People v. Northcott, 209 Cal. 639, 653, 289 P. 634, 70 A.L.R. 806; People v. Shurtleff, 113 Cal.App. 739, 744, 299 P. 92; People v. Sampsell, 104 Cal.App. 431, 286 P. 434.

With reference to the testimony of Callie Elliott, appellant urges that a witness cannot be impeached because of failure to testify as expected, if such witness has not testified against the party producing him. The witness in answer to the question: "* * * did Feinstein ever talk to you about your being in a street car accident?", replied, "Feinstein never talked with me." The district attorney then asked permission to impeach his witness on the ground of surprise and was allowed to confront her with her testimony given before the grand jury to the effect that it was appellant who first told her about claiming she was in a street car accident.

[5] The prosecution had the right to assume that the witness would adhere to the statement made before the grand jury. Being taken by surprise when she answered contrary thereto, the prosecution had a right to show that she had made such contrary statement. People v. Gallagher, 12 Cal.App.2d 434, 437, 55 P.2d 889, where it was held that the admission of evidence that impeached the prosecution's own witness did not constitute prejudicial error, where a reading of the entire record, including the testimony, showed there had been no miscarriage of justice.

Appellant maintains that the evidence is insufficient to sustain the judgment because of lack of requisite corroboration of the testimony of Leon Kent and Dorothy Lucile Kent, and also because of the inherent improbability of their testimony.

[6] Even though it may be assumed for the purpose of argument only that Leon Kent and Dorothy Lucile Kent were accomplices of appellant, neither of said Kents is charged with the commission of a crime; it is appellant who is charged with the crime of soliciting both Leon Kent and Dorothy Lucile Kent to commit the crime of grand theft. As appellant prepared and filed a complaint seeking $2,500 in damages by reason of the injuries alleged to have been received in a street car accident which was supposed to have taken place on January 28, 1937, that fact, taken with all of the surrounding circumstances disclosed by the record, was

ample corroboration of the testimony of both Leon Kent and Dorothy Lucile Kent.

[7] Corroborating evidence is sufficient if it of itself tends to connect the accused with the commission of the offense, although it is slight and entitled, when standing by itself, to but little consideration. People v. Tanner, 3 Cal.2d 279, 44 P.2d 324; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Kempley, 205 Cal. 441, 456, 271 P. 478; People v. McLean, 84 Cal. 480, 24 P. 32. "The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice." People v. Davis, 210 Cal. 540, 558, 293 P. 32, 40, citing People v. Martin, 19 Cal.App. 295, 125 P. 919.

It is obvious that the corroborating evidence in the instant case satisfies all legal requirements.

[8, 9] As to the angle of improbability complained of by appellant, such improbability of testimony must amount to incredibility and must very clearly appear in order to justify a reversal. People v. Dorland, 2 Cal.2d 235, 243, 40 P.2d 474. The testimony of the Kents established the solicitation by appellant that they make a false claim upon the railway company for injuries supposed to have been suffered in a street car accident which appellant knew had not occurred. This is amply corroborated by the filing by appellant as an attorney at law of the complaint in which the Kents were named plaintiffs seeking damages on account of this alleged accident. In the light of the facts disclosed by the record, appellant's claim as to the inherent improbability of the testimony of Leon Kent and Dorothy Lucile Kent cannot be sustained.

[10] Appellant's fourth point, misconduct of the trial judge, is not sustained by the record. As to the claim of misconduct of the district attorney, while we do not condone the remarks made by him during the trial and during his argument to the jury, such remarks were not so reprehensible in character as to constitute prejudicial misconduct which would warrant a reversal of the judgment, in face of the overwhelming proof of appellant's guilt. This is especially true, in view of the fact that the jury was admonished by the court that statements of counsel were not to be considered by it as evidence in the case.

A thorough examination of all of the instructions given reveals that the jury was fully and fairly informed upon the various elements forming the basis of the offense charged, and that appellant suffered no prejudice by the refusal of the court to give the requested instructions.

There was no error in the denial of appellant's motions for new trial and in arrest of judgment.

The judgment and order are affirmed.

We concur: DORAN, J.; WHITE, J.

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27 Cal.App.2d 655

PEOPLE v. NEAL et al.

Cr. 3112.

District Court of Appeal, Second District, Division 2, California.

July 21, 1938.

1. Criminal law 🔑958(3)

Denial of defendant's motion for new trial, where motion was supported by affidavits of additional witnesses offering merely newly discovered cumulative evidence corroborating testimony of alibi witnesses at trial, was not an abuse of discretion, especially where defendant did not show he could not with reasonable diligence have discovered and produced affiants as witnesses at trial.

2. Criminal law 🔑958(3)

Where defendant's motion for new trial was supported by affidavits of additional witnesses, defendant had burden of establishing that proffered evidence could not have been discovered with reasonable diligence in time for trial.

3. Criminal law 🔑958(1)

Where motion for new trial was supported by affidavits stating that affiants had been told by defendant's accomplices that defendant took no part in crime of which he was convicted but not by affidavits of

accomplices, denial of motion was not abuse of trial court's discretion.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Hurshel Neal, Verlia Brunson, and Jeanne M. Kelly were convicted of robbery and kidnapping for purpose of robbery, and Verlia Brunson appeals.

Affirmed.

Taylor, Kolliner, Bolton & Schwartz, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty. of Los Angeles County, and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

WOOD, Justice.

The appellant, Verlia Brunson, was jointly charged with defendants Hurshel Neal and Jeanne M. Kelly with the crimes of robbery and kidnapping for the purpose of robbery. It was also charged in the information that appellant had been convicted of felonies in the states of Michigan and Illinois and had served terms of imprisonment in each of those states. At a trial before the court without a jury each defendant was convicted on both charges and the charges of prior convictions were found to be true. The appeal is by defendant Brunson alone from the judgment and from the order denying his motion for a new trial.

Appellant now contends that the trial court abused its discretion in denying his motion for a new trial. The prosecuting witness, Joe Pearson, testified that at midnight of December 31, 1937, he was at the Biltmore hotel with a companion and that he had parked his car opposite the Fifth street entrance to the hotel. Shortly after midnight he left the hotel and went to his car where he waited for his companion. He entered the car and went to sleep on the back seat. He later was awakened, sensed that the car was moving and felt someone going through his pockets while a voice said "see if he has a wrist watch". For a while Pearson remained quiet and the car stopped at a gas station in Hollywood. At that time Pearson started to rise and was struck in the mouth by defendant Neal, whereupon a struggle ensued between Pearson and Neal during which Pearson became unconscious. Appellant was driving the car and defendant Kelly was in the front seat. The car left the service station and when Pearson become conscious he heard Brunson ordering Neal to "slug him". Neal produced a knife and pressed the blade against Pearson's stomach ordering him not to say anything under the threat of having the knife run through him. Defendants drove the car about until 4:30 a. m. at which time Pearson was released. Defendants took about $5 from Pearson's pockets and drove off with the automobile. On January 2, 1938, the three defendants were driving Pearson's automobile in the vicinity of the city of Santa Maria when they were stopped by a state traffic officer and placed under arrest. Each defendant made statements from which his guilt of the offenses charged could readily be inferred.

[1, 2] At the trial appellant presented the testimony of several witnesses in an effort to establish an alibi. According to these witnesses appellant had been in the town of Cucamonga at approximately 11:30 p. m. on December 31, 1937. On the following morning just prior to the Tournament of Roses parade he was seen driving toward Pasadena. In support of his motion for a new trial appellant presented affidavits of several additional witnesses, the contents of which substantially corroborated the testimony of the so-called alibi witnesses who had testified at the trial. The evidence offered by means of the affidavits was merely cumulative and it was within the discretion of the trial court to deny the motion based upon them. Moreover, there was no showing that appellant could not with reasonable diligence have discovered and produced the affiants as witnesses at the trial. The burden was upon appellant to establish that the proffered evidence could not have been discovered with reasonable diligence in time for presentation at the trial. People v. Byrne, 160 Cal. 217, 116 P. 521; People v. Yeager, 194 Cal. 452, 229 P. 40.

[3] Appellant also presented in support of his motion for a new trial the affidavits of four prisoners in the county jail who stated that defendant Neal had told them while in the jail that appellant took no part in the crime charged; also an affidavit by appellant's attorney in which he stated that defendant Kelly had told him that appellant was not involved in the crime. These affidavits were clearly hear-

say. Appellant did not present an affidavit by either Neal or Kelly.

No abuse of discretion on the part of the trial court in denying the motion for a new trial has been shown. The judgment and order are affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

27 Cal.App.2d 685

PEOPLE v. ASAVIS.

Cr. 3128.

District Court of Appeal, Second District, Division 1, California.

July 22, 1938.

1. Indictment and information 🔑87(4)

In prosecution for committing a lewd or lascivious act on or with the body of a female child under the age of 14 years, court properly dismissed misdemeanor charge of contributing to the delinquency of a minor where misdemeanor, if committed, had been committed more than one year prior to the filing of the information, so that charge was barred by limitations. Pen.Code, §§ 288, 801.

2. Criminal law 🔑549

A statement, to bear on its face the brand of improbability, so as to be unbelievable per se, must involve a claim that something has been done, that it would not seem possible could be done under the circumstances described, or involved conduct that no one but a person of seriously calentured mentality would be likely to do.

3. Infants 🔑20

Evidence sustained conviction of a lewd and lascivious act on or with the body of a female child under the age of 14 years. Pen.Code, § 288.

4. Criminal law 🔑1023(10)

An attempted appeal from a sentence in criminal prosecution would be dismissed because not authorized by statute.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Fred L. Asavis was convicted of a lewd and lascivious act on and with the body of a female child under the age of fourteen years, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, the defendant was accused of a violation of section 288 of the Penal Code, alleged to have been committed on or about the 9th day of February, 1937. After trial had before the court sitting without a jury, defendant was found guilty. Upon appeal the judgment was reversed, because of the improper admission of testimony concerning a similar offense allegedly committed three or four years previous, and the cause was remanded for a new trial. People v. Asavis, 22 Cal.App.2d 492, 71 P.2d 307. Upon the going down of the remittitur and while the cause was awaiting retrial in the superior court, the district attorney filed an amended information on March 3, 1938, in count I of which the identical charge of violation of section 288 of the Penal Code as pleaded in the original information was again set forth, and a second and additional count was added alleging that on or about February 9, 1937, the defendant was guilty of the crime of contributing to the delinquency of a minor, a misdemeanor; to which last-named count the defendant originally entered a plea of guilty, which, however, later was withdrawn and a plea of not guilty interposed. On the date set for the retrial, upon motion of the district attorney, the court dismissed the misdemeanor charge contained in count II on the ground that the same did not state a public offense, for the reason that upon its face it sought to charge a misdemeanor that had been committed more than one year prior to the filing of the amended information. Sec. 801, Pen.Code. The cause proceeded to trial upon the issues presented by count I, resulting in a conviction of defendant of the offense of violation of section 288 of the Penal Code. From the judgment and the sentence pronounced thereon and from the order denying his motion for a new trial, the defendant prosecutes this appeal.

[1] The first contention of appellant is that the court erred in granting the motion to dismiss count II of the amended information. This claim is without merit. It is now definitely established as the law of this state that an information which, like the one before us, in so far as count II is concerned, shows on its face that the prosecution is barred by limitation, fails to state a public offense; and the trial court was correct in ordering it dismissed. People v. McGee, 1 Cal. 2d 611, 36 P.2d 378.

[2, 3] It is next claimed that the evidence is insufficient to sustain the judgment of conviction for the reason that the story told by the prosecutrix is inherently improbable. At the time the crime was allegedly committed, the prosecutrix, a child of the age of nine years, was living with her guardian and attending school, where she was enrolled in the fourth grade. According to her testimony, she went to the house of appellant on the day in question to deliver a bottle of milk. Appellant came to the door and asked her to come in by the fire and warm herself, she went into the house and at the request of appellant sat down. He asked her to sit on his lap, and finally pulled her over onto his lap. Without narrating the sordid details of his conduct toward the girl as testified to by her, it is sufficient to say that she narrated, on both direct and cross-examination, a consistent story of indecencies upon the part of appellant which constituted a violation of section 288 of the Penal Code. In his brief appellant does not direct our attention to any particular inconsistencies or improbabilities in the story told by the child, and a reading by us of her entire testimony reveals none. Considerable weight is also given to the verity of the testimony of the prosecutrix by evidence showing that immediately following the alleged misconduct of appellant the child was observed crying; and further evidence showed that upon leaving appellant's residence the child went immediately to her own home, where she at once complained to her guardian upon the latter's return to the house. We are not directed to, nor do we find in this record, anything that would justify this court in stamping the story of the prosecutrix as inherently unbelievable or even improbable. As was said in People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1108, 1114, "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do." We are without authority, therefore, to nullify the action of the jury in accepting the story told by the girl and rejecting appellant's version of what took place on the particular occasion referred to.

Finally, appellant urges that the trial court erred in refusing to give five proffered instructions of a cautionary nature, directing the attention of the jury to the ease with which accusations like the one under consideration here can be made and the difficulty of defending against and disproving them, and also to the effect that the testimony of children of immature years should be viewed with great care and circumspection. We have read the instructions given and are satisfied that they fully and fairly presented to the jury the established rules for weighing and determining the credibility of witnesses as well as the effect and value of evidence. The instructions given correctly advised the jury with reference to each issue presented by the amended information and the defendant's plea thereto, as well as those issues raised by the evidence.

[4] The attempted appeal from the sentence is dismissed, because the statute does not authorize the same.

For the foregoing reasons, the judgment and the order by which the motion for a new trial was denied are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

DUCEY v. DAMBACHER, County Auditor.

Civ. 5884.

District Court of Appeal, Third District, California.

July 21, 1938.

Hearing Denied by Supreme Court Sept. 17, 1938.

1. Taxation ⚿699

The statute providing that if, on a specified day and hour, the taxes, penalties, and costs assessed against particular property have not been fully paid, then by operation of law and the declaration of the tax collector the property shall be sold to the state, and the tax collector shall make an entry opposite each parcel that property has been sold to the state, has the effect of starting the commencement of the five-year period within which redemption can be effected. Pol.Code, § 3771.

2. Taxation ⚿679(3)

Under statute providing that if, on a specified day and hour, the taxes, penalties, and costs assessed against particular property have not been fully paid, then by operation of law and declaration of tax collector the property shall be sold to the state, and the tax collector shall make an entry opposite each parcel that the property has been sold to the state, legal title to property continues in taxpayer during five-year period subject to lien in favor of the state, created by the assessment and levy. Pol. Code, § 3771.

3. Constitutional law ⚿16

The argument presented to voters prior to a general election explaining proposed constitutional amendment, purpose of which was to ratify statute of limitations on taxes, could be considered in determining purpose and intent of the proposition submitted and in construing its meaning. Pol.Code, § 3716; Const. art. 4, § 31b.

4. Taxation ⚿733

When property has been sold to the state as provided in statute dealing with the sale of unredeemed property at auction, such sale is for the payment of taxes, and the deed to the state removes not only the tax for the year of sale on which the deed is based, but all pre-existing taxes. Pol. Code, § 3771a.

5. Taxation ⚿37

The statute providing that it shall be conclusively presumed that every tax has been paid after 30 years from the time the tax became a lien, unless the property subject thereto had been sold in manner provided by law for payment of the tax, is not unconstitutional, in view of the constitutional provision expressly authorizing such a provision as a 30-year limitation. Pol.Code, § 3716; Const. art. 4, § 31b.

6. Taxation ⚿513

Lien for taxes should have been canceled in accordance with statute, where more than 30 years had elapsed since the taxes had become a lien, and there had been no sale at public auction and no deed to the state since the taxes became a lien. Pol. Code, § 3716.

Appeal from Superior Court, Tuolumne County; J. B. T. Warne, Judge.

On rehearing.

Judgment affirmed.

Prior opinion, 75 P.2d 98.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

C. H. Grayson, Dist. Atty. of Sonora, for appellant.

Rowan Hardin, of Sonora, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this appeal an opinion was filed affirming the judgment, and upon our motion a rehearing was granted in order to give the question further consideration. Further study has again satisfied us that the judgment should be affirmed.

Plaintiff herein is and was at the times herein mentioned the owner of a tract of land in Tuolumne county. The assessment rolls of that county show delinquent unpaid taxes against the land for the years 1893, 1896 and 1897, and noted on the assessment rolls against the property was, "Sold to the State". No proceedings had been taken to sell the property at public auction and no deed had ever passed to the state. All other taxes had been paid against the property to 1931, and thereafter the taxes were delinquent for 1931, 1932, 1933, 1934 and 1935. Prior to December, 1936, plaintiff sought to redeem the property by paying the taxes, penalties and costs arising from the delinquencies for 1931 and succeeding years. Defendant, as auditor of the county of Tuolumne, refused to accept this tender unless the taxes for 1893, 1896 and 1897 with costs and penalties were also paid. A writ of mandate was sought from the superior court to compel the auditor to accept the tender and to issue a certificate of redemption clearing the property of all of the delinquencies. The writ was duly issued, from which this appeal is taken.

Section 3771 of the Political Code then provided that if upon a specified day and hour the taxes together with penalties and costs assessed against the particular property had not been fully paid, then by operation of law and the declaration of the tax collector the same should be sold to the state, and the tax collector make an entry opposite each of such parcels, "Sold to the State."

At the time of the tender by respondent herein section 3716 of the Political Code read as follows:

"Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof; provided, that effective one year from the time this act takes effect, the lien of every tax whether now existing or hereafter attaching shall cease to exist for all purposes after thirty years from the time said tax became a lien;

"And provided further that effective one year from the time this act takes effect, every tax whether now existing or hereafter levied shall be conclusively presumed to have been paid after thirty years from the time the same became a lien, unless the property subject thereto has been sold in the manner provided by law for the payment of said tax."

The auditor contends that when in compliance with the provisions of the code he affixed the stamp "Sold to the State", such transaction constituted the sale referred to in section 3716 of the Political Code, supra.

Two questions appear to be here presented; first, what is meant by the expression in the first paragraph of section 3716 of the Political Code "or the property sold for the payment thereof", and the language found in the second paragraph in the same section, "unless the property subject thereto has been sold in the manner provided by law for the payment of said tax", and secondly, is the section unconstitutional because it grants specific immunity or credit unauthorized by law?

[1, 2] Considering the first problem, we find in Crocker v. Scott, 149 Cal. 575, 87 P. 102, that the sale by operation of law (sec. 3771, Pol.Code) has the effect of starting the commencement of the five-year period within which redemption can be effected, at the expiration of which a deed may be issued to the state. "During this period" as there held, "the legal title to the property continues in the taxpayer subject to the lien in favor of the state created by the assessment and levy" (page 111). It evidently therefore is not a sale but is merely a book transaction to facilitate the adjustment of accounts between the tax collector and the auditor. That such procedure is not intended to be treated as the sale referred to in section 3716 of the Political Code, is further apparent from the argument addressed to the voters prior to the general election in 1932, explaining a proposed constitutional amendment now embodied in the Constitution known as section 31b, article 4, the purpose of which amendment was to ratify and validate the statute of limitations affecting taxes, found in section 3716 of the Political Code. This argument reads in part as follows:

"The 1931 legislature passed a bill which would have the effect of placing a statute of limitations on taxes. Conflicting legal opinion made it desirable to pass Assembly Constitutional Amendment Number Two, which if approved by the electorate of the State will make constitutional the 1931 act, or permit the legislature to pass a constitutional act in 1933.

"During the early history of the state, when land was held in large parcels and taxes were small, the levying and collection of taxes was carried on in many counties in a careless and haphazard manner. Old tax rolls show taxes as unpaid which were in fact paid, receipts have been found among old private papers showing this to be the case.

"The law passed by the legislature in effect simply provides that when the State for *thirty years has not exercised its right to sell the property for delinquent taxes,* and when the time allowed by law for the State to sue to collect taxes has long since expired, the lien of the tax shall be removed also.

"In some counties private persons have made contracts with the authorities under which they dig up and examine the old tax rolls, and receive fifty per cent of all the old taxes which they may find, and which the present owners are compelled or induced to pay in order to clear their property. It is obviously unfair to permit the State to wait until all the parties are dead and all private records lost, and then endeavor to enforce a lien for taxes with all the penalties.

"The Constitutional Amendment in no way affects the collection of present taxes. It does not apply to cases in which the State has sold property for non-payment of taxes. It merely gives the legislature power, if it sees fit, to provide by law that if the State or its political subdivisions do not collect taxes or sell property for their non-payment within thirty years after the taxes are levied, the tax shall no longer be a lien upon the property."

[3] That such explanation may be considered in determining the purpose and intent of an act and in construing its meaning is sanctioned in Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72.

Our conclusion is in accord with an opinion given by the attorney-general after the amendment of section 3716 of the Political Code in 1931, wherein that officer stated in part as follows:

"The words 'or the property *sold* for the payment thereof' and the words 'unless the property subject thereto *has been sold in the manner provided by law for the payment* of said tax' refer, in my opinion, not to the automatic 'Sale to the State' provided for in section 3771 (Political Code), but to a sale by the State pursuant to the provisions of section 3771a, providing for a sale at public auction after the five year period of redemption has elapsed."

[4] When property has been sold to the state as provided in section 3771a of the Political Code, such sale is for the payment of the taxes, and the deed to the state removes not only the tax for the year of sale on which the deed is based but all pre-existing taxes. Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408. This latter case points out that under section 3787 of the Political Code the deed conveys to the state the absolute title to the property described therein, free of all encumbrance, except certain specified liens, and also determines that the state holds the property in its propriety capacity.

It would therefore appear that the sale referred to in section 3716 of the Political Code is the sale at public auction under section 3771a of the Political Code.

[5] The second question presented, namely, that section 3716 of the Political Code is unconstitutional, seems to be settled by a consideration of section 31b of article 4 of the Constitution, which expressly authorizes such a provision as a thirty-year limitation as found in section 3716 of the Political Code. This constitutional provision refers to property "sold in the manner provided by law for the payment of said tax" which, as previously pointed out, means a sale at public auction.

[6] It would therefore appear that the lien for the taxes for the years 1893, 1896 and 1897 should be canceled in accordance with the provisions of section 3716 of the Political Code, the thirty years having elapsed and there having been no sale at public auction and no deed to the state since those taxes became a lien.

The judgment is affirmed.

I concur: THOMPSON, J.

ARELLANO et al. v. CITY OF BURBANK et al. *

Civ. 11420.

District Court of Appeal, Second District, Division 1, California.

July 19, 1938.

Rehearing Denied Aug. 9, 1938.

Hearing Granted by Supreme Court Sept. 15, 1938.

1. Appeal and error 🔑930(1), 996

All reasonable inferences are to be indulged in support of conclusion of jury on conflicting evidence and when two or more inferences can be reasonably deduced from certain set of facts or circumstances, reviewing court cannot substitute its deductions for those of jury.

2. Municipal corporations 🔑755(1)

To warrant recovery against city under Public Liability Act, injury to plaintiff must have resulted from dangerous or defective condition of public street, city council or other governing board or some officer or person having authority to remedy condition must have had notice or knowledge thereof, and must have failed or neglected to remedy condition within reasonable time after acquiring knowledge or receiving notice or must have failed to take such action as might be reasonably necessary to protect public against such condition within reasonable time. St.1923, p. 675, § 2.

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*For subsequent opinion see 89 P.2d 113.

3. Municipal corporations 🔑755(1)

Whether requisite conditions under Public Liability Act are present so as to impose liability on city for injuries sustained because of dangerous or defective condition of street should usually be determined from facts of particular case. St.1923, p. 675, § 2.

4. Automobiles 🔑259

A city having been fully cognizant of hazard existing at street intersection because of bottleneck condition had legal duty to take proper steps to eliminate such condition and city's failure to take such action constituted negligence within Public Liability Act for which negligence city was liable for death and injuries to automobile occupants at such intersection. St.1923, p. 675, § 2.

5. Automobiles 🔑308(11)

In action against city for death and injuries sustained by occupants of automobile which at night in turning from unpaved street railroad right of way at street intersection, where bottleneck condition prevailed, struck curb and collided with pole, automobile driver's contributory negligence was for jury. St.1923, p. 675.

6. Negligence 🔑136(9)

It is only where inference of negligence is irresistible that it becomes duty of court to decide upon it as matter of law, and when facts or inference to be drawn from them are in any degree doubtful, only proper rule is to submit whole matter to jury under proper instructions.

7. Death 🔑33

The Public Liability Act authorizes recovery against city for wrongful death. St. 1923, p. 675.

8. Death 🔑97
New trial 🔑157

The amount of damages for wrongful death is committed first to sound discretion of jury and next to discretion of trial judge who in ruling upon motion for new trial may consider evidence anew, determine anew the facts and set aside verdict if it is unjust.

9. Appeal and error 🔑1004(3)

On appeal, decision of trial court and jury as to amount of damages recoverable for wrongful death cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest passion, prejudice, or corruption on part of jury.

10. Death 🔑99(1)

$5,000 for death of a girl was not excessive.

11. Trial 🔑295(1)

Alleged error in instructions was not reversible where taken as a whole instructions fully and fairly presented issues to jury and alleged error was so slight as to be entirely harmless and resulted in no prejudice.

12. Automobiles 🔑308(6)

In action against city for death and injuries sustained by occupants of automobile which at night in turning from unpaved street railroad right of way at street intersection struck curb and collided with pole, city's negligence in failing to eliminate or warn of bottleneck condition was for jury. St.1923, p. 675.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Mike Arellano and others against the City of Burbank and another for death and injuries sustained in an automobile collision. From a judgment for plaintiffs, and from an order denying motion for new trial, named defendant appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Ralph W. Swagler, City Atty., of Burbank, for appellant.

Mills, Hunter & Dunn and Paul J. Quigley, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by the City of Burbank from a judgment in favor of respondents, Mike Arellano and Frances Arellano, father and mother of Valentina Alma Arellano, for her death, and in favor of respondent Tomasa Dorothy Arellano for personal injuries resulting from an automobile accident which occurred at the intersection of Glenoaks boulevard and

Providencia avenue in the City of Burbank at 8:20 o'clock on the evening of October 5, 1935.

At the intersection where the accident occurred, Glenoaks boulevard and Providencia avenue cross at right angles, Providencia running northerly and southerly and Glenoaks easterly and westerly. Abutting the easterly side of the intersection is the westerly end of the Pacific Electric Railway Corporation's forty-foot right of way extending easterly. For some distance west of the intersection, Glenoaks is fifty feet wide; at the east side of the intersection, Glenoaks divides and abuts the Pacific Electric right of way on the north and south thereof, being forty feet wide on the north side and forty feet wide on the south side of the said right of way. Pacific Electric Railway Corporation maintains an electric car track along Glenoaks west of and across said intersection, continuing on the said forty-foot right of way easterly of said intersection. The streets within the intersection, as well as Glenoaks to the west thereof, are paved with a surfacing of the same substance, color and appearance and the top of the rails of the car track are flush with the surface of the pavement. The forty-foot right of way east of the intersection is not paved, and for about six feet immediately east of the intersection, the top of the ground is about level with the top of the rails and then drops off to about the top of the ties, or six inches below the rails. Westerly along Glenoaks from the intersection, the southerly rail of the car track is seventeen feet and three inches north of and parallel with the south curb of Glenoaks, and continues in a straight line across the intersection and upon the right of way.

East of the intersection and dividing the right of way from the southerly portion of Glenoaks there is a concrete curb which abruptly ends at the east side of the intersection, presenting to the west a face eight inches wide at the bottom, eight inches high and reducing to six inches at the top. This curb does not extend across Glenoaks at the easterly side of the intersection, and the end of the said curb is about three feet and nine inches to the north of the projected line of the southerly curb line of Glenoaks west of the intersection. About three feet and nine inches to the north of this dead end curb is a pole sixteen inches in diameter painted dark for about eighteen inches from the ground and for ten or fifteen feet above that point has been painted with aluminum paint which has lost its lustre so that the pole appears drab or dull gray. To the east of this pole other poles and posts are located extending easterly in the direction of the car tracks. To the north of this pole, at the east side of the intersection, the car track extends into an open space free from posts or poles and across which there is no curb, thereby presenting to one approaching from the west an apparent unobstructed continuation of the boulevard and car track to the east of the intersection. In other words, the situation is such that a person driving easterly on Glenoaks with his left wheels "straddling" the car track would collide with the unpaved right of way and drop down upon the railway ties, unless he turned either right or left around the end of the unpaved right of way and thereby reached the north or south lane of Glenoaks boulevard.

At the intersection in question boulevard stop signs were maintained regulating traffic on Providencia avenue, but no such signs were maintained on Glenoaks and there were no speed signs on Glenoaks west of said intersection at the time the accident occurred.

On the evening of October 5, 1935, the employees of a dehydrating plant located in Burbank had planned a surprise party at the home of Joe Suppon, one of their foremen. Urban Goebel, an employee of the plant, called for Howard Wills, another employee, and after driving around in Goebel's car for about three-quarters of an hour, they proceeded to the Suppon home, where they met the two Arellano girls, who were also attending the party. Since it was early, i. e., around 8 o'clock, and the other guests had not arrived, the two boys asked the girls to take a ride with them around the block and return later to the party. Urban Goebel was driving the car, next to him sat Valentina Alma Arellano, and to her right sat Howard Wills with Tomasa Dorothy Arellano sitting on his lap. Some fifteen or twenty minutes later, as they traveled easterly on Glenoaks, the car "straddling" the southerly rail of the Pacific Electric Railway car track, they approached Providencia avenue, passed through the intersection and, as Goebel turned abruptly to the right to avoid the tall pole on the railway right of way, his left front wheel struck the projecting end of the curb at the south side of the said right of way, causing him to lose control of his car. The car continued at an accelerated speed for a distance of two hundred thirty feet easterly on Glenoaks boulevard, where it struck a pole in the parkway resulting in the death of Valentina Alma Arellano and Urban Goebel, and the serious injury of respondent Tomasa Dorothy Arellano.

The instant action was instituted under the so-called Public Liability Act of 1923 (Stats.1923, chap. 328, p. 675), section 2 of which provides that municipalities "shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets". A directed verdict was rendered in favor of the Pacific Electric Railway Corporation, and from the judgment against the City of Burbank for $5,000 for the death of Valentina Alma Arellano, and $10,000 for the injuries sustained by Tomasa Dorothy Arellano, this appeal is prosecuted.

Appellant urges (1) that bottleneck conditions of streets are not embraced within the term "dangerous and defective condition of public streets", as used in said Public Liability Act; (2) that the driver of the car was guilty of negligence as a matter of law and such negligence was the sole proximate cause of the accident; (3) that the Public Liability Act does not authorize recovery for wrongful death, and that the damages awarded therefor were excessive; (4) that it was prejudicial error to charge the jury on general negligence and without regard to the limitation of duty imposed upon the City of Burbank under the Public Liability Act; (5) that the third amended complaint failed to state a cause of action and it was error to deny appellant's motions for nonsuit and for directed verdict; (6) that the verdict is not supported by the law or the evidence.

[1] As is usual in cases of this character, the evidence respecting the circumstances surrounding the accident is conflicting. The jury having determined that the accident occurred through the negligence of appellant, the rule of law is well settled that all reasonable inferences are to be indulged in support of the conclusion reached by the jury; that when two or more inferences can be reasonably deduced from a certain set of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the jury. Gorman v. County of Sacramento, 92 Cal.App. 656, 660, 268 P. 1083.

[2, 3] To warrant a recovery under the Public Liability Act (Stats.1923, p. 675), the following conditions must exist: "(1) The injury to the plaintiff must have resulted from a dangerous or defective condition of a public highway, street, * * *; (2) the city council or other governing board or some officer or person having authority to remedy the condition must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy the dangerous or defective condition within a reasonable time after acquiring knowledge or receiving notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against the dangerous or defective condition within a reasonable time after knowledge or notice." 9 Cal.Jur. Supp. 627, citing Bosqui v. City of San Bernardino, 2 Cal.2d 747, 759, 43 P.2d 547; Nicholson v. City of Los Angeles, 5 Cal. 2d 361, 54 P.2d 725. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286. Whether or not the requisite conditions are present should usually be determined from the facts of the particular case; the factors which contribute to produce a result are so varying that no hard and fast rule may find practical application to the great majority of cases. Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207.

In connection with its first point, appellant urges that "the case at bar is analogous in principle to the physical conditions that prevail as described by the court in the cases of Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207; Robertson v. City of Long Beach, 19 Cal.App.2d 676, 66 P.2d 167." These two cases are analyzed by the Supreme Court in the recent decision in the case of George v. City of Los Angeles, 79 P.2d 723, 726, where it was said (page 726): "In each of these cases the injury was caused by a collision of an automobile with a 'jog' or 'offset' in the street along which the automobile was being operated. It was held in the Waldorf Case, and followed in the other cited case, that there is no law of this state which requires a municipality to maintain barriers or warning devices at 'jogs' or 'offsets' in the streets of a municipality; that in almost every city of size in the state, some streets are laid out and improved without uniformity as to width or direction, resulting in 'jogs' or 'offsets' and that where there is nothing in the construction of such a street to conceal its real condition, no liability attaches to the municipality for injuries arising out of such construction.

"The factual situation in each of these two cases differs materially from that existing in the present action. It is well settled in this state that when dealing with cases falling under the provisions of the Public Liability Act of 1923, each of such cases must depend upon its own state of facts and that no hard and fast rule can be applied in the great majority of cases. Rafferty v. City of Marysville, [207 Cal. 657], at page 660, 280 P. [118] at page 119; Waldorf v. City of Alhambra, [6 Cal.App. 2d 522], at page 526, 45 P.2d [207] at page 208; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643. In each of the Waldorf and Robertson Cases, as we have seen, the claimed dangerous condition was a 'jog' or 'offset' in the street at its intersection with a cross-street, where the abutting property extended beyond the property line on the opposite side of the cross-street. The abutting property was surrounded by a curb some six inches in height, and there was also a sidewalk and parkway within the curb line. These, the court held, constituted barriers or warnings sufficient to avert disaster and readily visible to the driver of an approaching automobile. * * * By reason of the marked difference in the factual situation in the present case from those shown to have existed in the case of Waldorf v. City of Alhambra, supra, and Robertson v. City of Long Beach, supra, we are unable to agree with the respondent city that the decisions in those cases are determinative of the issues involved in the instant case. As the complaint in this case set forth facts showing the existence of a dangerous and defective condition in Allesandro street, together with notice of such condition by the officers of the city and their failure to remedy such condition, it met all requirements of the statute, and was not vulnerable to a general demurrer. The court, therefore, erred in sustaining said demurrer."

The intersection of Glenoaks boulevard and Providencia avenue reveals a much more complicated situation than a mere "jog" or "offset" in the street. Admittedly, there is a jog in Glenoaks boulevard, but added to that is the unpaved railway right of way commencing at the easterly side of the intersection, as well as the fact that the northerly curb of the paved portion of Glenoaks lying southerly of and adjoining the unpaved right of way came to an abrupt stop presenting at a point within the intersection a face eight by eight inches which any driver, even though using ordinary care, might easily overlook because of its inconspicuous aspect to one approaching the intersection from the west. There is evidence in the record that the driver turned abruptly to the right to avoid hitting the tall pole on the railway right of way and in so doing he struck the unprotected and inconspicuous end of the curb and thereby lost control of his car. There is no "jog" or "offset" in the car track at this point; continuing from the west, it traverses the intersection and then passes in a straight line over the unpaved right of way to the east of the intersection. There is also evidence in the record that at the time of the accident there was no visible warning to the driver of a machine traveling easterly into the intersection, "straddling" the car track, that he could not continue to drive his automobile along the car track and upon the right of way, but that he must turn either to right or left to avoid disaster. Because of the lack of visibility at the time of day when the accident occurred, the small projecting end of the curb would appear to one approaching from the west to be a part of the unpaved right of way.

[4] Minutes of the city council of Burbank introduced in evidence disclose that on February 20, 1934, Howard I. Stites, city manager and city engineer in charge of repair and maintenance of streets and highways, knew and recognized the hazard to traffic which existed at this intersection and had then reported "that deeds for right of way are being secured to widen the roadway there and lessen the traffic hazard at that corner." Called as a witness, Mr. Stites was asked if "on February 20, 1934, when you appeared before the council as the city manager and as the city engineer and discussed the obtaining of an easement over the right of way of the Pacific Electric Railway Corporation, it was for the purpose of widening or setting back those curb lines, was it not?" He replied: "It was." In September, 1934, appellant acquired an easement over two triangular strips of land embraced within the railway right of way and lying along the northerly and southerly sides of said right of way at its junction with the easterly line of the intersection. Mr. Stites testified that this

deed was secured from the railway company for the purpose of widening the street, doing away with the bottleneck condition and setting back the curbs. The minutes of October 23, 1934, reveal that the traffic hazard which then existed at this intersection would be removed upon completion of the contemplated improvement. However, the matter was allowed to rest and nothing was ever done to warn the motoring public that a dangerous condition existed at this corner. It was a year after the deed had been secured that the accident which is the basis of this action occurred. Having been fully cognizant of the hazard there existing, it was the legal duty of the appellant to take proper steps to eliminate such hazardous condition. Its failure "to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition" (Stats.1923, p. 675), constituted negligence as contemplated by said Public Liability Act.

[5, 6] The contributory negligence of the driver of the car involved herein was pleaded as a defense by appellant. The jury having found to the contrary, it is beyond the power of this court to interfere, taking into consideration all of the facts and circumstances disclosed by the record. "It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law; and, when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions." Van Praag v. Gale, 107 Cal. 438, 40 P. 555, 557.

[7] With respect to appellant's third point: In both Bennett v. Kings County, 124 Cal.App. 147, 12 P.2d 47, and Edwards v. San Diego, 126 Cal.App. 1, 14 P.2d 119, which were actions brought under the provisions of the Public Liability Act, damages for wrongful death were allowed. In the Bennett Case, referring to said act, the court at page 150, 12 P.2d at page 48, said: "The first point raised is that the demurrer to the complaint should have been sustained. It is contended that the statute upon which this action is based (Stats.1923, p. 675, § 2) is in derogation of the common law and must be strictly construed, and that since it does not specifically give a right of action to the heirs of a deceased person, such an action cannot be maintained. It is argued that those cases where such an action has been permitted or which have been treated as if such a right existed are not in point, since this particular question was not therein raised. See Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083; Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540. A part of the act in question reads: 'Counties * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways. * * *'

"Aside from the consideration of any other statutes, we are unable to see why the 'injuries to persons,' referred to in this statute, do not include such injuries as may be caused to persons by reason of the death of others as well as injuries to persons directly involved not resulting in death. We think the injury suffered by these plaintiffs is covered by the statute, and that the demurrer was properly overruled."

[8–10] As to appellant's complaint that the damages awarded for the wrongful death are excessive, the amount of damages in this kind of an action is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts and set aside the verdict if it is not just. "Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice or corruption on the part of the jury." Gorman v. County of Sacramento, 92 Cal.App. 656, 667, 268 P. 1083, 1088, and cases there cited. There is nothing in the record presented here which even suggests passion, prejudice or corruption on the part of the jury.

[11] Appellant in its supplemental opening brief claims error by the trial court in giving three certain instructions to the jury on the question of general negligence. In its closing brief, appellant admits that some of these individual instructions were proposed by it, and then calls attention to a fourth instruction which it also proposed but which it now claims was erroneously modified by the trial court. Taken as a whole, the instructions which were given fully and fairly presented the issues to the jury, and if any such error existed, it was so slight as to be entirely harmless and

resulted in no prejudice to appellant's cause.

[12] From what has heretofore been said, it is apparent that there is no merit in appellant's fifth point. The third amended complaint was sufficient as against a general demurrer, and there was no error on the part of the trial court in denying appellant's motions for nonsuit and for directed verdict.

The verdict is amply supported by both the law and the evidence.

The judgment is affirmed; the appeal from the order denying motion for a new trial is dismissed.

We concur: DORAN, J.; WHITE, J.

27 Cal.App.2d 706

In re CALHOUN'S ESTATE.

BEEKLY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 2219.

District Court of Appeal, Fourth District, California.

July 22, 1938.

Hearing Denied by Supreme Court Sept. 17, 1938.

1. Pleading 🔑214(3)

In proceeding for revocation of letters of administration, allegation of petition that decedent's mother on whose nomination administrator was appointed was incompetent at time of execution of nomination was required to be accepted as a fact on demurrer.

2. Executors and administrators 🔑35(1)

The provision of the statute that an administrator or executor "may" be removed in case of waste, embezzlement, mismanagement, or fraud is directory merely, the word "may" not being read "must" unless circumstances are such as to make it gross abuse of discretion not to order removal. Probate Code, § 450.

[Ed. Note.—For other definitions of "May" and "Must," see Words & Phrases.]

3. Executors and administrators 🔑32(1)

Under statute, the probate court in a proper case and at a proper time may be invested with a certain discretion in revoking or refusing to revoke letters of administration. Probate Code, §§ 426, 450.

4. Executors and administrators 🔑32(2)

The exercise of discretion by probate court to revoke or refuse to revoke letters of administration should not be exercised in ruling on demurrer to petition for revocation of letters, since such demurrer only raises questions of law and calls for ruling on legal sufficiency of petition for revocation which should be made on well-established rules of pleading.

5. Executors and administrators 🔑32(2)

Discretión of probate court to revoke or refuse to revoke letters of administration should only be exercised in decisions on facts after demurrer to petition for revocation has been disposed of. Probate Code, §§ 426, 450.

6. Judgment 🔑688

A judgment or order of the probate court respecting the administration of the estate is conclusive on the administration as to all matters directly involved in such judgment or order.

7. Executors and administrators 🔑17(7)

An incompetent person without understanding could not make a legal nomination of an administrator.

8. Executors and administrators 🔑29(5)

After appointment of administrator on nomination of decedent's mother, probate court was not required to again adjudicate question of competency of mother to make nomination in subsequent proceeding on petition of guardian of mother for revocation of letters of administration on ground that mother was incompetent at time of execution of nomination, since question was directly involved in proceeding on mother's nomination of administrator. Probate Code, § 450.

9. Executors and administrators 🔑17(7)

As respects sufficiency of nomination of administrator by mother of decedent, fact that mother was adjudicated incompetent subsequent to appointment of administrator was not evidence that mother was incompetent on date of execution of nomination or at any other time prior to date of adjudication. Probate Code, § 450.

10. Executors and administrators 🔑32(2)

A guardian stands in no better position to petition for revocation of letters of administration than her ward would have been had there been no guardianship. Probate Code, § 450.

11. Executors and administrators 🔑17(7)

After an heir has nominated an administrator and the administrator and probate court have acted on the nomination, the heir cannot change his mind and seek letters himself or nominate another.

12. Executors and administrators 🔑32(2)

Where administrator was appointed as nominee of a person of a preferred class named in statute, administrator could not be removed from its office on petition of guardian of person in the same or lower class. Probate Code, § 450.

13. Executors and administrators 🔑29(2)

An order appointing an administrator was not void on its face and hence was not subject to attack at any time because of typographical error in order which was corrected by trial judge on his own motion.

14. Executors and administrators 🔑20(9)

Judge of probate court has right to correct typographical errors in order of appointment of administrator and make his records speak the truth.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of the estate of Iva Delight Calhoun, deceased, wherein Easter M. Beekly, as guardian of the estate and person of Sophronia Arminella Cameron, an incompetent person, filed a petition for the removal of the Bank of America National Trust & Savings Association as administrator of the estate of Iva Delight Calhoun, deceased. From an order refusing to revoke letters of administration, the petitioner appeals.

Affirmed.

Don W. Kinney, of Taft, and G. A. Bisbee, of Los Angeles, for appellant.

Borton, Petrini & Conron, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from an order refusing to revoke letters of administration of the estate of Iva Delight Calhoun, deceased, issued to the Bank of America National Trust and Savings Association, and to appoint Easter N. Beekly, the guardian of the person and estate of Sophronia Arminella Cameron, administratrix in its place and stead. We will hereafter refer to the administrator as the "Bank of America".

Iva Delight Calhoun died intestate in Kern county on January 26, 1937, leaving surviving her as heirs at law James A. Calhoun, her husband, and Sophronia Arminella Cameron, her mother. On January 30, 1937, these two heirs signed a written nomination of the Bank of America as administrator and requested the superior court of Kern county to appoint it as such. On February 5, 1937, the Bank of America filed its petition for letters of administration. On February 18, 1937, the bank was appointed such administrator. It qualified on February 20, 1937, and entered upon the discharge of its duties. In the meantime James A. Calhoun died on February 6, 1937. On June 21, 1937, Easter N. Beekly was appointed guardian of the person and estate of Sophronia Arminella Cameron, an incompetent person.

On July 2, 1937, Easter N. Beekly, as such guardian, filed her petition asking revocation of the letters of administration which had been issued to the Bank of America and asking for her appointment as administratrix of the estate. In addition to the foregoing facts the petition alleged "that the said Saphronia Arminella Cameron was on the said 18th day of February, 1937, incompetent and unable, unassisted, to take care of herself and her property, and at the time of the execution of the said nomination, of which 'Exhibit A' is a copy, did not and was unable to comprehend the nature and purport of the said nomination".

The Bank of America demurred to this petition and at the same time filed its answer. The demurrer was sustained and the petition was dismissed. This appeal from the order followed.

[1] It is the theory of appellant that the nomination by James A. Calhoun became ineffective at the time of his death, which occurred prior to the time of the appointment of the Bank of America; that the nomination of Sophronia Arminella Cameron was ineffective for any purpose because she was incompetent at the time of its execution which, on demurrer, must be accepted as a fact; that under the provisions of section 422 of the Probate Code, appellant, as guardian of a parent who falls within class four of that section of

the code, became entitled to letters of administration as a matter of law over the Bank of America which, without a valid nomination, fell into class ten of that section.

For the purpose of this opinion we will assume, without holding, that the nomination by James A. Calhoun became ineffective with his death on February 6, 1937, and that Sophronia Arminella Cameron was at all times entitled to take part of the property of the estate on distribution.

Section 450 of the Probate Code provides as follows: "When letters of administration have been granted to any person other than the surviving spouse, child, parent, brother or sister of the intestate or the public administrator, any one of them who is competent and had a prior right to letters, or any competent person at the written request of any one of them who is competent and had such prior right, may obtain the revocation of the letters, and be entitled to the administration, by filing a petition praying the revocation, and that letters of administration issue to him."

[2] In Estate of Atkins, 121 Cal.App. 251, 8 P.2d 1052, the court said (page 1054): "Section 450 of the Probate Code, which is a re-enactment of section 1383, of the Code of Civil Procedure, provides that, where an administrator has been appointed and letters granted to other than a preferential person, upon the application of a preferential person the letters so granted will be revoked and the preferential appointed. Section 521 of the Probate Code, which is but a re-enactment of former Code provisions, specified that an administrator or executor may be removed where the estate has been wasted, embezzled, or mismanaged, or where he has committed a fraud, or is about to commit a fraud upon the estate. This section, as has been held, is directory and not mandatory. The word 'may' is not read 'must' unless the circumstances are such as make it a gross abuse of discretion not to order removal. Likewise section 524 of the Probate Code specifies that if, upon the settlement of an account, it appears that an executor or administrator has embezzled, wasted, or mismanaged the estate, his letters must be revoked. The word 'must' used in this sentence may at times be considered directory and not mandatory. In re Chadbourne's Estate, 15 Cal.App. 363, 114 P. 1012, where the use of the words 'may' and 'must' is discussed in an opinion written by former Justice Burnett of this court."

[3-5] If we should apply the rule announced in the Atkins Case to the facts before us we would be constrained to hold that under sections 450 and 426 of the Probate Code the probate court in a proper case and at a proper time might be invested with a certain discretion in revoking or refusing to revoke letters of administration. However, we do not believe that the exercise of any such discretion should be called into play in ruling on a demurrer to a petition. Such demurrer only raised questions of law and called for a ruling upon the legal sufficiency of the petition of appellant. The decision of such a question of law should be made upon the well-established rules of pleading. The application of those principles should be made by the trial judge and give no occasion for the exercise of any discretion. Such discretion should only be exercised in decisions on facts after a demurrer had been disposed of.

Section 401 of the Probate Code provides as follows: "No person is competent to serve as an executor or executrix who is * * * adjudged by the court incompetent to execute the duties of the trust by reason of * * * want of understanding * * *." Section 420 of the same code makes these disqualifications applicable to an administrator and an administratrix.

The principal question before us is the effect of the allegations in the petition of appellant to the effect that Sophronia Arminella Cameron was an incompetent person and one without understanding on January 30, 1937, at the time she signed the nomination of the Bank of America as administrator. Sections 401 and 420 of the Probate Code provide that a person *adjudged* incompetent may not be appointed an administrator. Mrs. Cameron was not *adjudged* incompetent until over four months after the Bank of America had been appointed on her nomination. We are confronted with the question: Did the appointment of her nominee involve a decision of the question of her competency to nominate?

[6] In Howell v. Budd, 91 Cal. 342, 27 P. 747, the Supreme Court said (page 748): "Passing to the law of this state, we find practically this identical question carefully

considered by this court in the case of Garwood v. Garwood, 29 Cal. 514, where the doctrine heretofore announced is fully approved and declared to be the law of the land. Respondent insists that the effect of the law found in Garwood v. Garwood, [29 Cal. 514] has been nullified by the following provision of section 1908 of the Code of Civil Procedure: 'In case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, * * * the judgment or order is conclusive upon the title to the thing, the will, or administration.' The fair and legitimate interpretation of this provision is, that a judgment or order respecting the administration of the estate is conclusive upon the administration as to all matters directly involved in such judgment or order." See, also, Estate of Aldrich, 147 Cal. 343, 81 P. 1011.

The petition for letters of administration filed by the Bank of America recited that it was the nominee of James A. Calhoun and Sophronia Cameron and as such was entitled to letters of administration. The nomination was filed with the petition.

[7-9] Assuming that the nomination by James A. Calhoun was rendered void by his death, the Bank of America was then seeking appointment as the nominee of Sophronia Arminella Cameron. Thus the validity of this nomination was before the court when the petition of the Bank of America was heard and granted. Appellant urges, and we think correctly, that a person without understanding could not make a legal nomination. Therefore, the competency of Sophronia Arminella Cameron to make the nomination was directly before the court and one upon which it could have taken evidence. This question being directly involved in this proceeding (for all we know evidence may have been taken upon it) we must conclude that it was then decided by holding that the nomination was valid and that the nominor was competent to act. That being true, the trial court was not compelled to again adjudicate that question. Sophronia Arminella Cameron was not adjudged incompetent until June 21, 1937. That is no evidence that she was incompetent on January 30, 1937, or at any other time prior to June 21, 1937.

[10, 11] A guardian stands in no better position to petition for revocation of letters of administration than her ward would have been had there been no guardianship. Estate of Graff, 169 Cal. 250, 146 P. 657. An heir having once nominated an administrator and the administrator and the probate court having acted on such nomination, the heir cannot change his mind and seek letters himself or nominate another. Estate of Bedell, 97 Cal. 339, 32 P. 323; Estate of Myers, 9 Cal.App. 694, 100 P. 712.

[12] Further, the Bank of America being a nominee of one of a preferred class named in section 450 of the Probate Code, it cannot be removed from its office on petition of a guardian of one in the same or lower class. In Estate of Carter, 9 Cal. App.2d 714, 50 P.2d 1057, it was said (page 1058):

"The rule is settled beyond controversy that no person in any of the preferred classes mentioned in section 1383 [Code Civil Procedure] could assert his prior rights under that section if original letters had been issued to any person within any one of the classes specifically mentioned in that section. Estate of Shiels, 120 Cal. 347, 349, 52 P. 808; Estate of Aldrich, 147 Cal. 343, 345, 81 P. 1011. Since its adoption that section has been held to apply only in cases where original letters have been issued to one 'other than' those specifically mentioned in that section."

[13, 14] Appellant urges that the order appointing the Bank of America was void on its face and therefore could be attacked at any time. The order had in it what was clearly a typographical error. This was corrected by the trial judge on his own motion. His right to do this and make his records speak the truth is too well settled to need citation of supporting authorities.

The order appealed from is affirmed. Respondent will recover costs of appeal.

I concur: BARNARD, P. J.

BIRKHOFER et al. v. KRUMM.

Civ. 2133.

District Court of Appeal, Fourth District, California.

July 11, 1938.

Rehearing Denied Aug. 8, 1938.

Hearing Denied by Supreme Court Sept. 8, 1938.

1. Mortgages 🔑335

Where payee of note secured by trust deed assigned note and trust deed as security for loan, and assignee re-assigned note and trust deed as security for another loan, a recorded notice of default and election to sell the property affected by the trust deed, though signed only by subsequent pledgees, was sufficient. Code Civ.Proc. § 692; Civ. Code, § 3006.

2. Mortgages 🔑335

Where payee of note secured by trust deed assigned note and trust deed as security for loan, and assignee re-assigned to third parties as security for another loan, third parties had legal title to the paper, and were entitled as pledgees to collect note when due and to exercise option of acceleration. Code Civ.Proc. § 692; Civ.Code, § 3006.

3. Mortgages 🔑330

The amendatory statute requiring notice of default of trust deed to "set forth the nature of such breach" is purely procedural in that particular, and hence is applicable to a trust deed executed before enactment thereof. Civ.Code, § 2924, as amended by St. 1933, p. 1669, § 1.

4. Constitutional law 🔑105
Statutes 🔑49

Procedural changes in a statute will be upheld where it is possible to comply with them, but not where they operate to prejudice previously vested rights.

5. Mortgages 🔑335

Where holder of trust deed was in fact entitled under the provisions thereof to accelerate due date of entire obligation, inaccuracy of statutory notice of default which recited default as to a portion of principal for which extension agreement had been made, and omitted reference to portion of principal as to which default actually existed, did not invalidate the notice or sale thereunder. Code Civ.Proc. § 692; Civ.Code, § 2924, as amended by St.1933, p. 1669, § 1.

6. Mortgages 🔑335

The statutory requirement that notice of default of trust deed "set forth the nature of such breach" is met if notice contains a correct statement of some breach or breaches sufficiently substantial to authorize declaration of default and foreclosure, and erroneous statements about other, merely cumulative, breaches are immaterial. Civ. Code, § 2924, as amended by St.1933, p. 1669, § 1.

7. Mortgages 🔑335

Acceptance of partial payment of amount due under trust deed does not waive notice of default previously given nor breaches described therein.

8. Mortgages 🔑335

A declaration, in notice of default of trust deed, of election to sell "to satisfy the obligations and all of the obligations secured by said deed of trust," was a declaration of election to invoke acceleration clause, and authorized sale for more than the amount in default. Civ.Code, § 2924, as amended by St. 1933, p. 1669, § 1.

9. Mortgages 🔑330, 559(2)

In determining the applicability to given situations of statute governing appraisement of property in action for deficiency judgment, court must consider the fact that such statute deals with two essentially different subjects, namely, the amount for which deficiency judgments may be rendered and the time for commencement of such actions. Code Civ.Proc. § 580a, as added by St. 1933, p. 1672, § 4.

10. Mortgages 🔑330

The statutory provisions limiting recovery of deficiency judgments after sales under trust deeds to the difference between entire indebtedness and fair market value are inapplicable to contracts made before its effective date, whether land was sold before or after such effective date. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4.

11. Mortgages 🔑330

The statutory provisions limiting time within which to bring action for deficiency judgment after sale under trust deed are inapplicable where land was sold before its effective date, but applicable when land was sold thereafter. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4; U.S.C.A. Const. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16.

12. Mortgages 🔑330, 559(2)

The statute prohibiting recovery of deficiency judgment under a trust deed or mortgage given to secure purchase price of land is inapplicable to contracts made before its effective date. Code Civ.Proc. § 580b, as added by St.1933, p. 1673, § 5; U.S.C.A.Const. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16.

13. Courts 🔑97(6)

Provisions in State Constitutions that merely parallel and iterate provisions of the Federal Constitution must be construed in harmony with the construction placed by federal courts on such federal provisions, since the question is essentially one of federal cognizance. U.S.C.A.Const. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16.

14. Courts 🔑97(6)

Where decision of federal court, construing the Federal Constitution, apparently necessitates changes in what has been treated as settled law concerning the constitutionality of a given application of a state statute, the State Supreme Court and not any subordinate state court should announce such changes, unless no reasonable distinction between the particular case presented and the federal court's decision can be made.

15. Mortgages 🔑330

The right to foreclose a trust deed in equity is not equivalent to the right to exercise power of sale and obtain deficiency judgment, as regards validity of statute relegating owner to foreclosure in equity, especially in view of the right of redemption remaining thereafter. Code Civ.Proc. §§ 580a–580c, as added by St.1933, pp. 1672, 1673, §§ 4–6; § 725a, as added by St.1933, p. 1673; § 726, as amended by St.1937, p. 770.

16. Mortgages 🔑375

In action for deficiency judgment under trust deed, owners of trust deed were not required to tender any issue concerning value of the security, in view of invalidity of statute requiring appraisal of the security. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4.

17. Evidence 🔑563(4)

Courts and juries are not bound to accept a witness' opinion on question of value, but may weigh such opinion in connection with other circumstances.

18. Mortgages 🔑369(3)

Inadequacy of price, however gross, is not ground for setting aside a sale under trust deed that is valid in other respects.

19. Judgment 🔑658

In action for deficiency judgment under trust deed, allegations of complaint, denials in answer, and findings in previous action brought by the same plaintiffs and also by original holder of trust deed, against the same defendant, to recover on an independent guaranty contract allegedly comprised in extension agreement, were admissible as prima facie evidence of defaults and of giving of notice of sale, where such findings were responsive to the issues and material in both cases.

20. Judgment 🔑585(3)

In action for deficiency judgment after sale under trust deed, judgment, in previous action by the same plaintiffs and original holder of trust deed against the same defendant, that such defendant was not liable under alleged independent contract of guaranty in extension agreement, was not res judicata.

21. Judgment 🔑584

The force of an estoppel by judgment resides in the judgment itself, not in the finding of the court or verdict of the jury.

22. Appeal and error 🔑1050(1)

In action for deficiency judgment under trust deed, wherein defendant admitted having defaulted in payments, alleged error in admitting portions of record in previous case to show defaults was not reversible.

23. Bills and notes 🔑489(6)

One who sues upon a note must allege, but need not prove, nonpayment.

24. Evidence 🔑383(7)

Recitals, in trustee's deed given in sale under trust deed, that trust deed provided that recitals in trustee's deed should be conclusive of the facts recited, and that notice of sale was given in a specified manner, were sufficient as a matter of law to sustain finding that notice of sale was properly given, in action for deficiency judgment.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Oscar Birkhofer and others against Theodore Krumm, to recover deficiency remaining after sale under trust deed. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; EDMONDS, J., dissenting.

Theo. G. Krumm, Martin J. Coughlin, and R. Bruce Findlay, all of San Bernardino, for appellant.

U. F. Lewis, of Redlands, and Ernest Clewe, of Oroville, for respondents.

A. V. Falcone, of Los Angeles, amicus curiæ for appellant.

HAINES, Justice pro tem.

This is not the first time that the transactions here involved have been, in some of their aspects, before this court. See Birkhofer v. Krumm, 4 Cal.App.2d 43, 40 P.2d 553; Birkhofer v. Krumm, 72 P.2d 899; Birkhofer v. Krumm, 75 P.2d 82.

The earlier phases of the dealings to be considered are recited in the first of the above mentioned opinions but since in the present appeal they are complicated by other matters it seems advisable for the sake of clarity to state the case de novo.

The amended complaint in the present action alleges the execution by one W. E. Grigsby and one Florence Gill Grigsby to one Y. J. Attwood of a promissory note, together with a deed of trust made to secure it, a copy of which deed of trust, affecting certain land in San Bernardino county and certain water company stock, as well as a copy of a note included in the deed of trust, are annexed to the complaint as an exhibit. The note bears date March 27, 1928, and is in the principal sum of $48,000, payable in eight annual instalments of $5,000 each on or before the 27th day of March each year beginning with March 27, 1929, and one instalment of $8,000 on or before March 27, 1937, with interest on unpaid principal at 7 per cent per annum, payable semiannually. The note contained the ordinary acceleration clause. It is further alleged that on April 14, 1928, the Grigsbys conveyed the property affected by the deed of trust to defendant, Theodore Krumm, now appellant, by a conveyance, a copy of which is also annexed to the pleading, subject to the indebtedness secured by the deed of trust, which Krumm assumed and agreed to pay. It is further alleged that on or about July 8, 1929, Attwood assigned his rights under the note and deed of trust to the plaintiff (now respondent) Murphy to secure payment of a note from Attwood to Murphy on which there remained an unpaid balance of more than $40,000, and that on or about June 9, 1933, Murphy in turn executed his note for $40,000 to plaintiffs and respondents Birkhofer and to secure its payment assigned to them his rights in the Grigsby note and deed of trust. It is further alleged that prior to January 31, 1934, breaches in the Grigsby-Krumm obligation occurred in the following particulars: That the interest which became due on March 27, 1933, amounting to $1,067.50, was not paid; that a like sum of $1,067.50 of interest which fell due in September, 1933, was not paid; that $2,500 which constituted one-half of the $5,000 instalment of principal which fell due on March 27, 1932, was not paid; also that on January 31, 1934, there remained unpaid the $5,000 instalment of principal which fell due on March 27, 1933. It is further stated that the Birkhofers on January 31, 1934, recorded in the recorder's office of San Barnardino county a notice of default and election to sell the property affected by the deed of trust. The complaint states that on February 4, 1934, Krumm paid on account of the instalment of interest which fell due on March 27, 1933, the sum of $1,000, and on February 22, 1934, on said interest a further $67.50 (which would be the balance of the same). The complaint goes on to allege that the Security Title Insurance and Guaranty Company, the trustee under the deed of trust on September 5, 1935, gave notice as required by section 692 of the Code of Civil Procedure, and the provisions of the deed of trust, that it would, on October 7, 1935, by reason of the defaults in the payment of the obligations secured by the deed of trust, including those mentioned in said notice of default and election to sell, proceed to sell at public auction the real and personal property which the deed of trust described, for the payment of the obligations thereby secured; that the said property was on October 7, 1935, sold accordingly for $7,500, and that after that sum had been applied to the payment of the expenses of sale, the trustee's fees and accrued interest on the note there remained of it the sum of $2,435.13 which was applied on the principal. It is alleged that in consequence of the situation so set out Krumm remains indebted to plaintiffs (now respondents) to the extent of $28,064.87, with interest from October 7, 1935.

In the second cause of action in their amended complaint the plaintiffs (respondents here) reiterate most of the allegations of their first cause of action and add certain others. Thus it is alleged that prior to January 23, 1933, plaintiff (now respondent) Murphy assigned his right, title and interest in the Grigsby-Krumm note and deed of trust to the Sebastopol National Bank to secure a note theretofore executed by him to it. It is also stated that on January 23, 1933, Krumm asked of Attwood, Murphy and the bank an extension of time to March 27, 1934, for the payment of the final $2,500 of the instalment of principal which had fallen due on March 27, 1932, and for the payment of $3,000 out of the $5,000 instalment of principal which was to become due on March 27, 1933, which extension had been granted by a writing, copy of which was made an exhibit to the complaint; also that in June, 1933, Murphy paid his said note to the bank and received from it a reassignment of the Grigsby-Krumm note and deed of trust, and proceeded, on June 9, 1933, to execute the $40,000 note, already referred to, to the Birkhofers, and to make to them, as security therefor, the assignment to them already mentioned of the said Grigsby-Krumm note and of his interest in the said deed of trust securing it.

Judgment against Krumm is asked for a deficiency of $28,064.87, with interest from October 7, 1935, and costs of collection as provided for in the deed of trust.

The answer undertakes to deny nearly everything which the amended complaint alleges and particularly the defaults therein set out, as well as the giving by the Security Title Insurance and Guaranty Company of the notice of sale "in the manner required in section 692 of the Code of Civil Procedure of the state of California and by the terms and conditions of the said deed of trust". It is, however, specifically stated that each of the $5,000 instalments of principal due on March 27, of the respective years 1929, 1930 and 1931 was paid; that a further $2,500 of principal has been paid, as well as all interest that had fallen due up to and including that accrued on September 27, 1932. The payments of $1,000 on February 4, 1934, and $67.50 on February 22, 1934, are also specifically admitted. Other matters are set up by way of separate defenses, some only of which require mention. In one of these separate defenses as to each cause of action it is stated that the Grigsby note and deed of trust was given for a balance of the purchase price of the real property described in the latter and it is claimed that by reason of section 580b, Code of Civil Procedure, as added by St.1933, p. 1673, § 5, no deficiency judgment may, after sale under the deed of trust, be rendered.

In another defense it is alleged that subject to the pledge to Murphy and Murphy's pledge to the Birkhofers, Attwood was the owner of the note and deed of trust, and it is claimed that a conspiracy existed between the plaintiffs (respondents) and Attwood that the latter should bid in the property described in the deed of trust at an inadequate price in order to enable the respondents to obtain a larger deficiency judgment against appellant, and that Attwood accordingly bid in the property at the sale for only $7,500 although it was really worth $30,000 and although he immediately thereafter offered to resell it in behalf of the plaintiffs (respondents) and himself for $20,000.

By way of amendment to the answer defendant (appellant) Krumm alleged that on or about January 15, 1934, the plaintiffs (respondents) agreed with defendant (appellant) to compromise and settle the indebtedness evidenced by the note and deed of trust for $20,000 and that defendant (appellant) performed all the terms and conditions of the agreement and that in an action numbered 37010 in the superior court of San Bernardino county it had been adjudicated that he did perform all of its terms; also that as part of such agreement it was understood that defendant (appellant) would make application to the Federal Land Bank of Berkeley for money with which to carry out the settlement and that the notice of default was recorded for the sole purpose of permitting the defendant (appellant) to make the application. It is claimed that by virtue of this settlement agreement the plaintiffs (respondents) waived any default on the part of the defendant (appellant) occurring prior to January 31, 1934. It is also claimed that respondents after January 31, 1934, waived the default referred to in their filed notice. In a further separate defense contained in the amendment to his answer defendant (appellant) asserts that on January 15, 1934, the plaintiffs (respondents) represented to him that he need not pay the interest due on the note, but that it might be paid later and that they would record the notice of default "for the sole purpose of permitting the defendant to file an application with the Federal Farm Loan Bank as aforesaid"; that accordingly and in reliance on such representation defendant (appellant) refrained from paying such interest and permitted the notice of default to be filed. It is added that on and prior to January 31, 1934, the plaintiffs waived any right they then might have to accelerate the due date of the unpaid principal of the note now sued upon.

The court, after the trial of the case, found all of the allegations of the complaint to be true (except as to the amount of the balance owing on the above mentioned note of Attwood to Murphy, the amount of which is not determined). With respect to the answer the court found that in the action 37010 therein referred to the Birkhofers and Murphy (respondents herein), together with Attwood, were plaintiffs and Krumm (appellant herein) was defendant; that final judgment was rendered therein on the merits to the effect that said action 37010 could not be maintained upon the extension agreement mentioned in plaintiffs' (respondents') second cause of action in the instant case, but that the cause of action in said cause 37010 was not the same involved in the instant case. It was found to be true that the Grigsby note and deed of trust set up in the complaint in the instant case were given for part of the purchase price of the land described in the deed of trust and that the present action was brought to secure a deficiency judgment after the sale of the said property described therein; that of the property therein described the land was purchased at the trustee's sale for $6,500 and the water company stock for $1,000. By reference to the allegations to that effect in the original answer it was found that it is true that Attwood was at the time of the sale the owner of the note and deed of trust involved, subject to his assignment of the same to Murphy and Murphy's assignment thereof to the Birkhofers as security for the respective debts for which said assignments were made, and was the purchaser of the property at the sale, but that the allegations of a conspiracy or fraud on the part of Attwood, Murphy and the Birkhofers and of the inadequacy of the price bid for the property sold are untrue. It was further found that all of the allegations of the amendment to the answer are untrue. Judgment was given for the plaintiffs (respondents here) in accordance with their prayer, from which, after the making and denial of a motion for a new trial, the present appeal is taken.

We proceed to notice seriatim the several contentions made in appellant's behalf.

Section 2924 of the Civil Code requires in case of mortgages containing powers of sale or transfers in trust to secure the payment of obligations (with certain exceptions not material here) that the power shall not be exercised until:

"(a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

[1] The first objection made to the recorded notice is that it is signed only by the Birkhofers, whereas the "beneficiary" named in the deed of trust is Attwood. This objection seems to us without substance.

[2] Even if the Birkhofers were no more than pledgees of the Grigsby-Krumm note and of the Attwood interest in the deed of trust made to secure it, they would as such pledgees be entitled to collect it when due. Civ.Code, § 3006. This right, while they actually held the paper, would include the right to exercise the option contained in the acceleration clause to declare the note due for any default in payment of interest or principal thereon. Patten v. Pepper Hotel Co., 153 Cal. 460, 96 P. 296; Beatty v. Pacific States Sav. & Loan Co., 4 Cal.App.2d 692, 699, 41 P.2d 378. Whether or not the Birkhofers can in fact be said to have been more than pledgees, so far as their relations to Krumm were concerned they held the legal title to the paper and the circumstance that the assignment under which they held was as security only is no concern of his. Wetmore v. San Francisco, 44 Cal. 294, 300; Bell v. Staacke, 141 Cal. 186, 202, 74

P. 774; Graham v. Light, 4 Cal.App. 400, 88 P. 373; Woolf v. Clarke, 17 Cal.App. 696, 121 P. 407; Traders Bank v. Wilcox, 42 Cal.App. 24, 183 P. 256; Tilden Lumber, etc., Co. v. Bacon Land Co., 116 Cal. App. 689, 693, 3 P.2d 350. So far as Krumm was concerned, then, the Birkhofers are to be treated as successors in interest of Attwood, the original "beneficiary" named in the deed of trust, and as being, accordingly, the "beneficiaries" thereof. The circumstance, therefore, that no other signatures than those of the Birkhofers appear on the notice of default as filed for record does not affect its validity.

[3-5] The next point made is that in the notice of default the particulars of the breach relied on are not correctly stated. In that contention appellant is in part right. The notice of default describes the breach as consisting in the failure to pay $1,067.50 interest that became due on March 27, 1933, a further $1,067.50 which became due on September 27, 1933, and $2,500 constituting one-half of a $5,000 instalment of principal which became due on March 27, 1932. As to this last item there had in fact been an extension of time for making the payment granted by the agreement referred to in the pleadings until March 27, 1934, so that, but for the right to accelerate the due date of the whole obligation it would not as yet have been due at all. On the other hand the notice of default omits to state that on account of a $5,000 instalment of principal which fell due on March 27, 1933, $2,000 in fact remained in default, the extension of time referred to having included the other $3,000 thereof only. In this connection respondents call attention to the fact that in 1928 when the deed of trust was executed the words now included in the above-quoted provisions of section 2924 of the Civil Code "and setting forth the nature of such breach" did not appear therein and were first added by an amendment made in the year 1933, St.1933, p. 1669, § 1, in consequence of which it is claimed that it was unnecessary in the instant case in filing the notice of default to include therein any of the particulars respecting the breach, since, as is claimed, the amendment could not in that respect affect an existing deed of trust. To this effect are cited various decisions, none of which have, in our opinion, any application. The amendment to section 2924 was, in the particular noted, purely procedural. It is true that procedural changes will not be upheld where they operate to the prejudice of previously vested rights. This change, however, had no such tendency and compliance with the added requirement was easily possible. We do not doubt, therefore, that when this notice of default was filed for record, the statutory requirement that such notice set forth the nature of the breach, existed. What we have, however, in this connection to decide, is whether or not the errors noted in the statements actually made in the notice are such as to be fatal to its validity. We do not think that they are. In Williams v. Koenig, 219 Cal. 656, 660, 28 P.2d 351, 352, it is said:

> "There is no requirement that the wording of a notice of default follow literally the wording of the statute; a substantial compliance in accord with the spirit and purpose of the statute is sufficient."

In Rogers v. Evans, 137 Cal.App. 538, 546, 31 P.2d 233, it was held that recitals not required by the statute or the terms of the trust, though in fact incorrect, are but surplusage, and do not invalidate the notice. Even with respect to statements of the nature of the breach under the code section as it now reads the Supreme Court has held, in Engelbertson v. Loan & Building Ass'n, 6 Cal.2d 477, 58 P.2d 647, 648, that:

> "There is nothing in the section which warrants the construction that a statement of the amount of the items is required."

In that case the notice specified that the obligor was in default as to "the instalment of interest falling due on December 1, 1933, and all instalments of interest subsequently falling due", and as to "balance of $2.32 on the September 1, 1932, instalments of dues on Building & Loan shares pledged by the trustors and all subsequent instalments", and "certain sums of money advanced or expended under the terms of said deed of trust, together with interest thereon as provided in said deed of trust".

[6, 7] In our view the intent of the statute is sufficiently complied with if the notice of default contains a correct statement of some breach or breaches sufficiently substantial in their nature to authorize the trustee or beneficiary to declare a default and proceed with a foreclosure. Since reliance on these breaches is manifestly enough to authorize the proceeding, the circumstance that erroneous statements may appear in the notice about other breaches, which breaches, if they occurred, would only be cumulative so far as their effect was concerned, may

properly be treated as immaterial. In the instant case there is no doubt that two substantial breaches in the payment of interest when due had occurred and had not been remedied at the time the notice was filed for record, nor is there any question that these breaches were in themselves enough to have authorized the holder or holders of the note to invoke the acceleration clause therein. In these circumstances we hold that the confusion in the notice with respect to the default in the principal was harmless. It is true that between the time that the notice of default was filed for record and the date of the sale the earlier of these two delinquent interest instalments was paid up but the other one was not. Acceptance of such partial payment has been in this state repeatedly held to be no waiver of the notice of default nor of the breaches therein described. Harris v. Whittier B. & L. Ass'n, 18 Cal. App.2d 260, 268, 63 P.2d 840; Sellman v. Crosby, 20 Cal.App.2d 562, 564, 565, 67 P.2d 706; Arata v. Downer, 21 Cal.App.2d 406, 409, 69 P.2d 213.

[8] It is further claimed that the sale was invalid because made to realize a sum greater than the amount in default under the note and deed of trust. We see no force in this argument inasmuch as the notice of default expressly declares an election to "sell or cause to be sold the premises and property described in said deed of trust to satisfy *the obligations* and *all of the obligations secured by said deed of trust*". This can amount to nothing less than a declaration of election to declare the whole sum of principal and interest on the Grigsby-Krumm note immediately due and payable. The acceleration clause having been thus invoked and the whole obligation declared due it follows the sale was not had for the purpose of realizing any excessive amount.

It is next urged with great insistence both by appellant's counsel and by the learned amicus curiae that sections 580a, 580b and 580c of the Code of Civil Procedure, as added by St.1933, pp. 1672, 1673, §§ 4–6, are applicable and must be fatal to respondents' case. The question of the applicability of legislation of the general description involved in section 580a to contracts previously made has been often considered in this state. In Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712, there were involved a note and deed of trust executed in 1930 and sale made thereunder after the effective date of section 2924½ of the Civil Code passed in 1933, St. 1933, p. 1674, § 8, which as amended in 1935, St.1935, p. 1838, provides that:

> "No judgment shall be rendered for the balance due upon any obligation which was secured by a deed of trust or mortgage with power of sale upon real property following the exercise of such power of sale, if exercised at any time between the effective date of this act and September 1, 1937, unless it shall affirmatively appear that the notice of breach and election to sell provided for in section 2924 of the Civil Code, pursuant to which such sale was held, was recorded at least one year before the date of such sale. This section shall be effective until September 1, 1938."

The court, after noting that if this law were to be applied to contracts already in existence then the payee of a trust deed note would have either to waive his right to a deficiency judgment against the maker or else to wait nine months longer than he was formerly required to wait before the trustee might sell the property to satisfy the debt, proceeded to hold that if the statute were so applied as to accomplish that result, its effect would impair the obligation of the contract within the meaning of the provisions both of the Federal and state constitutions forbidding such impairment. U.S.C.A. Const. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16. It was further held that the remedy, where it affects substantial rights, is included in the term "obligation of contract" and could not be so altered as to materially affect such obligations. Citing Green v. Biddle, 8 Wheat. 1, 75, 5 L.Ed. 547; Edwards v. Kearzey, 96 U.S. 595, 600, 24 L.Ed. 793; Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93. The court distinguished the case before it from Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, which upheld the Minnesota moratorium law on the ground that the latter case not only involved emergency legislation but also that the legislation there considered merely "extended the period of redemption upon reasonable conditions considerate of the rights of both debtor and creditor", (54 P.2d page 715), noting that the extension of time authorized under the Minnesota law did not run automatically in favor of any debtor, but might only be had upon conditions fixed by the court after judicial ascertainment of what was fair to both debtor and creditor under the conditions existing in each case, and only when the debtor pays the rental value of the property as fixed by the court upon notice and hearing, and that it was in the Blaisdell Case distinctly held that the temporary and conditional restraint imposed by the Minnesota statute "in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions", which were in that case held to exist. By contrast section 2924½ of the California Civil Code was said, though limited in time, to fix no conditions for its operation, to purport to give relief to any debtor irrespective of the amount of his indebtedness, the condition of the security or his need for additional time; to impose no condition upon the debtor in connection with the use and occupation of the property, to give no opportunity for inquiry into the situations of the respective parties and to provide no forum for the creditor to present the situation from his standpoint, but simply to give the debtor a preference without any consideration of the rights of the creditor. Such a statute, the court held, could not under the constitutions, state or federal, be made to apply to preexisting contracts. Brown v. Ferdon is undoubtedly the leading California case dealing with recent legislation having to do with the relief of debtors. There have, of course, been many others which have reached the supreme and appellate courts of this state.

[9] When we come to section 580a of the Code of Civil Procedure, and the decisions which deal specifically with it, regard must be had to the fact that that section deals with two essentially different subjects; that is, first with the amounts for which the deficiency judgments therein referred to may be rendered; and second, with the time within which actions to recover such judgments must be commenced. Decisions that have to do with the applicability or inapplicability of the section to given situations must be understood with reference to that distinction.

[10, 11] In Bennett v. Superior Court, 5 Cal.App.2d 13, 42 P.2d 80, in which a hearing was denied by the Supreme Court, the District Court of Appeal of the Second District denied an application for writ of mandate to require the superior court of Los Angeles county to appoint an appraiser under the provisions of section 580a of the Code of Civil Procedure in an action brought to recover a deficiency judgment upon an obligation secured by a deed of trust, after a sale, made before the effective date of the statute. The court held that it was not competent to so apply the statute as to limit the creditor to a recovery of merely the difference between the entire amount of the indebtedness and the fair market value of the property at the time of the sale, as the court might determine such value from the evidence, including the appraiser's report, and said that:

> "The substantive right of the beneficiary under the trust deed to be repaid the entire amount of the indebtedness had accrued before the section cited became effective, and the regulation which it contemplates could not be construed as having entered into the dealings between the parties when the contract was made. The operation of the statute in the circumstances is far more than procedural."

The same court in California Trust Co. v. Smead Investment Co., 6 Cal.App.2d 432, 44 P.2d 624, which was also an action to recover a deficiency judgment after a trustee's sale held before the effective date of section 580a, held that statute inapplicable. The body of the opinion does not disclose in terms which provision of the section the defendant was there seeing to invoke, though it may be gathered from the syllabus that, as in the Bennett Case, the effort was to secure the appointment of an appraiser and limit the amount of the deficiency in the manner which the section contemplates. In Title Insurance & Trust Co. v. Kinkel, 7 Cal.App.2d 623, 46 P.2d 778, there was again involved a case where both the execution of the deed of trust and the sale under its terms preceded the effective date of the code section, and the court again, upon authority of Bennett v. Superior Court, supra, held the right to require the appointment of an appraiser in the effort to limit the amount of the deficiency judgment inapplicable. Wilson v. Superior Court, 8 Cal.App.2d 14, 47 P.2d 331, was a case where the plaintiff, instead of causing a sale to be made by a trustee under a deed of trust executed prior to the effective dates of the 1933 amendment of section 726, St. 1933, p. 2118, and of section 580a of the Code of Civil Procedure, brought a foreclosure suit in the first instance and was met with the demand for the appointment of an appraiser, in the effort, again, to limit the amount of a plaintiff's deficiency judgment. That court held that the authority for such procedure contained in section 726 was inapplicable and remarked that had the plaintiff, instead of suing at the outset, first caused a trustee's sale to be had and then sued for a deficiency judgment section 580a would have been also inapplicable. In Bank of America Nat. Trust & Sav. Ass'n v. Dennison, 8 Cal.App.2d 173, 47 P.2d 296, the note of the defendants had been secured both by a deed of trust on land and a chattel mortgage on personal property. There had been a trustee's sale of the land on August 15, 1932, being prior to the enactment of section 580a of the Code of Civil Procedure, and a sale under the chattel mortgage on February 13, 1934, which was after its effective date. On March 20, 1934, more than three months after the date of the sale under the deed of trust and a little more than a month subsequent to the sale under the chattel mortgage, the holder of the note brought an action to recover a deficiency judgment against the obligors thereon. The trial court, having sustained a demurrer to the complaint based on the statute of limitations involved in subdivision 1 of section 337 of the Code of Civil Procedure as amended in 1933, St.1933, p. 2116, and section 580a of the Code of Civil Procedure as enacted in that year, and having entered judgment for the defendants, the judgment was on appeal reversed. While the opinion recognized that if a cause of action is not yet gone the legislature may shorten the time within which it may be asserted, provided that reasonably sufficient time be still allowed for its assertion, the Appellate Court held that the enactment of limitations of three months after a sale had in which to commence action for a deficiency judgment, could not, consistently with the constitutional rights of a creditor, be applied to a situation in which, at the time of the enactment, the three months next following the trustee's sale had already run, for that would leave no time at all available in which to bring an action for the deficiency. So far as section 580a and the amended subdivision of section 337 of the Code of Civil Procedure were concerned the court said (page 179, 47 P.2d page 299):

"We are satisfied that the Legislature intended that the operation of these practically duplicate laws should be limited to cases where the sale took place after their effective date."

This language, of course, must be understood from its context. The court did not thereby decide that section 580a as a whole might be applied in case of contracts made before its effective date, if only the sale of the security were not made until after that date. All that the court can here have meant was that the amended subdivision 1 of section 337 and so much of section 580a as constitutes a statute of limitations, might, without infringing constitutional provisions, be applied in such a case.

Bechtel v. Nelson, 10 Cal.App.2d 66, 51 P.2d 99, was another action to recover a deficiency judgment where the sale under a deed of trust had occurred prior to the effective date of section 580a. What was involved was the provision of that statute limiting the amount of the deficiency judgment following the sale under a deed of trust to the sum by which the amount due exceeded the fair market value of the property at the date of the sale. The court, following Bennett v. Superior Court, supra, held the statute inapplicable. A hearing in the case was denied by the Supreme Court. This case was followed by Smith v. Davis, reported in the same volume (page 487 et seq., 52 P.2d 515), where in like circumstances the same result was announced. In Central Bank of Oakland v. Proctor, 5 Cal.2d 237, 54 P.2d 718, involving a deed of trust executed before the effective date of section 580a of the Code of Civil Procedure, it does not appear from the opinion whether the trustee's sale occurred before or after the effective date of the enactment. However that may have been, the defendant had, during the trial, in reliance on the provisions of that statute, sought to introduce evidence regarding the market value of the property described in the deed of trust at the time of the sale. The evidence was excluded. The Supreme Court said (page 719):

"We find no error in the rulings thereon, for in Bennett v. Superior Court, 5 Cal.App.(2d) 13, 42 P.(2d) 80, hearing denied in this court, it was held that section 580a, supra, was without application to notes and deeds of trust antedating its enactment."

In Groner v. Kornblum, 12 Cal.App.2d 757, 54 P.2d 1115, it appeared that the note and deed of trust involved were executed and that the note fell due prior to the effective date of section 580a of the Code of Civil Procedure. However, the sale under the deed of trust was not made until October 17, 1933, which was after its effective date. The action was commenced on January 13, 1934. The opinion states that the case involved the right of the defendant to claim the benefits of section 580a. It seems clear that the benefits which the defendant sought to claim were not those of the statute of limitations included in section 580a, since suit was brought within the three months allowed by that statute for that purpose. The benefits claimed must, therefore, have been those provided for limiting the amount of the deficiency judgment. These were held by the court to be inapplicable to the case.

Bechtel v. Clemons, 12 Cal.App.2d 309, 55 P.2d 531, involved a default in payment of note secured by a deed of trust, both of which antedated section 580a of the Code of Civil Procedure. The property described in the deed of trust was sold though it does not appear from the decision when the sale occurred with respect to the effective date of the code section. Action was then brought to recover a deficiency judgment and a defense based in part on section 580a of the Code of Civil Procedure held inapplicable on the authority of Bechtel v. Nelson, supra. While the opinion does not state in terms what provision of section 580a the defendant sought to invoke, it may be gathered both from the reference to Bechtel v. Nelson and from the circumstance that inadequacy of the price realized at the trustee's sale was urged, that what the defendant was seeking to avail himself of was the provision limiting the amount of the deficiency judgment.

In Bank of America Nat. Trust & Sav. Ass'n v. Hirsch, 13 Cal.App.2d 681, 57 P.2d 521, a default having occurred upon an obligation secured by a deed of trust, the property described in the latter had been sold on August 31, 1932. An action to recover a deficiency judgment was filed late in 1934 and the court on the authority of Bank of America National Trust & Savings Association v. Dennison, supra, held that the provisions of section 580a of the Code of Civil Procedure forbidding such an action unless brought within three months after the sale, were inapplicable.

Reynolds v. Jensen, 14 Cal.App.2d 558, 58 P.2d 687, hearing denied by the Supreme Court, was again an action to recover a deficiency judgment after a sale of land under a trust deed. While the note and deed of trust were executed before the effective date of section 580a and of the amended subdivision 1 of section 337 of the Code of Civil Procedure, the trustee's sale had not occurred until after the effective date of those enactments and the action to recover the deficiency was not brought within three months after the sale. The court, citing the Dennison Case, held that in these circumstances the statutes of limitation contained in the enactments mentioned could, without violation of constitutional limitations, be applied and a defense based upon them upheld. An identical situation was involved in Palo Alto Mutual Building & Loan Association v. Cook, 17 Cal.App.2d 193, 61 P.2d 499, and the same result reached. The opinion in this case very clearly points out what we have already noted in the present opinion, that in cases involving the applicability or nonapplicability of section 580a, where the instruments concerned were executed before its effective date, the distinction between the provisions of that section for limiting the amount of deficiency judgments and its provision in the nature of a statute of limitations, must be observed. It is in that connection said:

"Appellant calls our attention to the language used in Central Bank of Oakland v. Proctor, 5 Cal.2d 237, 54 P.2d 718, where it is indicated that said section 580a does not apply to deeds of trust antedating its enactment. But the court there was dealing with provisions of said section other than those relating to the time for bringing an action to recover a deficiency judgment. Reading that decision in the light of the question before the court, we find nothing therein which is in conflict with the holding in Reynolds v. Jensen, supra."

In Loeb v. Christie Hotel Corp., 16 Cal. App.2d 299, 60 P.2d 529, it was held that section 580a of the Code of Civil Procedure could have no retroactive effect. The facts, however, are not stated in the opinion with sufficient detail to make it clear just what application of the section the defendant had sought to make.

In Everts v. Blaschko, 17 Cal.App.2d 188, 61 P.2d 776, this court held inapplicable the provisions of section 580a of the Code of Civil Procedure requiring actions to recover deficiency judgments after sale under a deed of trust to be brought within three months after the sale. The opinion states that the sale was had in 1933 and is not explicit as to whether it did or did not occur before the effective date of section 580a, supra, which was August 21, 1933. A reference to the original record in the case however, shows the date of the sale to have been June 14, 1933, that is before the statute became effective. The decision, therefore, is in line with the principles announced in the Dennison Case.

Security First Nat. Bank v. Sapkin, 19 Cal.App.2d 224, 64 P.2d 1097, 66 P.2d 656, also involved an action to recover a deficiency judgment after a sale had under a deed of trust on June 28, 1933, that is before the effective date of section 580a of the Code of Civil Procedure. The statute of limitations involved in that enactment was in the circumstances again held inapplicable.

In Bank of America Nat. Trust & Sav. Ass'n v. Century Land & Water Co., 19 Cal. App.2d 194, 65 P.2d 109, another action brought to recover a deficiency judgment after a sale under a deed of trust securing a note executed before the effective date of section 580a, supra, the section was again held inapplicable. It does not appear from the opinion whether the sale itself was held before or after the effective date of the statute. Neither does it appear in terms just what provisions of the statute the defendant sought to invoke. From the discussion in the opinion of the question of inadequacy of price, however, it may be gathered that he relied on the provision for limiting the amount of the deficiency judgment.

Finally, in Bakersfield Home Building Co. v. McAlpine Land & Development Co., Ltd., 79 P.2d 410, decided May 19, 1938, we recognized the validity as applied generally to actions to collect deficiencies after sales under deeds of trust occurring subsequent to the effective date of the code section, of the three months' limitation of time therein provided, but held that, as far as the case then before us was concerned, the limitation was suspended by the moratorium legislation of the state. Following Bennett v. Superior Court, supra, however, we held the other and distinct provisions of section 580a having to do with the limitation on the amounts of deficiency judgments inapplicable to obligations existent at the time that section became effective.

[12] As respects section 580b of the Code of Civil Procedure undertaking to forbid deficiency judgments altogether under deeds of trust or mortgages given to secure payment of the purchase price of real property it was, in Hales v. Snowden, 19 Cal. App.2d 366, 65 P.2d 847, hearing denied by the Supreme Court, held that to give the same application to cases arising under contracts executed before its effective date would violate both article 1, section 10, of the Constitution of the United States, U.S. C.A.Const. art. 1, § 10, and article 1, section 16, of the Constitution of California.

Section 580c of the Code of Civil Procedure seems up to this time to have engaged no considerable degree of judicial attention.

To summarize then, the course of the decisions in this state with respect to the said code sections 580a, 580b and 580c, the situation may be thus stated:

As to section 580a, (1) its provisions looking toward the limitation of deficiency judgments to the difference between the whole indebtedness and what the court may find to have been the fair market value of the real property by which, prior to the sale, the indebtedness was secured, have uniformly been held inapplicable to contracts made before the effective date of the code section, regardless of whether the sale of the security was had before or after such effective date; (2) its provisions in respect of contracts entered into before the effective date of the section, in so far as they undertake to impose a limitation of three months after the date of sale of the land by which an obligation is secured, wherein to bring an action for a deficiency judgment, have uniformly been held inapplicable when the sale of the land constituting the security for the debt has been had prior to the effective date of the code section, but to be applicable when such sale has been held thereafter, since, after the effective date of the statute there has still remained a reasonable time for commencing such action to recover the deficiency.

Section 580b has been held inapplicable in its entirety to contracts made before its effective date.

Section 580c, in so far as it represents any innovation, has not been the subject of judicial cognizance.

It is now earnestly contended that the foregoing decisions must be reconsidered in the light of the determination of the Supreme Court of the United States in Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Co. et al., 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 888. There a North Carolina statute provided that in case of any sale of real estate or personal property made by a mortgagee, trustee or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured should become the purchaser and take title; and thereupon such mortagee, payee or holder of the obligation should sue the mortgagor, trustor or other maker of the obligation whose property had been so purchased to recover a deficiency, it should be lawful for the defendant against whom such deficiency should be sought to allege and show as a matter of defense and offset that the property was fairly worth the amount of the debt secured by it at the time of the sale or that the amount bid was substantially less than its true value, and upon such showing to defeat or offset any deficiency judgment against him in whole or in part. It was competent under North Carolina law as an alternative to proceeding under powers of sale contained in instruments of the description mentioned, to foreclose by appropriate suit in equity. In these circumstances the Supreme Court of the United States affirmed a decision of the Supreme Court of North Carolina, 210 N.C. 29, 185 S.E. 482, holding that the statute did not, when applied to instruments entered into prior to its effective date, violate the obligation of contract. It was in the opinion inter alia said that (57 S.Ct. page 339):

"Although admitting that the challenged legislation affects only a remedy for enforcement of the contract, the appellant urges that the alteration is so substantial as to impair the obligation of the contract. The applicable principle is not in dispute. The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away."

The court went on to say that in the case before it:

"When the loan was made, two such remedies were available. The mortgagee could proceed by bill in equity to foreclose the security. If it did, the chancellor who controlled the proceeding could set aside a sale if the price bid was inadequate. In addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness, but his decree in that behalf would be governed by well-understood principles of equity. An alternative remedy sanctioned by state law was available if the deed of trust so provided. This was the sale of the pledged property by the trustee. If this were the remedy authorized by the contract, and the mortgagee himself became the purchaser at the trustee's sale, he might thereafter, in an action at law, recover the difference between the price he had bid and the amount of the indebtedness."

The court then proceeded to note the changes in the latter remedy above detailed effected by the North Carolina statute under review. It was observed that the changes had no applicability if the purchaser at the sale under the power contained in the instrument involved was other than the obligee. The court then went on to say:

"The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. By the old and wellknown remedy of foreclosure a mortgagee was so limited because of the chancellor's control of the proceeding. That proceeding, as has been said, has always been available to the mortgagee in North Carolina. Granting that by the alternative remedy of trustee's sale the mortgagee might perchance obtain something more, or might obtain only that which was his due somewhat more expeditiously, than he could in chancery, it remains that the procedure to foreclose in equity is, and has been, the classical method of realization upon mortgage security and has always been understood to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee. If, therefore, the Legislature of the state had elected altogether to abolish the remedy by trustee's sale, we could not say that it had not left the mortgagee an adequate remedy for the enforcement of his contract. But the Legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract."

[13] It cannot with candor be denied that this decision of the Supreme Court of the United States considerably impairs the assurance with which the reasoning heretofore adopted by all courts of appellate jurisdiction in this state in holding that the application of section 580a of the Code of Civil Procedure to the limitation of the amounts of deficiency judgments would contravene article 1, section 10 of the Federal Constitution, U.S.C.A.Const. art. 1, § 10, and the cognate provisions of article 1 of section 16 of the California Constitution, can now be

regarded. There can be no doubt that the question is essentially one of federal cognizance for, although a provision of the state constitution is involved, it is a provision in pari materia with the corresponding section of the Federal Constitution, and since the Federal Constitution is, as respects the subjects within its purview, the supreme law of the land, and the determination of the federal courts with respect to its construction are binding upon the tribunals of the states, it follows that such provisions of state constitutions as merely parallel and iterate provisions of the Federal Constitution must be so construed as to harmonize with the construction placed by the federal courts upon the latter. It must, moreover, be noted that in California, since the enactment of section 725a of the Code of Civil Procedure, St. 1933, p. 1673, a beneficiary under a deed of trust on real estate made to secure an obligation, as an alternative to such right as he may have under the instrument involved to require the real property affected to be sold at trustee's sale and then to pursue the debtor at law to recover any deficiency, has, in the event of a breach, the statutory right to proceed with a foreclosure suit in equity as in the case of a mortgage, and that, in that respect, the situation here is in a considerable degree analogous to that existing in North Carolina and involved in Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Co. et al., supra.

[14] Recognizing, however, as we do, the important bearing of the pronouncement of the Supreme Court of the United States upon the discussion, we still regard it as the function, rather of the supreme court of the state than of any state court subordinate to it, to announce changes in what has hitherto been treated within the state as the settled law with respect to the constitutionality of a given application of a state statute, unless indeed there be so exact a parallel between a particular case presented and a controlling decision of a federal court, that no reasonable distinction between them can be made. In the instant case, notwithstanding the similarity, in many respects, of the situation in California to that in North Carolina there remain substantial differences.

(a) It has been observed, that under the North Carolina statute the right to limit the deficiency judgment, in actions at law to recover the same, after a sale of the property originally securing the debt under a power of sale contained in the instrument involved, existed only when the obligee became the purchaser at the sale, whereas section 580a of our Code of Civil Procedure makes no such distinction. This difference is not in itself unimportant. Equity has, in many jurisdictions, looked with disfavor upon the purchase by an obligee of property which has constituted the security for an obligation, although, indeed, such purchase is not, in ordinary circumstances discountenanced in this state. It cannot, however, be gainsaid that there is a widespread opinion that, because of possible collusion or oppression, such purchases by obligees are to be regarded with caution and as a proper subject of regulation. A statute providing machinery to the extent referred to, for limiting deficiency judgments only in case the purchase has been made by the obligee, but leaving the amount of the deficiency to be fixed with reference to the amount actually realized at the sale, where outsiders unconnected with the obligee have purchased the property, does not deprive the obligee, who need not be a purchaser, of the right to have the actual market value of the security determined by the practical test of competitive bidding, rather than by some retrospective and theoretical view and finding of a court or jury. If no competitors appear at a particular time he need not purchase, but the sale may, from time to time, be postponed so as to thoroughly test the market. As contradistinguished from the North Carolina statute, however, section 580a of the California Code of Civil Procedure undertakes to deprive the obligee of all right to rely with finality, in the event of the sale under a power contained in the instrument involved, on this practical test by subjecting such test, so far as the amount of the deficiency judgment to be awarded is concerned, to the retrospective review of a court or jury. Furthermore, if the sale has been made under a power and an action thereafter instituted for the deficiency, the situation is different from that under what the United States Supreme Court characterizes as the "classical" equity practice, as existing in many jurisdictions, where a sale having been made under judicial process, must still be confirmed by the court. Under such equity practice it has not been necessary for the obligee to part with his security until he has been in possession of the court's ruling as to its market value and as to the resulting amount of the deficiency judgment in money to which he will be entitled, whereas, where he has once caused the security to be sold under a power and the proceeds to be applied on the debt, such obligee has no way of recouping it and attempting to sell it for a higher figure, if, in the subsequent action for a deficiency judgment the court or jury decide, in the retrospect, that it ought to have brought more at the sale and limit his deficiency judgment accordingly.

[15] If it be said that these considerations are without weight because in California now, as in North Carolina, the obligee is not forced to rely, in an action to recover the deficiency, after an exercise of the power of sale in a deed of trust or other instrument securing the obligation, on a subsequent action at law, but since the enactment of section 725a of the Code of Civil Procedure may, as he may in North Carolina, go into equity at the outset and there foreclose, and as a part of the same proceeding, obtain a judgment for the deficiency, the answer is that if he does so he will in California be confronted with the same situation that would have met him here had he caused the sale of the security before resorting to the court. This is true because the new procedure for judicial foreclosure in this state is, again, not, as in North Carolina, the "classical" procedure, afforded by the equity practice, of a sale under judicial process followed by a hearing as to whether or not it shall be confirmed; neither is it the former California practice under which a sale under judicial process, but without the necessity for confirmation, automatically determined the amount of the deficiency; but it is, since section 726 of the Code of Civil Procedure has been recast in its present form, St.1937, p. 770, a different practice, under which, after a judgment fixing the amount of the defendant's liability, a sale under court process of the security is first had, without any requirement of judicial confirmation, and then, the security having been thus parted with, even in cases where the obligee is not the purchaser, the court proceeds with the aid, if requested, of an appraiser, to decide in the retrospect, not what could have been realized for such security *at a forced sale* but what was its *market value* at the time of sale, and then to limit the amount of the deficiency judgment to the difference between the amount of the obligation and such theoretical market value. It may be added that in Wilson v. Superior Court, 8 Cal.App. 2d 14, 47 P.2d 331, hearing denied in the Supreme Court, it was held that even in a foreclosure in equity under section 725a of the Code of Civil Procedure of a deed of trust executed before said section was enacted and before section 726 of the Code of Civil Procedure was recast, the obligor could not, without infringing upon the constitutional rights of the obligee, insist on the method of limiting the deficiency judgment contemplated by section 726 as amended.

(b) A further and most important difference between the situation in North Carolina and that in California is that under the North Carolina statute as set out in the footnote to Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Co., supra, the limitation there contemplated of the amount of the deficiency judgment in case of the purchase by the obligee at a sale held under a power contained in the instrument wherein the security is provided, has no application at all if the obligee elects to pursue his alternative remedy by foreclosure in equity and sale under process of the court, even though he become the purchaser at the sale, whereas the California statute (sec. 726, Code Civ.Proc.) undertakes by a sweeping provision to apply the limitation of the deficiency judgment to any and every judicial foreclosure, thus leaving to the creditor no way at all of avoiding the limitation.

(c) A still further and vital distinction between the law of North Carolina and that of California so far as we are able to ascertain the situation from an examination of the statutes of the former state accessible to us, is that, although under North Carolina law no foreclosure sales under mortgages or deeds of trust, whether under powers of sale therein or pursuant to court decrees can be final until ten days after the making of a sale, and although if, within such time, an increased bid in the statutory amount be received, a resale must be had (North Carolina Code of 1931, § 2591); yet, after the time for receiving bids is past, regardless of whether the sale was made under a power in the instrument involved, or has been made under court decree and is, thereafter, confirmed by the court, no right of redemption exists; whereas in California, redemption may be made at any time within a year. Code Civ.Proc. § 702. It has been held that statutes purporting to give a right of redemption where none existed when the instrument involved was executed, infringe upon the constitutional rights of the obligee (Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93); also statutes purporting to enlarge an existing right of redemption (Coddington v. Bispham's Ex'rs, 36 N.J.Eq. 574); or to extend the time within which it may be exercised. Barnitz v. Beverly, supra; State v. Sears, 29 Or. 580, 43 P. 482, 46 P. 785, 54 Am.St.Rep. 808. So, also, with statutes forbidding a mortgagee to take possession at an agreed time. Mundy v. Monroe, 1 Mich. 68; Blackwood v. Van Vleet, 11 Mich. 252; Boice v. Boice, 27 Minn. 371, 7 N.W. 687. These decisions must, of course, be now read with the reservations attending valid emergency legislation as expounded in Home Building & Loan Association v. Blaisdell, supra, but neither sections 580a nor 580b of the Code of Civil Procedure nor the provisions of section 726 of that code in its amended form relating to deficiency judgments, though doubtless suggested by the financial depression, purport at all to be merely emergency legislation but appear on the contrary to be intended to be permanent in their operation. Manifestly, then, the effect of resorting to a foreclosure in equity is, that the holder of a deed of trust containing a power of sale subjects the security to a possible redemption within a year, to which it would not otherwise be subject and is for that reason, additional to those recounted under (a) and (b) above, no equivalent for the remedies possessed by him prior to the time sections 580a and 580b of the Code of Civil Procedure became effective.

In view then, of the differences that we have pointed out between the statutory provisions in force in North Carolina and our own we are not prepared to depart from the above cited decisions in this state to the effect that neither the provisions of section 580a, supra, for limiting the amount of deficiency judgments, nor those of section 580b, supra, forbidding deficiency judgments in the case of foreclosures under powers of sale in mortgages or deeds of trust given for the purchase price of property, can be properly applied to contracts made prior to the effective date of those sections.

[16–18] A good deal is said in the briefs about the inadequacy of the price at which the property that originally constituted the security for the indebtedness here involved was sold. Counsel for appellant assert as an undisputed fact that the land was worth $1,500 per acre at the time of the sale, or for some 27½ acres which it included an aggregate of $41,250. Appellant did, indeed so testify, and in one of the former opinions of this court (72 P.2d 899) his testimony to that effect is treated, in view of the other circumstances appearing in the pleadings and evidence, as not devoid of substantial importance. On the other hand plaintiffs (respondents) have tendered no issue respecting the value of the security and if we are right in the views hereinbefore expressed of the law, they were not required to tender any. The answer, on the other hand, states its reasonable value, as we saw, to be $30,000, which allegation, however, is one of those which the trial court found to be untrue. Courts and juries, of course, are not necessarily bound to accept the opinion of a witness on a question of value but such opinion is to be weighed in connection with other circumstances that may be shown. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 103 P. 320, 19 Ann. Cas. 1230; Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374. We are without other information as to precisely what the trial court believed the value of the security sold to have been at the time of the sale than may be gathered from its finding already alluded to against the appellant's claim that it sold for an inadequate price. Though it be assumed, however, that the evidence is insufficient to justify that view, it is still the law of this state that inadequacy of price, however gross, furnishes of itself alone no ground for setting aside a sale in other respects valid. Winbigler v. Sherman, 175 Cal. 270, 165 P. 943; Rauer v. Hertweck, 175 Cal. 278, 165 P. 946; Sargent v. Shumaker, 193 Cal. 122, 223 P. 464; Baldwin v. Brown, 193 Cal. 345, 224 P. 462; Stevens v. Plumas, etc., Mining Co., 2 Cal.2d 493, 41 P.2d 927; Central Nat. Bank v. Bell, 5 Cal.2d 324, 328, 54 P.2d 1107; Billings v. Farm Development Co., 74 Cal.App. 254, 259, 264, 240 P. 298; Meyer v. Zuber, 92 Cal.App. 767, 772, 268 P. 954; Bechtel v. Clemons, supra; Bechtel v. Wilson, 18 Cal.App.2d 331, 63 P.2d 1170, 64 P.2d 785. The charges of conspiracy and fraud made in appellant's brief have been found untrue by the trial court and we find no ground for disturbing its findings on that branch of the case.

[19, 20] It is finally urged in appellant's behalf that the decision of the trial court is not sustained by the evidence because of the method adopted of proving or attempting to prove the existence of the defaults referred to and the alleged failure to prove at all the giving by the trustee of the notice of sale under the deed of trust. The method adopted by counsel for plaintiffs (respondents) of proving the defaults in the first instance was to refer to the judgment roll in the above-mentioned action bearing the San Bernardino superior court number 37010 in which many of the allegations of the complaint and

denials in the answer parallel similar allegations and denials in the instant case; to read into evidence a given paragraph of the complaint in said case 37010 and also the responsive paragraph of the answer thereto; and then to read the court's finding on the issue thereby joined. To this method of procedure counsel for appellant interposed the general objection of incompetency, irrelevancy and immateriality, with the further specific objection that the parties in the two actions were not the same. The matter offered was over such objection received in evidence by the court. In this ruling we perceive no error. As found by the court in the present action judgment was entered in case 37010 and has become final. It is on the other hand true, as the court also found in the instant case, that the cause of action involved in case 37010 was not the same involved here. What the plaintiff there sought, was to hold Krumm liable, not directly upon the note which he assumed, but on what was claimed to be an independent contract guaranteeing its payment, resulting from the language employed in the extension agreement already referred to. The judgment was, in effect, that he was not so liable under such independent contract. We agree, of course, that what was there concluded cannot be res adjudicata as respects what is here involved, nor is there any doubt about the correctness of the rule of law as stated in Purcell v. Victor Power & Mining Co., 29 Cal.App. 504, 510, 156 P. 1009, 1011, to the effect that:

[21] "It is elementary, and indeed necessarily, true that the force of an estoppel by judgment resides in the judgment itself. It is not, in other words, the finding of the court or the verdict of the jury which concludes the parties, but the judgment entered thereon."

While, however, findings, though made between the same parties are not in strictness res adjudicata except as made so in consequence of a judgment entered upon them, they have nevertheless been held to be prima facie evidence of the matters found. 34 Cor.Jur. 888-9, citing Wall v. Hill's Heirs, 1 B.Mon., Ky., 290, 36 Am.Dec. 578. The findings in respect of the default on the note here involved were not outside the issues in case 37010 but were responsive to issues made by the pleadings in that case, and indeed, the making of them was essential to the application of the ratio decidendi there, for unless it were there found that there had been a default in respect to one or more payments on the note, there would have been no occasion in that case to consider whether or not the alleged guarantee there insisted upon was effective as such or not. These findings are thereby distinguished from findings that are immaterial to the issues in the case, such as are referred to, for example, in Collins v. Gray, 154 Cal. 131, 135, 97 P. 142, and in the authorities there cited. So far as the parties are concerned there is nothing in the point that they were not the same in case 37010 as in the instant case. The defendant is the same and all three of the parties plaintiff in this case were also parties plaintiff in the former case. The only difference is that Attwood was made a party before and is not here. For the purposes under discussion that difference is immaterial.

[22-24] Although, in the circumstances, we do not think that any error was committed in receiving as part of plaintiffs' (respondents') proof the portions of the record in case 37010 that were admitted, an examination of the transcript in the instant case discloses that, even if they were excluded from consideration, it would make no difference in the result. So far as the defaults are concerned the rule is that he who sues upon a note must allege nonpayment but is not required to prove it. 20 Cal.Jur., pp. 952, 953, and numerous cases cited. Moreover, at the trial of the instant case, in answer to a question as to why he did not, during the month of January, 1934, "pay the interest which was then overdue in the neighborhood of $2100 or $2200", appellant answered, "Because I didn't have any money." Thereafter he testified to having paid in February of that year an aggregate of $1,067.50, and was asked the question: "And that made up one-half of the interest then due?" He answered "Correct". So far, therefore, as the interest specified in the notice of default is concerned, the correctness of the notice is established by appellant's own testimony. If he claims to have paid anything else with which he has not been credited he had every opportunity to show it. As respects the giving of the trustee's notice of sale it is enough to observe that the trustee's deed for the property sold is in evidence and recites in detail not only that the notice was given but the manner in which it was given and that by the terms of the deed of trust such recitals are made conclusive of the facts recited. This, as a matter of law, is sufficient to sustain the trial court's findings on that issue. Bechtel v. Wilson, 18 Cal.App.2d 331, 335, 63 P.2d 1170, 64 P.2d

785, citing Sorensen v. Hall, 219 Cal. 680, 28 P.2d 667; Stevens v. Plumas Eureka Annex Min. Co., 2 Cal.2d 493, 41 P.2d 927; Central National Bank v. Bell, 5 Cal.2d 324, 54 P.2d 1107; Cobb v. California Bank, 6 Cal.2d 389, 57 P.2d 924.

For the reasons given the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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27 Cal.App.2d 733

RATCLIFF v. SAN DIEGO BASEBALL CLUB OF THE PACIFIC COAST LEAGUE et al.

Civ. 2044.

District Court of Appeal, Fourth District, California.

July 25, 1938.

1. Theaters and shows 🔑6

Those who are in charge of professional baseball games are not insurers of their patrons, but are required to exercise ordinary care to protect their patrons from injuries from thrown or batted balls.

2. Theaters and shows 🔑6

Those in charge of professional baseball games are not required to screen all seats in order to prevent injury to patrons from thrown or batted balls, but need only provide a protected area sufficiently large to accommodate as many as may be reasonably expected to call for such protection.

3. Theaters and shows 🔑6

One who voluntarily occupies a seat at a professional baseball game outside of the area protected by screen assumes the risk of being struck by thrown or batted baseballs.

4. Theaters and shows 🔑6

Those who are in charge of professional baseball games are under duty reasonably to protect that part of the grandstand behind and near the home plate where the greatest danger from flying balls exists.

5. Theaters and shows 🔑6

The exercise of ordinary care for the protection of patrons of professional baseball games requires that patrons should be furnished protection from flying bats at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected.

6. Theaters and shows 🔑6

In patron's action against baseball club to recover for injuries sustained when a baseball bat flew out of the hands of a player and struck patron who was 80 feet distant in grandstand and on way to seat in protected area, question whether the accident could have reasonably been anticipated was for jury.

7. Trial 🔑244(4)

In patron's action against baseball club for injuries sustained when struck by a flying baseball bat while on way to seat in protected area of grandstand, instruction that, in considering negligence of the club, jury could consider the proximity of the playing field to the grandstand and the aisle in which patron was walking, was not error as against contention that court unduly emphasized the proximity of the field to the grandstand.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Martha Ratcliff against the San Diego Baseball Club of the Pacific Coast League and others to recover for injuries sustained when plaintiff was hit with a baseball bat. Judgment for plaintiff for $2,000 against the named defendant, and the named defendant appeals.

Affirmed.

Wright, Monroe, Thomas & Glenn, of San Diego, for appellant.

Eli Levenson and J. J. Brennan, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries suffered by the plaintiff as a result of being hit with a baseball bat which had slipped from the hands of a player.

The plaintiff purchased a ticket for a seat in the grandstand of the playing field operated by the San Diego Baseball Club for a game between that club and the Sacramento Club. A regular aisle or passageway ran along the front of this grandstand, being parallel to the line between home plate and first base, and some forty or forty-five feet distant from that line. The central part of the grandstand, being that portion which was back of the home plate and for some distance on each side thereof, and the corresponding part of the passageway, were protected by a wire screen about thirty feet high. At the time in question, which was shortly before the opening of the regular ball game, certain members of the Sacramento Club were engaged in batting practice with a pitcher in the box and a left-handed batter at home plate. The plaintiff was walking along this passageway on her way to a seat in the section protected by this screen. When she had almost reached the part of the passageway which was protected by the screen the batter took a swing at a ball, missed it, and the bat slipped out of his hands and flew through the air, passing just beyond the end of the screen and striking and injuring her. It was ninety feet from the home plate to first base and there is evidence that the point at which the plaintiff was struck was eighty feet from the home plate.

In this action the San Diego Baseball Club was made a defendant on the theory that it was negligent in failing to protect this portion of the entrance passage, and the Sacramento Club and its batter were joined on allegations that the baseball bat had been negligently and carelessly thrown. A jury returned a verdict for $2,000 as against the San Diego Club, but found in favor of the other defendants. From the judgment which followed the San Diego Baseball Club has appealed.

There is no dispute as to the facts which led to this injury. There is little dispute as to the rules of law, but there is a wide difference of opinion between the parties as to the application of this law to the conceded facts. A number of cases from various states are cited which involve the question of liability to a spectator for injuries received from a thrown or batted ball at a professional game. Some of the usual rules applied in such cases are summarized in Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P.2d 144, as follows (page 146):

"With respect to the law governing cases of this kind, it has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to insure patrons against injury from such source. All that is required is the exercise of ordinary care to protect patrons against such injuries (Edling v. Kansas City Baseball, etc., Co., 181 Mo.App. 327, 168 S.W. 908), and, in doing so, the management is not obliged to screen all seats, because, as pointed out by the decisions, many patrons prefer to sit where their view is not obscured by a screen. Moreover, the management is not required to provide screened seats for all who may apply for them. The duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion (Wells v. Minneapolis Baseball, etc., Assn., 122 Minn. 327, 142 N.W. 706, 46 L.R.A.,N.S., 606, Ann.Cas.1914D, 922; Brisson v. Minneapolis Baseball, etc., Ass'n, 185 Minn. 507, 240 N.W. 903); and if as in the cases of Wells v. Minneapolis Baseball etc. Ass'n, supra, and Kavafian v. Seattle Baseball Club Ass'n, 105 Wash. 215, 177 P. 776, 181 P. 679, a spectator chooses to occupy an unscreened seat, or, as in the Brisson Case, supra, is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck by thrown or batted balls; and, if injured thereby, is precluded from recovering damages therefor."

[1-4] The essence of these rules seems to be that those in charge of such games are not insurers of their patrons, that they are required to exercise ordinary care to protect their patrons from such injuries, that they are not required to screen all seats, and that they have met the burden thus resting upon them when they have provided a protected area sufficiently large to accommodate as many as may be reasonably expected to call for such protection. It is well settled that one who voluntarily occupies a seat outside of the area thus protected assumes the natural and well-known risk of being struck by thrown or batted balls. It seems also to be generally recognized that a duty rests upon the management to reasonably protect that part of the grandstand behind and near the home plate, where the greatest danger from flying balls exists.

[5] While the instant case does not involve a flying ball it seems clear that similar principles are, in part, applicable and that the exercise of ordinary care for the protection of patrons of baseball games requires that they should be furnished protection from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be ex-

pected. This seems to be conceded by the appellant, its main contentions being that it is not liable for a failure to guard against this accident in the absence of proof that the same was one which should reasonably have been anticipated, that the undisputed evidence fails to show such a situation, and that there is, therefore, no evidence to show negligence upon its part.

It is conceded that this accident would not have happened if the existing screen had extended an additional two or three feet in the direction from which the respondent was coming. It is also conceded that baseball bats somewhat frequently slip from the hands of batters, but it is earnestly contended that there was no evidence that on any previous occasion, anywhere, such a bat had been known to travel at the exact angle and for the exact distance which this one did. From this it is argued that the happening of such an accident as this could not have been anticipated by the appellant. This calls for a brief review of the pertinent portions of the evidence.

A number of witnesses who had been long connected with professional baseball testified to the general effect that they had many times seen a bat slip from the hands of a batter when he swung hard at a ball and missed it, that on such occasions, when the batter was left-handed, the bat would fly in the general direction of first base, that more often than otherwise it would go inside the playing field or diamond, that often it would not, that usually it would not go as far as first base, and that sometimes it would go that far or farther. One witness testified that he had seen bats slip out of the hands of players and that on the occasion here in question "the player took a healthy swing at the ball, but missed it, and the bat naturally flew out of his hands and went whirling in the air". Another witness testified that he had played professional ball for fourteen years, that he had seen bats slip out of the hands of players a great many times, that such an occurrence would average about once in every three games, that a majority of these bats went into the infield, that sometimes they would go as far as first base, that a good many do not go that far, that it is comparatively rare for one to go into the grandstand, but that he had seen them go into the grandstand. When asked if it was not an unusual thing for a bat thus slipping from the hands of a player to go far enough to the side and a sufficient distance to go into the grandstand he replied: "Well, no, I have seen a good many of them go into the stands." The batter from whose hands this bat slipped testified that he had seen bats slip on many occasions, that on several occasions he had seen them go into the stands, that it was a natural thing for a bat from a left-handed player to go in the direction in which this bat went, that on some occasions such bats will go as far as first base, that they may go in any direction, and that the direction the bat goes depends upon how far around the batter has gone with his swing at the time the bat slips. The manager of the appellant club testified that this bat traveled about eighty feet, that he had seen bats slip from the hands of batters, that he had seen them go into the grandstands, and that he had seen a bat travel as far as this one did under similar circumstances during a ball game.

[6] The respondent having purchased a ticket which entitled her to a seat in the protected section of this grandstand was proceeding thereto along the passageway which had been provided for that purpose by the appellant. While the appellant was required to exercise only ordinary care in protecting the respondent from such an injury as this while she was proceeding along the passageway thus provided, that duty was not performed if such an occurrence as this should have been reasonably anticipated by the appellant. Under the circumstances here appearing it cannot be said, as a matter of law, that such a happening as here occurred could or should not have been anticipated. There is ample evidence that bats rather frequently slip from the hands of batters and that such occurrences are not unusual, although they may not occur in every game. It appears that occasionally such bats fly into the grandstand and that such an occurrence has been many times observed by each of the witnesses who were professionally engaged in the game. It further appears that not infrequently a bat so slipping from the hands of the player goes a distance of ninety feet or more. There is not only evidence that such bats sometimes go into the grandstand, but it is a reasonable inference from the testimony that the exact direction in which such a bat will fly depends upon the position of the player at the time the bat slips from his hands and cannot be foretold, although the distance it may travel is reasonably well known. The fact, if it be a fact, that no one had before seen such a bat fly through

the air at exactly this angle and for this precise distance is not controlling here. The very fact that the exact line of flight cannot be determined in advance is in itself a good reason why the exercise of reasonable care in guarding against such an incident should require the furnishing of protection over the area where experience has shown that such a danger is to be expected. It was a question for the jury whether such an accident as this could have been reasonably anticipated and we think the evidence is sufficient to sustain their finding upon that question. The matter was submitted to the jury under instructions which correctly set forth the appropriate rules of law. This is conceded by the appellant, with one exception, which will now be considered.

[7] The court gave the following instruction:

"You are instructed that in considering the question of negligence of the defendant San Diego Baseball Club, you may consider the closeness and the proximity of the playing field to the grandstand and the aisle in which the plaintiff was walking when she was injured."

The appellant contends that in giving this instruction the court erred in laying undue emphasis on one portion of the evidence. There was evidence that the home plate was thirty-one feet six inches in front of the screen back-stop which in turn was five feet from the grandstand, and that the line from home plate to first base was approximately thirty-six feet from the grandstand. The real issue presented to the jury was whether or not an occurrence of this kind should have been anticipated by the appellant. This involved the consideration of the testimony as to previous occurrences of this nature and the distance and direction traveled by bats which have slipped from the hands of the players, as shown by past experience. It was proper for the jury to consider the testimony relating to past experience along this line, in connection with the actual position of this playing field as related to the grandstand and the passageway. The court so instructed the jury and we are unable to see how the matter was unduly emphasized.

The judgment is affirmed.

I concur: MARKS, J.

HAINES, Justice pro tem., deeming himself disqualified, does not participate herein.

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27 Cal.App.2d 689

In re CASHION'S ESTATE.

CASHION v. CARTY et al.

S. C. 65.

District Court of Appeal, Second District, Division 1, California.

July 22, 1938.

1. Wills 🔑324(2)

In a will contest, evidence as to mental competency of testatrix at time of execution of will was for the jury where evidence was conflicting.

2. Wills 🔑386

The rule that a verdict or finding will not be disturbed upon appeal where there is real and substantial conflict in evidence on the issue of facts involved applies to litigations over the validity of wills.

3. Wills 🔑386

In a will contest all questions of the weight of testimony are exclusively for the jury and for the trial court.

4. Wills 🔑386

A verdict and finding in a will contest will not be disturbed where there is a conflict upon issues of fact.

5. Wills 🔑386

In considering the sufficiency of evidence in will contest, jury is warranted in believing as true all the evidence in support of contestant's claims, unless it is inherently so improbable as to be unworthy of belief, and in disregarding as untrue all evidence of proponent which in any way is contradicted or impeached.

6. Wills 🔑55(1)

Evidence warranted revocation of probate of will upon ground that testatrix had not sufficient mental capacity to make the will on the day she signed the will.

7. Wills 🔑384

In will contest where trial court called jury's attention to single issue of whether testatrix had sufficient mental capacity to make the will, trial court's instruction on question of undue influence after motion for nonsuit as to that issue had been granted was not prejudicial.

◆

Appeal from Superior Court, Los Angeles County; Chas. S. Burnell, Judge.

Proceeding in the matter of the estate of Jessie Cashion, deceased, wherein James Angus Cashion filed will contest and petition for revocation of probate of the will against Edwin L. Carty, as administrator with the will annexed and another. From a judgment for the contestant, proponents appeal.

Affirmed.

Charles F. Blackstock, of Oxnard, for appellants.

Hindman & Davis and E. Eugene Davis, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Jessie Cashion, aged 58 years, died on April 14, 1936, in Los Angeles county, leaving a last will and testament dated July 14, 1934, by which she bequeathed to her son, the respondent herein, a diamond ring, and devised and bequeathed to her daughter, the appellant Jean E. Flanagan, all the rest of her property, both real and personal. Charles E. Pearce, who was named therein as executor thereof, having predeceased the testatrix, the appellant Edwin L. Carty was duly appointed as administrator with the will annexed, the nomination of said son and daughter to that effect having been duly filed, and the will was admitted to probate on May 18, 1936. Thereafter, to-wit, on October 19, 1936, respondent son filed his contest and petition for revocation of the probate of the said will upon the ground, among others, that testatrix at the time she executed her will was not mentally capable of making a valid will. Appellants, the proponents of the will, filed their answer in opposition to such contest and upon the issue so joined the cause was heard by the trial court sitting with a jury. During the course of the trial all questions were disposed of upon motion for nonsuit, except one issue which the trial judge in his instructions to the jury stated as follows:

"The one issue before you is whether or not Mrs. Cashion during the very day she made this will, on the 14th day of July, 1934, was or was not of sufficient mental capacity and competency to make such a will, and that is the only question you have to determine."

At the close of its deliberations, the jury returned the following special verdict:

"1. Was the will which is in evidence in this proceeding executed by Jessie Cashion as and for her last will and testament? Answer: Yes.

"2. Was said will the free and voluntary act of Jessie Cashion? Answer: No.

"3. Was Jessie Cashion of sound and disposing mind and memory and mentally capable of making a will on July 14, 1934, at the time said will is claimed to have been executed? Answer: No.

"4. Did she understand the nature of the act she was about to perform? Answer: No.

"5. Did she have in mind those persons who were the natural objects of her bounty? Answer: Yes.

"6. Was she able to remember the nature and extent of her property? Answer: No.

"7. Was she able to understand the manner in which she wished to dispose of her property? Answer: No.

"8. Was she able to determine to whom she wished to leave her property? Answer: Yes.

"9. At the time said will was signed was Jessie Cashion under the influence of intoxicating liquor to such an extent as to render her mentally incapable of executing a will and incompetent to do so? Answer: Yes."

From the judgment entered pursuant to said verdict revoking the probate of the will and terminating the appointment of the administrator with the will annexed, this appeal is prosecuted by proponents, the said administrator and the said daughter of testatrix.

It is here urged that the verdict is not sustained by the evidence, and that the court erred in instructing the jury on the question of undue influence and in propounding to the jury a question as to whether or not the will was the free and voluntary act of testatrix after the court had already granted a motion for nonsuit on the question of undue influence.

Evidence was produced by respondent to the effect that his mother, the testatrix, was a chronic alcoholic and that by reason of the continuous and excessive use of intoxicating liquor, she was unable to carry on a coherent conversation; that she was unable to concentrate; that she mumbled when she talked and shook when she walked; that she was spasmodic and would start to do one thing and forget it and start something else; that her mind wandered; that she could not carry on an intelligible conversation except for a few minutes at a time, and that she was not normal.

While witnesses for appellants admitted the constant use by testatrix of intoxicating liquor, evidence was introduced to the effect that testatrix always talked intelligently and coherently even when drinking and under the influence of liquor; that her memory was good, that she was a very sensible and shrewd woman; a wonderful cook and that she habitually prepared the family dinner, both with and without the help of her servants; that she was a woman who loved her home, went out very little, and had a large circle of friends and relatives, who were contant visitors in her home, and that she appeared normal and of sound mind.

[1] From the foregoing resume, it is readily apparent that the testimony adduced at the trial was directly conflicting on the question of mental competency of the testatrix, and that therefore her mental state on the day she executed the will was a question of fact for the jury, to be determined from all of the evidence presented.

There is evidence from which the jury could infer that testatrix was not only mentally incompetent on the day when she executed her will but also that she was habitually in such a state of intoxication as to be incapable of executing a valid will.

[2-5] It was held in the Estate of Gill, 14 Cal.App.2d 526, at page 528, 58 P.2d 734, at page 735: "* * * the rule that a verdict or finding will not be disturbed upon appeal where there is a real and substantial conflict of evidence on the issue of facts involved applies to litigation over the validity of wills as well as to any other kind of litigation. Estate of Doolittle, 153 Cal. 29, 94 P. 240. All questions of the weight of the testimony are exclusively for the jury and for the trial court. The rule is the same in will contests as in other proceedings; and a verdict and finding in such a case will not be disturbed when there is a real and substantial conflict upon the issues of fact involved. Estate of Snowball, 157 Cal. 301, 107 P. 598. * * * In considering the question of the sufficiency of the evidence the jury is warranted in believing as true all of the evidence in support of contestant's claims, unless it is inherently so improbable as to be unworthy of belief, and in disregarding as untrue all the evidence of proponent which is in any way contradicted or otherwise impeached."

[6] Guided by the principles enunciated in the cited case, it is obvious that the evidence supports the verdict of the jury that testatrix had not sufficient mental capacity to make the will here in question on the day she signed the same.

[7] In view of the fact that the trial court in his instructions to the jury directly called attention to the single issue to be determined by it, no prejudicial error was committed by the court when he gave an instruction on the question of undue influence after a motion for nonsuit as to that issue had been granted.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

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27 Cal.App.2d 642

PEOPLE v. ALLEN et al.

Cr. 3118.

District Court of Appeal, Second District, Division 2, California.

July 21, 1938.

Rehearing Denied July 27, 1938.

1. Gaming 🔑98(5)

Testimony of police officer that he gained access to room maintained by accused and that he saw horse racing forms, overnight entry sheets, and national scratch sheets for horse racing and heard reports on horse race returns as they came in on machines maintained by accused and made bets and saw others make bets on horse races, sustained conviction of accused for unlawfully keeping and occupying a room for purpose of recording bets upon horse races. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑63(3)

The statute denouncing as a crime the unlawful keeping and occupying of a room for the purpose of recording bets upon horse races was not repealed by statute legalizing pari-mutuel betting on horse races. Pen.Code, § 337a, subd. 2; St.1933, p. 2046; Const. art. 4, § 25a.

3. Gaming 🔑75(1)

Under statute providing that "wager made inside an enclosure under the pari-

mutuel system for a principal who is not within the enclosure" shall be legal and that "any activity of the principal in connection with such wager" should not be considered illegal, keeping and occupying a room for the purpose of recording bets upon horse races was not made lawful. Pen. Code, § 337a, subd. 2; St.1933, p. 2047, as amended by St.1935, p. 1943; Const. art. 4, § 25a.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Joseph Allen, Emil Paluso, Sam Begno, and Jack Irvine were convicted of having unlawfully kept and occupied a room for the purpose of recording bets upon horse races, and they appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendants were charged in an information with violation of section 337a, subdivision 2, of the Penal Code in that they unlawfully kept and occupied a room for the purpose of recording bets upon horse races. They were found guilty by the court and have appealed from the judgments of conviction.

[1] The defendants contend that the evidence is insufficient to justify the convictions. A police officer testified that on February 18, 1938, he went to the building located at 7408 Sunset boulevard in the city of Los Angeles and there found a barber shop located in the front portion of the building and in the rear of the barber shop was a large room. The officer tried to open the door to this room but found it locked. Defendant Stein came to the door and said to the officer, "I don't know your face". He then called defendant Allen and asked Allen if he knew the witness and Allen replied in the negative. Defendant Irvine was called and he stated to Stein that he knew the witness, whereupon Stein opened the door and the officer entered the room. He saw six overnight entry sheets for horse races fastened to a board in the center of the room; two national scratch sheets for horse racing dated February 18, 1938, upon a desk located in the room; also a Pacific Daily Racing Form upon a table. Defendants Allen and Paluso were seated at a desk in the room where the national scratch sheets were located. He saw a teleflash speaking machine being operated in the room and heard reports coming over the machine that Night Intruder was first in the second race, and Paul Scarlet was second, the returns being from Hialeah Park horse racing track in Florida for the last race being run on that date. There were thirty or forty people in the room when he entered in the morning of February 18, 1938, and a larger number in the room on the afternoon of that day. The officer placed two bets with defendant Paluso, one in the morning and one in the afternoon. He saw defendant Irvine mark the results on a sheet posted on the wall as they came over the teleflash machine. The door was kept locked by defendant Stein who acted as doorkeeper and let people in as they arrived. In the afternoon the witness saw defendant Begno receiving money and "markers" for horse races from persons in the room. Manifestly, the evidence is ample to sustain the convictions. People v. Sutherland, 59 Cal.App. 462, 210 P. 965; People v. Hatfield, 77 Cal.App. 212, 246 P. 95; People v. Hinkle, 64 Cal.App. 375, 221 P. 693.

[2, 3] Defendants contend that section 337a of the Penal Code was repealed by the adoption of the "Horse Racing Act" of 1933, St.1933, p. 2046, and by section 25a of article 4 of the Constitution of California. The point has been decided adversely to the contention of defendants. People v. Wilson, 19 Cal.App.2d 340, 65 P.2d 834; In re Goddard, Cal.App., 74 P.2d 818; In re McKelvey, 19 Cal.App.2d 94, 64 P.2d 1002. Defendants further contend that the acts of which they are accused have been made lawful by the 1935 amendment of the "Horse Racing Act" of 1933, St.1933, p. 2047, as amended St.1935, p. 1943, wherein it is provided: "A wager made inside an enclosure under the pari-mutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure." In the matter of the application of William Walker, 80 P.2d 990, opinion filed June 30, 1938, the Supreme

Court decided this point adversely to the contention of defendants.

The judgments are affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

27 Cal.App.2d 769

PEOPLE v. PALUSO.

Cr. 3117.

District Court of Appeal, Second District, Division 2, California.

July 21, 1938.

Rehearing Denied July 27, 1938.

Hearing Denied by Supreme Court Aug. 18, 1938.

Gaming 🔑**98(5)**

Evidence *held* sufficient to sustain conviction for unlawfully keeping and occupying a room for the purpose of recording bets upon horse races. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Emil Paluso was convicted of unlawfully keeping and occupying a room for the purpose of recording bets upon horse races, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

WOOD, Justice.

In an information filed by the district attorney Emil Paluso, the defendant and appellant, was charged with violation of section 337a, subdivision 2, of the Penal Code in that on February 28, 1938, he unlawfully kept and occupied a room for the purpose of recording bets upon horse races. He was found guilty in a trial by the court and prosecutes this appeal from the judgment of conviction.

The evidence offered by the prosecution was similar to the evidence offered in the case of People v. Allen et al., Cal.App., 81 P.2d 630, in which the opinion of the court is this day filed. The contentions of the appellant in this case are the same as the contentions made in the case to which reference has just been made.

For the reasons stated in People v. Allen et al., supra, the judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

27 Cal.App.2d 645

PEOPLE v. KAHN.

Cr. 3119.

District Court of Appeal, Second District, Division 2, California.

July 21, 1938.

1. Gaming 🔑**98(1)**

Evidence *held* sufficient to sustain conviction for unlawfully receiving money to be wagered upon a horse race. Penal Code, § 337a, subd. 3.

2. Criminal law 🔑**364(1)**

In prosecution for unlawfully receiving money to be wagered upon a horse race, testimony of arresting officer concerning conversation between accused and wagerer who placed bet with accused which took place at the scene and at the time of the offense charged was admissible since it constituted a part of the transaction, as against contention that it was hearsay. Penal Code, § 337a, subd. 3; Code Civ.Proc. § 1850.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

William Kahn was convicted of unlawfully receiving money to be wagered upon a horse race, and he appeals.

Affirmed.

Freedman, Christlieb & Alexander, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was accused by information of the crime of the violation of section

337a, subdivision 3, of the Penal Code, in that he unlawfully received money to be wagered upon a horse race. At a trial before the court without a jury defendant was found guilty and now prosecutes this appeal from the judgment of conviction.

[1] Defendant contends that the evidence is insufficient to justify the conviction. In their opening brief counsel for defendant fairly and frankly set forth the testimony given by the arresting officer in his direct examination: "Edward L. Newton testified as follows: That on or about the 11th day of January, 1938, he observed the defendant on a public sidewalk in the vicinity of 1650 No. Vine Street; that he commenced observing him at about five minutes of twelve and placed him under arrest about fifteen minutes after twelve; that the defendant was standing next to the curbing and different men would come up to the defendant and give him bills (paper money); that the defendant would then put the money in his pocket, make notations on a tablet he carried in his hand, disappear for two or three minutes and come back to the curb again. That he took from the defendant's pocket a 'National Scratch Sheet,' which the defendant previously looked at once in a while; that while he (Newton) was standing alongside the defendant, one Ruby Goldie came up to the defendant and said to the defendant, 'One dollar to win on horse 94, Bernard F'. That on that date there was a purported horse race at Tropical Park, Florida, in which there was a purported horse named 'Bernard F.' running; that the defendant put the dollar bill given to him by Goldie in his pocket that the defendant made the notation '94' and then '1' under the first column of a tablet; that he placed the defendant under arrest and the following occurred: 'A. I asked him who he was working for, and he said he wasn't working for anyone; he wasn't working for anyone right now. He was running his own book. I asked him why he had all that money on him. He said, well, he always kept enough on him to do his own paying off; and at the time of the arrest he had $355.00 on him.'" From the testimony just quoted it is manifest that the evidence is sufficient to justify the conviction.

[2] Defendant contends that Officer Newton's testimony concerning the conversation between defendant and Goldie was erroneously received, arguing that the testimony is hearsay. There is no merit in this contention. The conversation took place at the scene of and at the time of the offense charged. It constituted a part of the transaction. Sec. 1850, Code Civ. Proc.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

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27 Cal.App.2d 712

WEISBROD et al. v. WEISBROD et al.

Civ. 2076.

District Court of Appeal, Fourth District, California.

July 22, 1938.

1. Descent and distribution 🔑82

Letters to writer's brothers and sister stating that writer would share estate which writer inherited from her father with brothers and sister were not "written instruments," so as to be presumptive evidence under statute that consideration passed from brothers and sister to writer. Civ. Code, §§ 1614, 1615.

The term "instrument in writing" includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but not accounts, ordinary letters or memoranda. An "instrument" is a written document; a formal or legal document in writing, such as a contract, deed, will, bond, or lease. The term "instrument" in a broad sense, includes formal or legal documents in writing, including contracts, deeds, wills, bonds, leases and mortgages.

[Ed. Note.—For other definitions of "Instrument" and "Written Instrument," see Words & Phrases.]

2. Descent and distribution 🔑82

A daughter's oral expressions and letters stating that daughter would share estate which she inherited from her father with her brothers and sister were not a completed contract which placed on daughter any legal obligation of making any particular disposition of the estate.

3. Descent and distribution 🔑83

Where letters to writer's brothers and sister stating that writer would share estate which writer inherited from her father with brothers and sister, were not written instruments within statutes making such instruments presumptive evidence of consideration, question whether alleged contract between writer and brothers and sister for equal distribution of estate among all of them was supported by consideration would be determined from the evidence. Civ.Code, §§ 1614, 1615.

4. Descent and distribution 🔑83

Evidence *held* insufficient to permit brothers and sister to share in bulk of estate which father left to another daughter on ground that brothers and sister and daughter enter into a valid contract for equal distribution of estate.

5. Specific performance 🔑32(1)

Without mutuality, no specific performance of an asserted agreement can be decreed.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by George Weisbrod and others against Ellen Weisbrod and others for a judgment declaring the rights of the plaintiffs in the estate of John M. Weisbrod, deceased. From the judgment, the plaintiffs appeal.

Affirmed.

Wm. H. Wylie and Ed. P. Sample, both of San Diego, for appellants.

Harrison G. Sloane and Fred A. Steiner, both of San Diego, for respondents.

HAINES, Justice pro tem.

John M. Weisbrod died a widower on December 21, 1935, leaving surviving him six children, George Weisbrod, David K. Weisbrod, Augusta Weisbrod Foster, Moritz Weisbrod, Ellen Weisbrod and Walter Weisbrod, as well as the four minor children of a daughter who had predeceased him. Of these the first four are plaintiffs and appellants in the present action, Moritz, who is an incompetent, appearing by Security Trust and Savings Bank, a corporation, as his guardian. Defendants and respondents are Ellen Weisbrod, Walter Weisbrod and one W. F. Bothe, as guardian of the four minor grandchildren.

Decedent had for some years prior to his death lived at San Diego, occupying, with his incompetent son Moritz, the home. Two of his other children, Ellen and Walter, were at the time of his death and continue to be residents of San Diego. The other children have resided and continue to reside in the San Joaquin valley. It appears that for some time prior to his death the decedent had been afflicted with heart and pancreas disorders and was subject to senile dementia; that on December 4, 1935, that is, some 17 days before his death, he made a will, in which he left the bulk of his estate to his daughter, Ellen, but a small fractional share to his said four minor grandchildren. The whole estate was of the appraised value of approximately $24,000. Ellen Weisbrod having filed the will with her petition for its admission to probate, notice was in due time sent to the other heirs at law, in consequence of which David came to San Diego and there, after being in court on the day that it was admitted to probate, expressed his dissatisfaction with the dispositions made in the will and doubt of its validity, whereupon, according to David's testimony, Ellen said that she felt that after the debts were paid "we should all share and share alike and be congenial and happy." Thereupon, according to David's testimony, at his suggestion that she write the other heirs of her intentions, Ellen wrote to her brother George at Newman, California, a letter under date of January 17, 1936, containing the following:

"Well, brother I suppose you are wondering about how thing's have been fixed. If dad left a will. Well here how thing's are. Dad had a will made out by an attorney name (Steiner). He has been dad's lawyer for about (5 years) so he put some faith and trust in this lawyer. So about (3wks) before he passed, he had this last will made out. In this lawyer's office. I and Walt was there also, and he appointed me by law in the will, the executrix of the estate. Now we are going to have an appraiser to come out here to appraise the place. And it is going to be sold. So we can have it all together in the estate. Then each heir can share and share alike. Of course there is outstanding debts, such as Shannon and Johnson Saum. And the Dr. that took care of dad during his last illness. All those debts have to be took care if. And they have to be paid from the Estate. And after they are all paid. Then the other will be divided among the living heir's and there is six of us. Now, George, I hope this proved satisfactory with you. Because I am going to play white. I will close now hoping to hear from you soon I remain as ever your loving sister.

"Ellen."

At the same time Ellen wrote a letter to her sister, Mrs. Foster, containing substantially the same matter. Thereupon David, after consultation with George and Mrs. Foster wrote Ellen under date February 17, 1936, a letter containing the following:

"We have been advised to write to you pertainting the estate of which you are executrix. We do not wish to make any changes in the executing but we want legal assurance we will share and share alike, therefore, we ask you to see your attorney and have him draw a letter to that effect and give each of the heirs a certified copy of the same. * * * I trust you will give me an immediate reply and look on this in a broad minded way as I fell you will. * * *."

In what she said to her brother David upon his visit to San Diego and in writing the two letters of January 17, 1936, above referred to, Ellen had not consulted her attorney, who, after talking with her and learning of these occurrences, wrote each of the plaintiffs and appellants a letter under date February 25, 1936, the body of which is in the words and figures following:

"Miss Ellen Weisbrod tells me that she has been importuned to prepare and execute some sort of a document running in favor of her brothers and sisters to the effect that she intends to share sooner or later with them or part of them the estate which she lately inherited from her father. She tells me also that she has prepared and forwarded a letter intimating that her intention was to ultimately share this estate with certain of her brothers and sisters.

"Since that time she has discussed this matter with me and has asked that I advise you, as I am advising all of your brothers and sisters, that she is not now sure exactly what she intends to do when the probate period is ended and she does not want to be placed in the position of having you or anyone else say that you relied upon any offers or promises made by her to distribute any or all of her father's estate, and thereby be deprived to now object to her probate of his estate or of his will.

"Hence, if you have any contest to present with respect to this last will of John M. Weisbrod or with her management of it, I suggest that you advise her with relation thereto, or take such steps as you may deem proper, because it appears to her that she is going to be involved in family complications unless this particular action is taken by her at this time.

"I write this letter to you because if Miss Weisbrod desires to change her mind, or if she has already changed her mind, or if she in the future desires to change her mind and divide this other than equally between her brothers and sisters or if she is not going to divide it at all, you will not be deprived of your chance to make whatever legal objections you think you have at the present time."

When this letter was received David, George and Mrs. Foster came together to San Diego and interviewed Ellen, who, according to David's account of the matter, said in substance that she intended, if they "would go away and leave her alone and not interfere with law or anything", to carry out her intentions expressed in her earlier interview with David and in her letters of January 17th. Appellants, however, did not let the matter rest there, for all four then called on Ellen's attorney. According to the account of the interview given by the latter, George stated "that he wanted some legal assurance that he was going to profit from the estate"; to which the attorney replied that "that was the reason the letter was sent, so that they would not be illusioned one bit or be deprived of any right to make any objection they wanted to make to the probate" of their father's will. He says, in substance, that he went on to tell them that Ellen's attitude was due to certain annoyances that she had received from other members of the family, that they could have recourse to the law to obtain any legal rights they claimed to have, that if they wanted consideration at Ellen's hands their best course was to treat her right, that he would not advise her to give them any assurance about any division of the property.

David Weisbrod testified that on the occasion of this visit of the three appellants referred to to San Diego, in the discussion at the house prior to going to the attorney's office, Ellen stated that she knew nothing of the letter which her counsel had written and had not authorized it; that in the course of the conversation with the attorney the latter said in substance that if the other heirs were nice to Ellen she would be nice to them, or words to that effect. He fixed the date of this visit as about March 13 or 14, 1936.

Mrs. Foster testified that after David, George and she had arrived at San Diego, on this visit they talked to Ellen, who said that she wanted the estate divided "share and share alike" and that she disclaimed any knowledge of the letter written by her counsel. Mrs. Foster's testimony is very meager about what was said by Ellen's attorney on the occasion of the visit to his office, but she does quote him as having said "if you would go away and leave your sister alone and be good to her I think she will be likewise".

It was stipulated that in a former proceeding Ellen had testified that when she wrote the letters of January 17, 1936, it was her purpose to have an equal division made of the property of the estate.

The present suit is one for declaratory relief in which the plaintiffs and appellants alleged an agreement in the terms of Ellen's letters of January 17, 1936, above referred to in consideration of their refraining from a contest of the will and avoidance of litigation and dissension with Ellen, and sought a judgment declaring their rights in the estate under what they claim to have been a trust created by Ellen, "or otherwise", under the terms of her said letter, in their favor. Ellen Weisbrod answered the complaint, denying the existence of any contract with the appellants; denying that any agreement was ever made for the avoidance of litigation or controversy; denying that such litigation or controversy was avoided; denying any agreement to distribute the estate of the father in any other manner than as provided by his will and the law; alleging the institution of a contest by Moritz Weisbrod and a judgment in that proceeding against the contestant; alleging that there was no consideration for anything said in Ellen's said letters; and setting up that on being informed of her legal rights Ellen caused her attorney to write the letter hereinbefore mentioned as written by him.

After the trial of the case the court found, inter alia, that Ellen's letter was neither intended nor received as a contract or agreement; that it was without consideration; that none of the appellants paid any consideration, made any promise or suffered any prejudice in return for its having been written, or in return for any intention therein expressed or in reliance thereon; that it was a mere voluntary expression of intention and withdrawn by the aforesaid letter of Ellen's counsel; that no proceedings were had in the estate of the father nor abstained from by reason of any agreement on Ellen's part. The court concluded, as a matter of law, that Ellen had made no assignment or contract with any of appellants respecting the distribution of their father's estate, and rendered judgment accordingly that Ellen and the minor children were entitled to receive distribution under the will of John M. Weisbrod, and that none of the appellants had acquired any right in the estate through any agreement or assignment from Ellen. From this judgment the present appeal is prosecuted.

Appellants' argument, as we understand it, runs as follows: That Ellen Weisbrod's letters of January 17, 1936, amount to written instruments entering into certain engagements with appellants; that being written instruments, they afford, under sections 1614 and 1615 of the Civil Code a presumption that there was consideration for them; that it is true that the complaint alleges the consideration to have been that appellants would make no objection to the probate of their father's will or to the issuance of letters to Ellen and the mutual benefit of all parties in interest consequent upon the avoidance of litigation and dissension between brothers and sisters, as well as the saving of costs and expenses incident to such litigation; but that these allegations as to the consideration for Ellen's promises were surplusage and therefore it was not necessary for appellants to prove them, but that the presumption of consideration above referred to resulting from the mere existence of the written instruments was all-sufficient, even if proof of the specific considerations alleged wholly failed; that the averments in the answer that there was no consideration for the promises alleged is a mere conclusion of law and raises no issue; that by reason of the premises the trial court was, as a matter of law, bound to decide that the promises alleged were made upon due and sufficient consideration and to enforce the asserted contract accordingly.

[1, 2] These contentions appear, even at first sight, too labored and artificial to be sound. They assume, at the outset, that Ellen's letters are written instruments within the meaning of the code sections re-

ferred to. We do not think they are. There is no question that the letters which she, on January 17, 1936, addressed to her brother George and to her sister Mrs. Foster, as well as her oral expression made shortly theretofore to her brother David were expressive of her feelings and intentions as they then were. Manifestly, however, neither these letters nor her oral expressions amounted to any completed contract, nor were the letters written instruments, complete as such in themselves, which could be said under sections 1614 and 1615 of the Civil Code to be presumptive evidence of any consideration having passed from her brothers and sister or any of them to herself. The term "instrument in writing" is said in State v. Heaton, 17 Wash. 310, 49 P. 493, referring to Bouv. Law Dict., Vol. 1, page 1608, to include "bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters, or memoranda" (page 495.) In Black's Law Dictionary an "instrument" is defined as "a written document; a formal or legal document in writing, such as a contract, deed, will, bond or lease", citing, inter alia, Cardenas v. Miller, 108 Cal. 250, 39 P. 783, 41 P. 472, 49 Am.St.Rep. 84, where it is said (page 256, 39 P. page 784): "The term 'instrument,' in its broad sense, includes formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc." The meaning of the expression "instrument" was also discussed in People v. Fraser, 23 Cal.App. 82, 84, 137 P. 276, 277, where it was said that:

> "Generally the term 'instrument' as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term 'instrument' as employed in our statutes has been defined to mean an agreement expressed in writing, signed and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty."

[3] If, then, Ellen Weisbrod's letters fall short of being written instruments, within the meaning of the code sections referred to and, therefore, do not in themselves import consideration, appellants are hardly in a position now to contend that their own very specific allegations contained in their complaint as to what they claim the consideration to have been, can, under such authorities as Cordes v. Harding, 27 Cal.App. 474, 150 P. 650, and Hualde Ranch Co. v. Beebe, 3 Cal.App.2d 592, 593, 40 P.2d 545, on which they rely, be mere surplusage and open the way for a claim that they have, by pleading the alleged intrument, as a matter of law pleaded some other, further and different consideration from that specifically alleged in their complaint, and have also proved such unspecified but distinct consideration through the potent agency of the presumption invoked. Neither do we see that the citations of Peak v. Republic Truck Corp., 194 Cal. 782, 790, 230 P. 948, and Bashford v. Levy & J. Zentner Co., 123 Cal.App. 204, 210, 11 P.2d 51, to the effect that allegations in a complaint inconsistent with the text of a writing set forth in haec verba are surplusage, have any application to this case, since here appellants' allegations as to the alleged consideration for what they claim that Ellen promised in her letters, had they been able to prove it, would have involved no inconsistency with the terms of the pleaded letters. If, then, appellants' allegations as to what was the consideration cannot be disregarded as surplusage, manifestly respondents' specific denials with respect to that consideration cannot be disregarded either, as appellants would have us do, for the purpose of requiring respondents to rely on the general allegation of no consideration, also contained in their answer, which general allegation appellants would, as a further step, then have us hold to be a nullity upon the authority of such cases as Gushee v. Leavitt, 5 Cal. 160, 63 Am.Dec. 116, a line of authorities itself much weakened, as to denials of consideration, by the expression of the Supreme Court in denying a hearing in Rivera v. Cappa, 29 Cal. App. 496, 498, 499, 156 P. 1016, 1017. See, also, opinion of the Supreme Court in denying a hearing in Drovers' National Bank v. Browne, 88 Cal.App. 716, 723, 724, 264 P. 265.

We think, then, that the trial court had before it sufficient issues to warrant a consideration of the evidence with respect to appellants' claim of consideration for the alleged contract which appellants seek to establish, and respondents' claim of an absence of consideration for it. It seems to us futile in this case to discuss further whether there was any presumption of consideration for such a promise as appellants claim that Ellen Weisbrod made to them in her letters. The actual situation was fully before the trial court and in these circumstances it was not required to decide the case upon the basis of any mere disputable presumption, had there been one.

[4, 5] All in all we find no reason for disagreement with that court's findings or action. There is practically no dispute about the facts. The question is not what occurred, but of the legal effect of what occurred. This will had already been admitted to probate and letters issued. It was still, of course, subject to contest. The utmost that could with plausibility be contended as respects Ellen Weisbrod's letters is that they were in the nature of offers. Instead of accepting them as such, however, what the plaintiffs (other than Moritz's guardian) actually did, through David, was to write Ellen demanding something other and different from her letters, to-wit, a formal written communication to be prepared by her attorney precisely amounting to an assignment to them of shares equal to her own in their father's estate. This was tantamount to treating her letters and oral expressions as something merely tentative and asking instead something which they never got, and their demand for which provoked the very definitive reply from Ellen's counsel. Whether Ellen had in terms authorized her counsel's letter or not, she in effect acquiesced in it, for, though she was present, as we saw, with three of appellants at the conference at her counsel's office, she never did furnish appellants with the sort of a writing that they demanded. In view of all this we think that the trial court would have been entirely justified in concluding, as it probably did, that David, George and Mrs. Foster were made aware that she would not furnish it in the teeth of her counsel's advice. So far as appears, they went home without any further attempt to get it and we think the court justified in finding that any offer Ellen may have made was, in effect, withdrawn. In these circumstances we do not think that any contract at all can be said to have been made or that appellants can be treated as having been in any way bound to themselves refrain from any will contest or other legal action that they might have deemed to their advantage. They still had ample time in which to contest the will if they wished, and so far as Moritz's guardian is concerned, it appears that such a contest was actually instituted. There was no mutuality of agreement and it is elementary that without mutuality no specific performance of any asserted agreement can be decreed. None of the elements of an estoppel are present.

The evidence, in our view, supports the trial court's conclusion that Ellen Weisbrod is under no legal obligation which requires her to make any particular disposition of the property devised and bequeathed to her under the father's will.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

11 Cal.2d 576

BELLMAN v. SAN FRANCISCO HIGH SCHOOL DIST.

S. F. 15850.

Supreme Court of California.

July 26, 1938.

1. Appeal and error 🔑1001(1)

An implied finding that school district employees were negligent was conclusive where there was substantial evidence which, when read with inferences most favorable to high school girl, supported verdict in her favor for injuries sustained in a tumbling class (School Code, § 2.801, as amended by St.1931, p. 2487).

2. Appeal and error 🔑930(1)

The intendments on appeal in negligence action were in favor of the judgment.

3. Schools and school districts 🔑89

That high school girl received injury because she did not do "roll over two" gymnastic exercise correctly did not necessarily convict of contributory negligence, nor absolve school district from liability for her injury (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

4. Schools and school districts 🔑89

In determining whether school district was negligent in carrying on gym class, test was whether school officials used same care as persons of ordinary prudence charged with duty of carrying on a public school system would use under same circumstances (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733).

5. Schools and school districts 🔑89

In determining whether school district is responsible for injury to pupil allegedly resulting from failure of its employees to use ordinary care, what is ordinary care depends upon circumstances of each particular case, and is to be determined as a fact with reference to situation and knowledge of parties (School Code, § 2.801, as amended by St.1931, p. 2487).

6. Schools and school districts 🔑89

In passing on school district's liability for injuries sustained by high school girl in doing "roll over two" exercise in tumbling class, jury could properly consider whether exercise was inherently dangerous and whether girl should have been allowed or required to take tumbling instruction (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

7. Evidence 🔑14

It is common knowledge that some students in school show more aptitude for athletics than others.

8. Schools and school districts 🔑89

As respects liability of school district for injuries sustained by high school girl in tumbling class, teachers, in exercise of ordinary care, were required to take into consideration variation in capacities of students for physical training and fact that some forms of exercise are undesirable for girls (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

9. Schools and school districts 🔑121

Evidence that high school girl enrolled in tumbling class under protest, that teacher did not give instructions directly, that girl had a bad knee, and that "roll over two" gymnastic exercise required complete co-ordination, *held* to justify judgment for girl for injuries resulting from her failure to do "roll over two" exercise properly, either on theory that exercise was not suitable for high school girls, that teacher knew or should have known that girl was not in proper condition for such instruction, or that teacher did not properly instruct her (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

10. Schools and school districts 🔑121

Evidence that high school girl, injured in tumbling class because of her failure to do "roll over two" gymnastic exercise properly, had enrolled in class under protest because other gymnasium classes were filled and that she was told when she wished to withdraw, because of bad knee, that she would have to continue to get her credits, *held* to establish that girl was not contributorily negligent (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

11. Schools and school districts 🔑122

In action against school district for injuries sustained by high school girl while doing "roll over two" gymnastic exercise in tumbling class in which she was compelled to enroll because other classes were filled, whether school district was negligent in giving such exercise to high school girls, in giving exercise to this girl, or in not having given her proper instruction, *held* for jury (School Code, § 2.801, as amended by St. 1931, p. 2487, §§ 3.731, 3.733, 3.735).

12. Schools and school districts 🔑122

In action against school district for injuries sustained by high school girl while doing exercise in tumbling class, instruction that jury should consider only whether girl's injury was caused by negligence of a school employee in carrying out physical education work was properly refused, since it unduly limited district's liability to negligence in teaching of school subjects (School Code, § 2.801, as amended by St.1931, p. 2487).

13. Trial 🔑68(1)

A motion to reopen case in order that plaintiff's guardian ad litem, who had testified in case, might be asked whether she had ever been convicted of a felony was properly denied, where police department record upon which motion had been made showed only the imposition of a jail sentence (Code Civ.Proc. § 2051).

14. Witnesses 🔑344(1), 345(1)

A witness may not be impeached by evidence of particular wrongful acts, but conviction of a felony may be shown (Code Civ. Proc. § 2051).

15. Witnesses 🔑252

The admission of photographs or diagrams for purpose of illustrating testimony rests largely within trial judge's discretion.

16. Witnesses 🔑252

In action against school district for injuries sustained by high school girl while performing exercise in tumbling class, refusal to permit witness to illustrate her testimony by use of pictures in textbooks was not an erroneous abuse of discretion (School Code, § 2.801, as amended by St.1931, p. 2487).

17. Schools and school districts 🔑121

In action against school district for injuries sustained by high school girl while performing exercise in tumbling class, admission of a junior high school bulletin on physical education offered by defendant was properly denied as irrelevant (School Code, § 2.801, as amended by St.1931, p. 2487).

18. New trial 🔑76(1)

Although amount of damages to be allowed for personal injuries is left to jury's sound discretion, it is subject to review by trial judge in ruling upon motion for new trial (Code Civ.Proc. § 657).

19. Damages 🔑95

The measure of damages in personal injury action is amount which will compensate for all detriment proximately caused by defendant's negligence (Civ.Code, § 3333).

20. Appeal and error 🔑1004(1)

An appellate court may not interpose its judgment as to proper amount of damages for personal injuries, unless it appears that recovery was so excessive as to shock sense of justice and raise presumption that amount was arrived at as result of passion and prejudice, rather than upon a fair and honest consideration of facts (Civ.Code, §§ 3333, 3359).

21. Damages 🔑24

Recovery in personal injury action is limited, so far as physical suffering, pain, or mental anguish are concerned, to compensation for consequences which have occurred up to time of trial or which it is reasonably certain will follow in the future, and jury may not consider consequences which are only likely to occur (Civ.Code, § 3283).

22. Damages 🔑130(3)

$15,000 for injuries sustained by 17 year old girl in high school tumbling class causing a nystagmus, a lack of planar reflex on the left side, and a possible brain injury, and claimed to have caused headaches, dizziness, occasional vomiting and loss of weight, *held* excessive in the amount of $10,000, where girl had been in bed only three weeks and had thereafter assisted in doing housework (Civ.Code, §§ 3333, 3359).

23. Appeal and error 🔑1178(6)

That damages awarded a high school girl in negligence action against school district were excessive did not require reviewing court to set aside verdict of jury that school district was guilty of negligence and liable for girl's injuries.

24. Appeal and error 🔑1140(1)

Where verdict in personal injury action was erroneous only to extent of excess damages, defendant was awarded new trial on sole issue of damages conditional upon plaintiff's refusal to remit excess damages.

SHENK, LANGDON, and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Belva Bellman, a minor, by and through her guardian ad litem, Ordell Cohen, against the San Francisco High School District for injuries sustained when endeavoring to do an exercise taught in a high school tumbling class. From a judgment for plaintiff and from an order denying its motion for a new trial, defendant appeals.

Affirmed upon condition of remittitur, otherwise to stand reversed and remanded.

For prior opinion, see 73 P.2d 596.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellant.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, amici curiæ in support of appellant.

James F. Brennan and Walter McGovern, both of San Francisco, for respondent.

PER CURIAM.

Because of the importance of the question a hearing was granted in this case. Upon further consideration of the principles involved we are satisfied with the conclusions reached upon the previous hearing and we hereby adopt the opinion prepared at that time by Mr. Justice Edmonds as our opinion upon rehearing. It follows:

"While a student in the Polytechnic High School at San Francisco, Belva Bellman, a seventeen-year-old girl, sustained personal injuries when endeavoring to do an exercise taught in the tumbling class which was conducted by the school as one of the courses in physical education. Through a guardian ad litem she brought suit against the San Francisco High School District and by the verdict of a jury was awarded damages in the sum of $15,000. A judgment was thereafter entered in her favor, and the school district has appealed from the judgment and from the order by which it was denied a new trial.

"The respondent was a student in the high sophomore class of the school for the spring term of 1934 and enrolled in a 'Beginners' Tumbling Class'. There were eighteen separate exercises or stunts prescribed for this class. It was necessary to do successfully at least ten of the eighteen in order to obtain a passing grade and the more stunts which were satisfactorily performed, the higher the grade which was given. One of these exercises is known as the 'roll over two'. To do it the performer takes a short run and dives over two persons who are on the floor on their hands and knees, alights on outstretched arms, and with the head curled under in order to complete a forward roll, comes to a standing position. While trying to accomplish this feat the respondent struck her head. The appellant contends that there is no evidence of any negligence of the school district, or of its officers or employees, which resulted in the injuries complained of and that they were caused by the contributory negligence of the student. It is also claimed that the damages awarded are excessive and that errors were committed by the trial court entitling the school district to a reversal of the judgment.

"Contrary to the rule of the common law, the legislature of this state has declared that school boards shall be 'liable as such in the name of the district for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees'. Sec. 2.801, School Code, Deering's Gen.Laws, Act 7519. The School Code also requires high school boards to prescribe suitable courses in physical education (sec. 3.731) and makes it the duty of such boards 'to enforce the courses of physical education prescribed by the proper authority, and to require that such physical education be given in the schools under their jurisdiction or control'. Sec. 3.733. All high school students except those in cadet companies or excused on account of physical disability must 'attend upon such courses of physical education for at least two hours each week that school is in session'. Sec. 3.735.

"Prior to the term in which she was injured, the respondent had been a student in the same school and was enrolled in the gymnasium classes. According to her testimony, in January, 1934, when the new semester commenced, she asked to continue in the gymnasium class but was told by the teacher in charge of registration that the gymnasium classes were full and that she would have to take physical education in the tumbling class. The school officials deny that this occurred. In any event, the respondent entered the tumbling class and attended regularly from January until May, when the accident occurred. In that time she learned to do a number of the exercises, including the 'roll over two'. The accident happened during a regular class period while the respondent was attempting to do the exercise with the teacher of physical education watching her. This teacher testified that as the respondent 'took off and jumped over the girls, her hands were not extended as they should be for the proper landing, but were about half bent, and consequently when her hands hit the floor her head was there also instead of the hands taking the weight so that the head could tuck under'.

[1–5] "The implied finding of the jury that the employees of the school district were negligent is conclusive if there is substantial evidence which, when read with the inferences most favorable to the respondent, support the verdict. The intendments are in favor of the judgment (Hassell v. Bunge, 167 Cal. 365, 139 P. 800; Hind v. Oriental Products Co., 195 Cal. 655, 235 P. 438), and while the evidence shows that the respondent received injury because she did not do the exercise correctly, this does not necessarily convict her of contributory negligence nor absolve the school district from liability. The question is whether the school officials used the same care as persons of ordinary prudence, charged with the duty of carrying on the public school system, would use under the same circumstances. The legislature has made school districts responsible for the injury of any pupil resulting from the failure of their officers or employees to use ordinary care. What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with reference to the situation and knowledge of the parties.

[6–8] "In deciding whether the employees of the appellant used ordinary care it was proper for the jury to consider not only whether the exercise was inherently dangerous but also whether they should have allowed or required the respondent to take instruction in tumbling. It is a matter of common knowledge that some students show much more aptitude for athletics than do others. Some enjoy physical exercise; others find games or stunts of any kind very difficult. Frequently students of the same age have very different capacities for physical training. Also, some forms of exercise are considered entirely proper for boys while too strenuous or otherwise undesirable for girls. In the exercise of ordinary care it was the duty of the teachers employed by the school district to take all of these factors with others into consideration in determining the kind of instruction to be given the respondent.

"In her testimony the teacher of the tumbling class said that in order to do the 'roll over two' the student should make an approach to the persons on the floor by a run in good rhythm, neither too fast nor too slow, and take off from the two feet, not from one, making a good spring over the backs of the other students to clear them from 12 to 18 inches. The important thing, she said, is the landing. Describing this she said the performer must land on the hands, with the hands taking the weight of the body almost straight but under control with the head tucked in. The exercise is completed, according to her, by dropping on the shoulders and coming to a standing position with the feet together.

[9–11] "Of the 18 exercises taught in the tumbling class the 'roll over two' is the only one where the body is entirely off the floor for a portion of the time it is being performed. The evidence presented to the jury shows that it requires complete coordination, and the teacher admitted that if for any reason the rhythm required for that type of work is broken, the arms must momentarily stand the full weight of the body going through the air four or five feet; also, that unless there is complete coordination in relaxing the arms and tucking in the head, 'there is liable to be difficulty'. If the student failed to tuck the head under at the proper moment, the teacher said, 'then the head would get it'.

"In addition to this enumeration of the requirements for the exercise, the jury had before it the testimony of the teacher of the tumbling class that proper performance depends not only upon a girl's agility and muscular strength but also upon her mental attitude. Muscular strength is not all that is required, she said. 'You might have muscular strength and not be able to do it.' The jury was told by the respondent that she took the tumbling class work under protest; that the physical education teacher gave her no instruction directly but that she was shown how to do the exercises by advanced students in the class; that in doing the 'roll over two' she had many times fallen on top of the girls on the floor; that she had a bad knee that 'went out' at times; that two weeks before the accident she had fallen in the locker room and that the physical education teacher had dressed her knee with hot compresses; and that she had then told the teacher that her knee was bad and that she did not want to take tumbling; but that the teacher said 'I would have to in order to get my credits.' This and other evidence, if believed by the jury is sufficient to support a verdict for the respondent either upon the theory that the 'roll over two' is not an exercise suitable for senior high school girls or that appellant's employees knew or should have known that because of the respondent's mental or physical condition she was not a proper subject for such instruction, or that the class teacher did not properly instruct and supervise her. It also justifies the implied finding of the jury that the respondent was not guilty of contributory negligence. While there was testimony from teachers of physical education that the 'roll over two' is not dangerous, the evidence also shows that injury could result if it was not performed in a particular way. That the respondent sustained some injury while attempting the exercise is certain. Under the circumstances shown in this case the issue of negligence was solely one for the determination of the jury. Mastrangelo v. West Side U. H. School District, 2 Cal.2d 540, 42 P.2d 634.

"The case of Kerby v. Elk Grove Union H. S. District, 1 Cal.App.2d 246, 36 P.2d 431, 94 A.L.R. 1502, relied upon by the appellant, presents a different situation. There the student died after being struck on the forehead by a basketball while engaged in playing the game at school. But the boy was considered a proficient basketball player and no one knew that he had the physical difficulty which the medical testimony showed was aggravated by the blow and caused death. The court properly held that the instructor was not negligent in permitting the student who appeared to be a vigorous, robust boy, to participate in the game in the absence of any knowledge of his malady. The injury in Hack v. Sacramento City Junior College District, 131 Cal.App. 444, 21 P.2d 477, was caused by the negligent act of students in doing something not particularly directed by the teacher and while he was not present. In Underhill v. Alameda E. School District, 133 Cal.App. 733, 24 P.2d 849, the court held that the statute imposing liability upon school districts is broad enough to cover injuries received by a pupil while playing in a school yard if such injuries are caused by the negligence of the district or its officers or employees, but found the complaint insufficient in its allegations of negligence. Applicable to the instant case is the rule stated in Goodman v. Pasadena City H. S. District, 4 Cal.App.2d 65, 40 P.2d 854, where it was said that a plaintiff may recover by proving either the existence of a danger known to the authorities who neglected to guard the pupils against it or that there was an unknown peril which by the exercise of ordinary care under the same circumstances a reasonably prudent person would have discovered.

[12] "The appellant contends that the trial judge erroneously refused to give to the jury the following instruction proposed by it: 'You are instructed that you are not to substitute your judgment with regard to what is correct and sound educational policy in the conduct of physical education for that of the Board of Education, but you are only to determine whether or not in the carrying out of said physical education work there was any negligence by an employee of defendant which proximately caused the injury suffered, if any, by Belva Bellman.' This ruling was correct. While it does not lie within the province of the jury to determine whether a certain subject should be taught, school authorities may be guilty of negligence in requiring a student to take a particular course of study. The instruction complained of limited the liability of the appellant to negligence 'in the carrying out of said physical education work'. Of course, a school district would not be guilty of negligence if it prescribed a course of study which no student ever took. But the statute does not limit liability to negligence which occurs in teaching a subject, and the instruction may reasonably be interpreted as placing this restriction upon the right of the respondent to recover.

"After the taking of evidence was concluded but before the case was submitted to the jury the appellant asked leave to reopen its case for the purpose of asking Ordell Cohen, the guardian ad litem of the respondent and a witness in the case, whether she had ever been convicted of a felony and also whether she had been arrested on certain occasions. To support its request made at that time, counsel for the appellant presented to the trial judge in the absence of the jury a record which he said he had just then received from the police department. He also said that he had no information other than was shown by it.

[13, 14] "When the motion was made the judge said 'You can ask her if she

has been convicted of a felony, of course.' This was followed by a discussion between counsel concerning the record after which the motion was denied, apparently for the reason that the record or written memorandum giving certain information concerning Ordell Cohen does not show any conviction of a felony but only an arrest and conviction with a sentence of one year in a county jail. Appellant's counsel made no showing that he believed Mrs. Cohen had suffered conviction of a felony at any time and as the motion was made upon the record which was submitted to the court, it was properly denied. A witness may not be impeached by evidence of particular wrongful acts, but the conviction of a felony may be shown. Sec. 2051, Code Civ.Proc.

[15-17] "Appellant also complains that a witness was not allowed to illustrate her testimony by the use of pictures in text books. The admission of photographs or diagrams for this purpose rests largely within the discretion of the trial judge. No abuse of that discretion has been shown. Also, there was no error in refusing to admit in evidence a junior high school bulletin on physical education. The appellant insists that evidence showing 'that the same exercises or stunts were authorized for junior high school girls and performed by them' was relevant to the issues before the court. But the fact that the same exercises were prescribed for younger girls has no evidentiary value. It may be even more negligent to require girls of junior high school age to take certain physical exercises than to make the same requirement for older girls. The fact that the exercises were prescribed for one group does not prove that the school authorities used due care in requiring students of another group to take them.

[18-20] "Concerning the amount of damages awarded to the respondent by the jury, the appellant contends that it is so out of proportion to the injuries shown by the evidence as to require a new trial. While the sum to be allowed as damages for personal injuries is left to the sound discretion of the jury, it is subject to review by the trial judge in ruling upon a motion for a new trial (sec. 657, Code Civ.Proc.), and the power of this court to relieve a defendant from a judgment for damages in an amount so plainly and outrageously excessive as to indicate that it was arrived at as the result of passion or prejudice has often been recognized and exercised. Livesey v. Stock, 208 Cal. 315, 281 P. 70; Epply v. Los Angeles Creamery Co., 216 Cal. 194, 13 P.2d 664; Reneau v. Hirsch, 88 Cal.App. 1, 262 P. 1100. The measure of damages in an action for personal injuries is the amount which will compensate for all the detriment proximately caused by the negligence of the defendant. Sec. 3333, Civ.Code. 'Damages must in all cases be reasonable * * *' (sec. 3359, Civ.Code), but what is a reasonable amount is a question upon which there may legitimately be a wide difference of opinion. Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock a sense of justice and raise the presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts. Slaughter v. Van Winkle, 213 Cal. 573, 2 P.2d 789.

"The respondent claims that her skull was fractured when she fell and the medical evidence offered by her confirmed the fracture and was to the effect that it might result in serious and permanent consequences. On the other hand, while the history given by the respondent showed that after the accident she developed a severe headache and was nauseated and that she later suffered from headache, dizziness, occasional vomiting and loss of weight, her physicians found few objective symptoms. One of her physicians testified that the physical and eurological examinations were negative except for a nystagmus, which is an involuntary oscillation of the eyeball, and the lack of planar reflex on the left side, indicating a mild interference with the nerves of the spinal column. Another physician testifying in her behalf found the nystagmus, which he said was a disturbance of the coordination of the eye muscles, indicating some organic disturbance within the pathways that control the muscular movements of the eye but 'was not a pronounced thing', and some abnormal reflexes. He said that her tendon reflexes were exaggerated, but he added, 'I would not place very positive significance on that except that it was in keeping with the diagnosis as finally made.' He also mentioned that a Babinski test showed some mild disturbance. Concerning this test he said: 'By itself it could not be given, in my mind, a very positive significance, but taken in connection with other findings it might.' He stated as his opinion of the respondent's injuries that at the time of the trial she was suffering from the local and general effects of a brain injury which made prognosis difficult, and that the symptoms complained of might persist for a long time with a 'fair probability' of more serious manifestations.

"Viewing this evidence most strongly in favor of the respondent and giving her the benefit of all reasonable inferences, a verdict of $15,000 is much in excess of the reasonable amount which the law fixes as the measure of damages which the respondent may recover and impels the conclusion that it was arrived at as a result of passion or prejudice. The appellant charged the respondent and her guardian with exaggerating the extent of the injury which the respondent received. In support of this claim the appellant called one witness who testified that immediately before an examination of the respondent by a physician, the guardian directed her to run in order to increase the rate of her heart beats and make her condition appear more serious than it was. Other unfair and misleading practices were charged to the respondent and the guardian. While both the respondent and the guardian denied that the injuries had been exaggerated by them, each admitted that the respondent walked much more than a mile just before one physical examination.

[21] "But assuming that the respondent and her guardian have not exaggerated the injuries, the medical testimony fails to show any certainty of serious permanent injury. The respondent's own physician testified only to a probability of permanent disability. Under section 3283 of the Civil Code, 'damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future'. By this section, in an action for personal injuries recovery is limited so far as physical suffering, or pain, or mental anguish are concerned, to compensation for the consequences which have occurred up to the time of the trial, or it is reasonably certain under the evidence will follow in the future. Melone v. Sierra Ry. Co., 151 Cal. 113, 91 P. 522. The jury may not consider consequences which are only likely to occur. 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' Silvester v. Scanlan, 136 Cal.App. 107, 28 P.2d 97, 99; Bailey v. Yosemite Portland Cement Corporation, 136 Cal.App. 111, 28 P.2d 65. No such certainty is shown in the evidence in this case.

[22-24] "Considering the medical evidence presented by the respondent, an award of $15,000 is grossly excessive and raises the presumption that it could not have been based upon a fair consideration of the facts relating to the injuries which the respondent suffered. The average citizen looks upon school authorities as protectors of the children in their charge and the circumstances of the injury, as related by the respondent to the jury, would particularly arouse the passions and prejudices of parents. But the respondent was only in bed three weeks and has since admittedly assisted in doing housework and performed the duties of a young woman in a home. Measuring the respondent's evidence by the rules which have been stated, the sum of $5,000 is the maximum amount which may be permitted to stand. There is no reason to set aside the verdict of the jury that the appellant was guilty of negligence and liable to the respondent for the injuries proximately occasioned thereby. Pretzer v. California Transit Co., 211 Cal. 202, 294 P. 382. But the appellant is entitled to a new trial upon the sole issue of the amount of damages unless within thirty days from the filing of the remittitur in the court below, the respondent shall remit from the judgment the sum of $10,000."

It is ordered that if such remission be so made then the judgment shall stand affirmed with neither side to recover costs upon appeal; otherwise it shall stand reversed and the cause be remanded for trial upon the issue stated.

SHENK, Justice (dissenting).

I dissent. It seems to me the majority has totally disregarded the rights of boards of education and trustees of school districts to provide courses in physical education in accordance with power vested in them by the law of the state, and has placed within the power of a jury to say whether such courses should be pursued regardless of negligence on the part of the public authorities. Courses in physical education will thus be curtailed or eliminated, depending on the degree of "guess" indulged by the school authorities on what a jury would say about it. My views are expressed in the dissenting opinion of Mr. Justice Nourse sitting pro tempore in this court on the former hearing and in which dissenting opinion I then concurred. That opinion is as follows:

"The complaint charges the district with negligence in general terms. To hold it liable for injuries received in this manner it is necessary to prove that the district was guilty of some act of omission or commission which this court can say as a matter of law is actionable negligence. 'The law does not make the school districts insurers of the safety of the pupils at play or elsewhere.' Goodman v. Pasadena City H. S. Dist., 4 Cal.App.2d 65, 40 P.2d 854, 855.

"The record is silent in so far as proof of any act of negligence is concerned. If it be argued that it was negligent for the school district to give the course of instruction in the first instance, the answer is that it is one prescribed and accepted in thousands of other schools. If it be argued that this particular stunt is inherently dangerous, the same answer holds. Since the true test of negligence is what a reasonable person would do under similar circumstances, the directors of the school district cannot be held negligent in prescribing these exercises in view of the common acceptance of the course by others. Here is a standard of 'due care' established by accepted practice throughout our common schools. Our district cannot be held negligent in simply following this general standard.

"There is nothing left but the asserted negligence of the instructor, first, in her method of handling the class, and second, in permitting plaintiff to do this stunt at this particular time. As to this, there is no evidence of incompetency or neglect in her manner of instruction. To the contrary the only evidence on the subject shows that the class was brought on carefully and skillfully until the close of the semester when the girls were all prepared to perform these stunts for their grades. The plaintiff frankly testified that she had gone through all this development successfully and had performed this particular stunt more than forty times before and during the day in which she was injured.

"It is intimated that the instructor might have been negligent in permitting plaintiff to do the stunt on this particular day because of a previous knee injury. The alleged injury to the knee occurred two weeks before the date of the injury sued on. During the period following, plaintiff continued to perform this stunt and others on numerous occasions twice a week without complaint and without notice to her instructor that she had any difficulty or distress. The 'knee injury' was plainly an afterthought greatly overemphasized by her counsel. But, assume it to be true, still after this injury the plaintiff continued with the course unhampered, participated in all her other class activities, and, on the day of the accident she voluntarily went to her teacher, told her she had accomplished the stunt, that she was *ready* for her test, and asked her teacher to observe her for her marking. The injury resulted from her improper use of her hands. She did not at any time attribute it to her knee. Her explanation is: 'Q. What happened to you. A. As I was running up to go over the girls my hands went over and they went underneath me and I went down on the mat and I hit my head on this side.' A number of other girls in the class who witnessed the accident testified that plaintiff 'took off' on one foot, whereas, they had all been trained to take off on both feet. This is what caused her fall, and this is not controverted in any respect whatever. The stunt was the last of a series of eighteen given in the course. It was necessary for the pupil to pass but *ten* of the eighteen to get her grade. It was *not* necessary for her to do the 'roll over two'. She chose this voluntarily and never complained to her instructor that it was too hard or too dangerous or that she had any difficulty or pain. Her protest was to the course as a whole. She wanted to take any easier course for the same grade—a very common desire among pupils in all schools.

"This case is of far greater importance than the amount of the verdict. It charges the school district with negligence when it has done nothing more than follow the rules and regulations in accordance with universal practice; it condemns as careless and negligent a competent and faithful teacher who just did her duty as prescribed for her in the rules and regulations. It opens the door to suits for damages for any injury which a pupil may sustain—not only upon the school premises, but on the street or at home, because it holds that the jury is the final judge of *what is negligence* and hence, may give damages at its will. In effect it holds that each jury may determine what in its judgment is a proper course of instruction, whereas the state has committed that function to the school authorities.

"The opinion is unfair to the school district and to the entire structure of education throughout the state. No district and no teacher can tell whether physical education is condemned as negligence in all cases, or whether it is the duty of the teacher to examine and *know* the physical and mental condition of every pupil, and assume liability if any injury occurs to a pupil by reason of such physical and mental condition at any time and at any place.

"Confusion must result from the opinion because of the difficulty in determining its rule. What is the rule of this case? Is it that if there is any hazard in a course of instruction the district is liable for any injury resulting therefrom? If so the schools are negligent *as a matter of law* for giving that course, though the state school law may authorize or require it. Is it intended to hold that a teacher is negligent if she permits a pupil to take a course which carries some hazard, or if the pupil is later found to have been physically unfit? If so the teacher must have medical training to determine the physical fitness of each pupil. Is it the rule that negligence results when injury arises in a course which is taken under protest? The opinion states that some girls enjoy the exercises, but that this plaintiff took it under protest. The same is often true as to Latin, algebra and the sciences. Would it follow that the district is liable if a girl gets a headache when she takes algebra under protest? This girl was a healthy specimen weighing 117 pounds and had never before complained to the teacher of physical weakness or sickness—except as to the so-called knee injury. How can it be said that the district was negligent in permitting her to take the course in the first instance? Is it the rule of the case that this course is 'inherently dangerous' or is this confined to the particular stunt of 'roll over two'? The opinion states that the stunt *might* be inherently dangerous—that means injury might result if it is not done properly. Every athletic event, the R. O. T. C., the courses in physics, chemistry, the simple game of tennis or hockey—even the old fashioned 'wand' exercises—would likewise be 'inherently dangerous' because injury might result in any of them. The opinion states that the exercise might have been 'too strenuous or otherwise undesirable for girls'. This goes to the entire course of physical education for girls throughout the entire school system of the state. Does the opinion hold that the district is negligent in prescribing the course in the first instance, because girls are too weak generally, or because they are unable to absorb instruction to perform properly? Or is it intended merely to hold that the courts and not the school authorities should determine what courses of instruction should be given?

"The opinion fails to pass on any of these elements positively. It does say that all these circumstances taken together would support an *inference* of negligence. This is sound if any of the 'circumstances' is negligent in itself. But this is not sound if *no one* of the elements is actionable negligence as a matter of law. The sum of nothing plus nothing equals nothing.

"Where the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances a question of law is presented. Ross v. Pacific Elec. R. Co., 39 Cal.App. 658, 179 P. 538; Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P. 1109. It is error to say that negligence is always a question of fact for the jury. The truth of the facts is to be determined by the jury but if these facts do not as a matter of law constitute actionable negligence it is a question of law for the court. Negligence cannot be inferred when the only facts proved are such that reasonable minds—not sympathy—can draw but one conclusion—that there was no negligence. It must be borne in mind that this is not a question of conflict in the evidence. We have given to the respondent every presumption of truth in her evidence and still there is no evidence of any act of commission or of omission by the school district or by its employee which can, as a matter of law, be designated as actionable negligence."

We concur: LANGDON, J.; HOUSER, J.

MONDINE v. SARLIN et al.

L. A. 16606.

Supreme Court of California.

July 27, 1938.

Rehearing Denied Aug. 25, 1938.

1. Negligence 🔑32(1)

An owner owes no duty to a patron or business invitee to keep premises in a condition of absolute safety and is not bound to discover defects which reasonable inspection would not disclose.

2. Negligence 🔑32(1)

An owner of business premises is required to have a superior knowledge of dangers which would not be obvious to a patron if such dangers are discoverable in the exercise of due care.

3. Explosives 🔑9

In action for injuries sustained by buyer of gasoline while gasoline was being pumped from seller's storage tank to buyer's tank truck by means of an electric motor-driven gasoline pump, when an explosion was caused by sparks from the pump, under evidence that buyer had previously used pump and seller had used pump continuously for over three years but had not inspected the apparatus at any time prior to the explosion, questions whether seller had made reasonably frequent inspection of his equipment and whether inspection would have revealed a defect were for jury.

4. Negligence 🔑72

The imminent peril rule has no application where one voluntarily leaves a place of safety and places himself in danger.

5. Explosives 🔑9

In action for injuries sustained by buyer of gasoline when an explosion occurred while gasoline was being pumped from seller's storage tank to buyer's truck by means of an electric pump, where explosion was caused by sparks from the pump, buyer was within 20 feet of the pump when he discovered the danger, and buyer attempted to disconnect motor, imminent peril rule applied.

6. Explosives 🔑9

In action for injuries sustained by buyer of gasoline when gasoline exploded while being pumped from seller's storage tank to buyer's truck by means of an electric pump, of which buyer was in charge, buyer was within 20 feet of motor at time he discovered sparks flying therefrom, and buyer was attempting to disconnect motor at time explosion occurred, question of reasonableness of buyer's decision, as regards contributory negligence, was for jury.

7. Damages 🔑96

The sum to be allowed as damages for personal injuries is within the discretion of the jury.

8. Appeal and error 🔑1004(1)

Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock the sense of justice and raise a presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts.

9. Damages 🔑132(1, 15)

$20,000 was excessive and $10,000 was adequate, where 49-year-old independent oil dealer, whose average annual net income was from $2,500 to $3,000, received extensive third-degree burns involving the whole right side of his body, was confined to hospital for a month and to his bed at home for six months, more than 200 skin grafts had been performed and more were to be made, medical expenses amounted to $1,200 at time of trial, use of right arm and hand was partially impaired, but he had been re-engaged in his former business of truck driver and independent dealer since recovery so that earning power was but little impaired, and disfigurement was permanent.

10. Appeal and error 🔑1178(6)

Where verdict was proper in all respects except as to damages, retrial of negligence issues was not required, and appellant was entitled to a new trial on issue of damages only in case of respondent's failure to file remittitur.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Joe Mondine against Jean P. Sarlin and others to recover for personal injuries resulting from an explosion of gasoline. Judgment for plaintiff for $20,000, and the named defendant appeals.

Affirmed on condition of remittitur of $10,000.

For prior opinion, see 72 P.2d 930.

Joseph Scott, J. Edward Keating, and Robert F. Shippee, all of Los Angeles (J. Howard Ziemann, of Los Angeles, of counsel), for appellant.

William M. Rains, E. D. Reiter, Ellis D. Reiter, Walter S. Barrette, and Francis M. Reiter, all of Los Angeles (Albert L. Denney, of Los Angeles, of counsel), for respondent.

EDMONDS, Justice.

By the verdict of a jury the plaintiff was awarded $20,000 in an action for personal injuries resulting from an explosion of gasoline. The defendant Jean Sarlin has appealed from the judgment.

At the time of the accident the appellant owned a plant for the storage and sale of gasoline in wholesale quantities. On the morning of the accident the respondent, who was in the business of trucking and selling petroleum products, drove his tank-truck to the appellant's premises for the purpose of buying gasoline. The service tank from which he usually filled his truck was empty, and he volunteered the use of his truck to fill this tank from a storage tank located a short distance away. He placed his tank-truck, which had a capacity of 1000 gallons, near the storage tank and helped one of appellant's employees place a portable electric pump in position. The appellant provided a two-inch rubber hose to connect the storage tank and the pump. Another hose was connected to the discharge end of the pump and inserted into the tank on the truck through a dome.

A flexible cable, consisting of four wires encased in random lengths of rubber garden hose was connected at one end to a power line in the switch house. The other end of this cable terminated in a four-prong plug, which was inserted in a socket on the motor. The electricity could be turned on or off either by a switch in the switch house or by pulling the plug from the socket.

After the hose connections were made, the appellant turned on the electricity and gasoline began to flow into the tank-truck and he and one of his employees who had assisted in setting up the pump left the scene, leaving the respondent alone. Mondine then stepped on the running board of his truck in a position where he could see the amount of gasoline flowing into it.

According to his testimony, about eight or ten minutes after the pumping commenced he glanced at the electric motor and saw sparks four or five inches long coming from it. He estimated that at that time the tank on his truck was a little less than half full. Jumping to the ground he started for the motor, intending to disconnect it from the power by pulling the cable out of the socket. Before he reached the motor an explosion occurred. The hose pulled out of the tank on the truck, spraying gasoline over a considerable area. Some of this gasoline fell on the respondent, whose clothes caught on fire, causing him to be severely burned.

The evidence shows that the motor and the pump had been used by the appellant almost daily for more than three years. During that time, it appears, there was no indication of any defect in the motor and the respondent himself had used the same equipment on numerous occasions before the accident occurred. In view of these facts the appellant contends that there is no substantial evidence to establish negligence on his part. More specifically, he argues that the defect in the motor was latent and that he, therefore, owed no duty to the respondent to discover it.

[1, 2] An owner owes no duty to a patron or business invitee to keep his premises in a condition of absolute safety and is not bound to discover defects which reasonable inspection would not disclose. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793. But he is required to have a superior knowledge of dangers which would not be obvious to the patron if such dangers are discoverable in the exercise of due care. Sec. 344, Restatement of Torts; Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630. In the present case the respondent was performing a gratuitous service for the appellant's benefit and he had a right to expect that the apparatus furnished him for that purpose was in reasonably safe condition. One who supplies a chattel for another to use for the supplier's business purposes is under a duty "to exercise reasonable care to make the chattel safe for the use for which it is supplied" and "to discover its dangerous character or condition". Sec. 392, Restatement of Torts. In comment b. following this section it is said: "A person so supplying goods is required

not only to give warning of dangers which he knows are involved in the use of the article, or which from facts within his knowledge, he knows are likely to be so involved, but also to subject the article to such an inspection as the danger of using it in a defective condition makes it reasonable to require of him." In Harvey v. Machtig, 73 Cal.App. 667, 239 P. 78, it was said (page 80): "To use and keep in operation a device or apparatus upon which the safety of human life depends, without it being frequently or properly tested as to its continued strength and efficiency to meet the purposes for which used, is not such reasonable care as a prudent man should take to guard the safety of those intrusted to his protection."

[3] There is no evidence that the appellant made any inspection of the apparatus at any time prior to the accident. Considering the dangerous use to which the motor was constantly subjected, it was clearly for the jury to decide not only whether the appellant had made reasonably frequent inspection of his equipment but also whether inspection would have revealed a defect. It is true that a witness for the appellant testified that an inspection of the motor made after the accident disclosed no defects, but it was admittedly, examined under different conditions, and the jury was at liberty to accept respondent's testimony that the motor was sparking at the time of the explosion as the cause of the accident.

There is a further ground upon which the jury's implied finding of negligence may be sustained. The motor used was an open-vent model, i. e., its mechanism was exposed by four ventilating windows in the casing. Considering the fact that this motor was being operated in proximity to a highly inflammable substance, this court cannot say as matter of law that the appellant acted with reasonable prudence in leaving the respondent alone in the attendance of the apparatus. Had he or his employee remained near the pumping apparatus, the sparks might have been discovered before the respondent saw them or the current disconnected at an earlier time.

[4-6] Nor do the facts shown compel the deduction that the respondent was contributorily negligent. The appellant argues that the evidence established that the respondent knowingly and voluntarily approached a known danger and that he may not invoke the doctrine of "imminent peril". The fallacy apparent in the appellant's contention is that he assumes the respondent was not in a position of danger at the time he discovered that the motor was sparking. The imminent peril rule has no application where one voluntarily leaves a place of safety and places himself in danger (Bartuluci v. San Joaquin Light & Power Corp., 21 Cal.App.2d 376, 69 P.2d 440), but the facts here shown do not present such a case. Respondent was on the truck and within twenty feet of the motor when he discovered the danger. He was within the zone of peril at the time and there was no opportunity for mature deliberation. He was faced with the immediate choice of running away or of turning off the electricity either at the motor or in a switch house nearby. The jury could well conclude that his decision to disconnect the electric plug at the motor was not unreasonably imprudent under the circumstances. The fact, as he testified, that the thought of serious danger to the appellant's uninsured property flashed through his mind does not necessarily indicate that he had time to reflect. The reasonableness of his decision was properly a question for the jury. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53.

[7, 8] The appellant finally contends that the amount of damages awarded to the respondent by the jury is greatly out of proportion to the injuries which he received. While the sum to be allowed as damages for personal injuries is within the discretion of the jury, the power of this court to relieve a defendant from a grossly excessive judgment has often been recognized and exercised. Livesey v. Stock, 208 Cal. 315, 281 P. 70; Epply v. Los Angeles Creamery Co., 216 Cal. 194, 13 P.2d 664. But before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock the sense of justice and raise a presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts. Slaughter v. Van Winkle, 213 Cal. 573, 2 P.2d 789.

At the time of the accident the respondent was 49 years of age. His average annual net income for seven years preceding the accident had been between $2,500 and $3,000. He received extensive skin and third degree burns involving the whole right side of his body from the right ear and right side of his face to his right thigh. Undoubtedly these burns caused considerable pain. He was confined to the hospital for about a month and to his bed at home for about six months. More than 200 skin grafts had been performed at the time of the trial, and others were to be made. The cost of hospitalization and medical service amounted to about $1,200 at the date of trial. A physician testified that the resulting scars would be permanent and that the function of the right arm and hand would be impaired. According to the witness he will never be able to close his right hand completely. As against the evidence concerning respondent's disability, the parties have stipulated that in February, 1938, respondent was, and for six months prior thereto, had been engaged in his former business and occupation of truck driver and independent dealer in petroleum products "except that he no longer engages in the tasks of loading and handling the hose connected with such occupation". This shows that his permanent disability is much less than that expected by his physician and that his earning power has not been greatly impaired.

[9] Considering these facts, it is apparent that practically the only permanent injury which respondent has sustained is the disfigurement of the right side of his body and the partial impairment of the use of his right hand. There is no medical testimony that the burns he received had any permanent deleterious effect upon his health or will produce serious consequences in the future. Under these circumstances, the jury's award of $20,000 is obviously excessive and raises a presumption that it could not have been based upon a fair consideration of the facts relating to the injuries which respondent suffered.

[10] Measuring the respondent's evidence by the rules which have been stated, the sum of $10,000 is the maximum amount which may be permitted to stand. However, in view of the conclusion that the verdict was proper in all respects except as to damages, there is no necessity for a retrial on the issues of negligence. Pretzer v. California Transit Co., 211 Cal. 202, 294 P. 382. The appellant is entitled to a new trial upon the sole issue of damages unless within thirty days from the filing of the remittitur in the court below, the respondent shall remit from the judgment the sum of $10,000. If such remission be made, then the judgment shall stand affirmed with neither side to recover costs of appeal; otherwise, it shall stand reversed and the cause remanded for trial upon the issue of damages.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; HOUSER, J.; SHENK, J.

11 Cal.2d 601

COATS v. GENERAL MOTORS CORPORATION.

S. F. 15838.

Supreme Court of California.

July 27, 1938.

Rehearing Denied Aug. 25, 1938.

1. Appeal and error 🔑1097(3)

Where it was once determined as the law of the case that evidence supported verdict in favor of plaintiff, who was suing former employer for stock allegedly due under employer's bonus plan, any additional evidence which was merely cumulative or contradictory gave rise only to questions of weight and credibility which were exclusively for the jury.

2. Master and servant 🔑73(3)

The fact that corporate employer's bonus plan, which precluded recovery by branch manager in case of dismissal because of unsatisfactory service, purported to constitute the employer's executive committee the sole judge of the cause of dismissal, and that executive committee found that employee had been dismissed for unsatisfactory services, did not preclude employee from recovering for stock due under the plan, where committee's finding was contrary to fact.

3. Appeal and error 🔑930(4)

Where jury was instructed that to return verdict for plaintiff it must find that certain requirements had been fulfilled, the Supreme Court would assume that on that

issue the jury in returning verdict for plaintiff found for the plaintiff.

4. Appeal and error ⚷1099(1)

The law of the case extends to all matters without which the first decision could not have been rendered.

5. Evidence ⚷460(2)

The question of what was released by receipt was open to explanation or elucidation by parol evidence where receipt was ambiguous.

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In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Fred N. Coats against the General Motors Corporation for the value of stock claimed to have been wrongfully withheld by defendant. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Prior opinion, 64 P.2d 1168.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, Alfred Sutro, Eugene M. Prince, and Eugene D. Bennett, all of San Francisco, and O. D. Hamlin, Jr., of Oakland (Donahue, Hynes & Hamlin, of Oakland, of counsel), for respondent.

SHENK, Justice.

This is an appeal by the defendant from a judgment on a verdict awarding $148,980.06 to the plaintiff in an action for the value of stock claimed to have been wrongfully withheld. The case was twice tried. The first trial resulted in a directed verdict. From the judgment entered thereon both parties appealed. That judgment was reversed on the ground that the evidence and the inferences fairly to be drawn therefrom required the factual issues to be decided by the jury. Coats v. General Motors Corporation, 3 Cal.App. 2d 340, 39 P.2d 838. The issues of fact were submitted to the jury on the second trial in compliance with the decision on appeal. The only question to be determined is whether the evidence in the present record is sufficient to support the verdict.

The amount of the verdict is not questioned. It is not contended that the same evidence, which on the former appeal was held to require the submission of the case to the jury, was not presented on the subsequent trial. It is the defendant's contention on this appeal that the additional evidence, introduced at the second trial, considered with the plaintiff's evidence, now requires a reversal and a direction that judgment be entered for the defendant.

The opinion on the first appeal is referred to for a more extended recital of the facts.

In 1918 the plaintiff was employed by Willys Overland as branch manager at an annual salary of $15,350. He severed that connection to accept employment with Chevrolet Company at $7,500 a year and participation in the General Motors Corporation bonus plan. That plan contemplated distribution of corporation stock "as a reward to certain of its employees, including employees of its subsidiary companies" (of which Chevrolet company was one), "who have contributed to its success in a special degree by their invention, ability, industry, loyalty, or exceptional service and whom it is deemed desirable to have interested as stockholders and partners in the corporation's prosperity." In addition to such "special service" bonuses, "conspicuous service" bonuses were awarded to "those who have contributed most in a general way to the corporation's success." A bonus fund was established by setting aside a percentage of the corporation's net earnings which was invested in common stock of the corporation. In December of each year, after considering the recommendations made by division heads, the president of the defendant corporation submitted to the finance committee his list of employees who were in line for bonus awards. In January, awards were made by the finance committee of common stock for services rendered the preceding year. When the awards were made certificates for the number of shares allotted were issued in the names of the employees so rewarded. Certificates representing one fourth of the award were delivered immediately. The balance was delivered to the bonus custodian who held it for delivery one fourth at the end of one year, one fourth at the end of two years, and the last fourth at the end of three years. The beneficiary of the award was required to execute an irrevocable power of attorney which would enable the bonus custodian to retransfer the stock to the corporation should the employee leave the service. A system of accounting was used by which credits were established and accumulated monthly at the rate of one-forty eighth of the total amount of undelivered stock. The plan expressly provided that "if a beneficiary leaves the service of the corporation of his own volition, or is dismissed because of unsatisfactory service, (of which the executive committee shall be the sole judge), that portion of his bonus represented at the time by the debit balance of his account shall revert to the bonus fund, and a certificate for the portion of his bonus represented by the total credits in his account shall be delivered to the beneficiary free from all restrictions, provided, however, that no fractional share shall be issued. Any fractional share to which the beneficiary is so entitled shall be purchased at the then market value thereof out of the money in the bonus fund. All amounts forfeited by such beneficiary shall revert to the bonus fund. Should a beneficiary be dismissed from the service of the corporation for no fault of his own with an entirely satisfactory record (of which the executive committee shall be the sole judge), he may continue a beneficiary under the bonus plan to such an extent as the executive committee may determine. Subject to the rights of the bonus custodian to retain possession of the stock certificates or to transfer the stock as herein provided, an award shall vest the beneficiary with all the rights of a stockholder in the stock awarded, including the right to vote and to receive dividends thereon, but excepting, however, the right to sell, assign, or pledge his interest in the stock."

A few months after his employment by Chevrolet the plaintiff was promoted and sent to St. Louis in charge of sales. In 1922 he was made zone sales manager for the Pacific Coast and transferred to California. In 1923 he was elected vice president of Chevrolet Motor Company of California, and in 1925 he was made regional sales manager over territory comprising seven states. Increases in his annual salary brought it to $21,000. In each year of his service he was awarded a conspicuous service bonus. In August, 1926, the corporation declared a 50 per cent. dividend on the common stock which it issued in the form of stock. Under the plan the plaintiff thus became entitled to dividend stock to the amount of dividends declared on the bonus stock previously awarded to him, including that portion thereof not yet delivered. The dividend stock on undelivered bonus stock, however, was treated by the parties and by the court as subject to the same plan for distribution as the undelivered bonus stock.

In December, 1926, on recommendation of R. H. Grant, an officer, and William S. Knudsen, president of the Chevrolet company, the defendant's president, Alfred P. Sloan, Jr., recommended the plaintiff for a 1926 bonus award, which was accordingly made. On the following January 2nd, however, upon the plaintiff's arrival in Detroit, he was informed by Mr. Grant of his dismissal. The present action was to recover the value of undelivered dividend and bonus stock, comprising one-fourth of the 1924 bonus award, half the 1925 award, and three-fourths of the 1926 award, with the exception of a fractional share represented by the sum of $41.88 for which the plaintiff receipted on March 30, 1927.

[1, 2] On the second trial as on the former trial there was evidence that the dismissal of the plaintiff by Mr. Grant was made on the latter's own decision, and that the announcement thereof to the plaintiff was accompanied by an admission on the part of Grant that the cause thereof was not dissatisfaction with his services. There is further and independent evidence in the record that the plaintiff's services were considered satisfactory. The defendant contends that the resolution of the executive committee, in the light of the additional evidence produced by it, supplants any inferences which might be drawn from the contradictory evidence. That resolution states: "Resolved that in view of the fact that the services of Mr. F. N. Coats were terminated January 1st, 1927, because his work had not been satisfactory to the corporation all bonuses due him be cancelled as of that date." We may assume that the jury found that the resolution had in fact been adopted, which under the evidence was also a question for its determination. The resolution was also a part of the record on the former appeal. It was not then considered sufficient to overcome the favorable case presented by the plaintiff. The additional evidence relied upon by the defendant on this appeal consists in part of the views expressed by the individual members of the committee or other executives of the defendant on the matter of their dissatisfaction with the plaintiff's services. Such evidence, and additional evidence on other disputed

facts, merely served to continue the conflict in the evidence. It did not overcome as matter of law the effect of the evidence tending to prove that the reason for the dismissal of the plaintiff was not because of unsatisfactory services. It once having been determined as the law of the case that the latter evidence was support for a verdict in the plaintiff's favor, any additional evidence which was merely cumulative or contradictory gave rise only to questions of weight and credibility which were exclusively for the jury. Hoffman v. Southern Pac. Co., 215 Cal. 454, 457, 11 P.2d 387; Andrew v. Bankers' & Shippers' Ins. Co., 125 Cal.App. 24, 13 P.2d 515; Gates v. Pendleton, 71 Cal.App. 752, 236 P. 365; Burns v. Jackson, 53 Cal.App. 345, 200 P. 80. We cannot accede to the defendant's contention that the executive committee's finding that the plaintiff's dismissal was for unsatisfactory services and the additional evidence relied upon by it makes an end of the case. Obviously the crux of the entire controversy is whether the plaintiff was in fact dismissed for unsatisfactory services; in which event alone under the plan was it contemplated that he should be wholly deprived of stock which previously had been awarded to him as compensation for conspicuous services. No contention is made herein that the executive committee passed upon the question of whether the plaintiff's services were satisfactory. Its function was to determine whether or not the cause of the dismissal was for unsatisfactory services, and to terminate or continue the plaintiff's bonus rights accordingly. On the evidence in the present record the jury could conclude that the purported finding of the executive committee was contrary to the fact and that the plaintiff had not in truth been dismissed for unsatisfactory services. This is not a case which calls for the application adversely to the plaintiff of the rule stated in 6 Cal.Jur. pp. 417-418 and cases cited and relied on by the defendant, that the decision of the party who must be satisfied by the character of the performance is conclusive upon the employee; nor of the rule next stated in the same text that the decision of a third party or an umpire in whom that power resides is likewise conclusive. In this case the circumstance that the bonus plan purported to constitute the committee the sole judge of the cause of dismissal is unavailing where its finding is contrary to the fact. Long v. Chronicle Publishing Company, 68 Cal.App. 171, 228 P. 873; Fidelity & Casualty Co. of New York v. Eickhoff, 63 Minn. 170, 65 N.W. 351, 30 L.R.A. 586, 56 Am.St.Rep. 464; see also, Trevellick v. Western V. M. Ass'n, 237 Ill.App. 493, 498, 499.

[3, 4] The defendant urges that nevertheless a reversal should follow from the application of the provisions of the bonus plan which empower the executive committee to say to what extent the employee shall continue as a beneficiary of the plan should he be dismissed from service for no fault of his own with an entirely satisfactory record. An answer to this contention is that those provisions contemplate that there shall be a continuation of the benefits to some extent, which was not the action of the committee in this case. Also in this respect it cannot be said that the plaintiff has not produced proof that he was dismissed "with an entirely satisfactory record" and "for no fault of his own". The jury was instructed that it must find that these requirements as well had been fulfilled. It must be assumed that on that issue the jury found for the plaintiff. Furthermore, the legal sufficiency of the plaintiff's evidence in that regard is concluded by the former decision. The law of the case extends to all matters without which the first decision could not have been rendered. Davis v. Edmonds, 218 Cal. 355, 23 P.2d 289.

[5] The defendant finally contends that the effect of the plaintiff's execution of the receipt of March 30, 1927, was to release the defendant from any and all demands for further delivery of bonus or dividend stock. This question was determined adversely to the defendant's contention on the former appeal. The receipt was there held to be sufficiently ambiguous in character to support a finding that the plaintiff was receipting merely for the amount due for a fractional share, as in prior similar transactions, and that the receipt did not purport to cover stock awarded and earned but not yet deliverable under the terms of the bonus plan. The question of what was released was open to explanation or elucidation by parol evidence. Carpenter v. Markham, 172 Cal. 112, 155 P. 644; Coats v. General Motors Corporation, supra.

No greater merit may be accorded the contention reiterated on this appeal that the plaintiff's delay in bringing the action precludes him from any recovery under the facts presented. That question also was concluded by the decision on the former appeal.

No error appears in the rulings on the admission of evidence or in the instructions to the jury. They were in accord with the views expressed by the court in its decision on the former appeal. We conclude that the additional evidence introduced on the second trial had no greater effect than to perpetuate the conflict and that there is evidence in the present record which is sufficient support for the jury's verdict.

No other points require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; HOUSER, J.; LANGDON, J.; CURTIS, J.

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11 Cal.2d 570

PALMANTEER v. PALMANTEER.

L. A. 16545.

Supreme Court of California.

July 25, 1938.

1. Divorce 🔑27(1)

Acts of cruelty committed subsequent to the separation of a husband and wife may afford proper grounds for divorce.

2. Divorce 🔑130

Uncorroborated testimony of husband concerning cruelty of wife with evidence of specific act of cruelty occurring several years after separation of husband and wife which was corroborated by testimony other than that of husband *held* sufficient to support decree of divorce on ground of extreme cruelty. Civ.Code, § 130.

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Suit for divorce by Cleyon Earl Palmanteer against Irene Palmanteer. From an interlocutory decree for the plaintiff, defendant appeals. On plaintiff's motion to dismiss appeal or affirm decree.

Decree affirmed, motion denied.

Frank E. Carleton, of Los Angeles, for appellant.

O. E. Farnham and Marshall & Farnham, all of Long Beach, for respondent.

WASTE, Chief Justice.

This is an appeal by defendant from an interlocutory decree in favor of plaintiff in an action for divorce on the ground of extreme cruelty. Plaintiff moves this court to dismiss the appeal or affirm the decree.

[1, 2] No substantial question is presented. Appellant challenges the sufficiency of the evidence to support the findings and decree. The evidence was in direct conflict. This conflict was resolved in favor of plaintiff by the trial court and there is no reason to disturb its conclusion. Plaintiff alleged and testified to the commission against him of four specific acts of cruelty, one of which occurred several years after he and defendant had separated. The commission of this one act only was corroborated by testimony other than that of the parties. Appellant urges that such corroboration was not sufficient to satisfy the requirements of section 130 of the Civil Code. The contention is without merit. Acts of cruelty committed subsequent to the separation of a husband and wife may afford proper grounds for divorce. Cardinale v. Cardinale, 8 Cal.2d 762, 768, 68 P.2d 351; Stitt v. Stitt, 8 Cal.2d 450, 65 P.2d 1297; MacDonald v. MacDonald, 155 Cal. 665, 672, 673, 102 P. 927, 25 L.R.A.,N.S., 45. The evidence in this case as a whole, including the testimony corroborating commission of one of the four alleged acts of cruelty, contains sufficient support for the findings and decree. 5 Cal.Jur.Supp., sec. 95, 96, pp. 271 et seq. and cases cited.

The decree is affirmed. Motion denied.

We concur: SHENK, J.; HOUSER, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.; CURTIS, J.

11 Cal.2d 571

Ex parte ELLIS.

Cr. 4157.

Supreme Court of California.

July 26, 1938.

1. Municipal corporations 🔑600

Municipalities may regulate the use to be made of property in the interest of the public health and welfare, so long as the attempted regulation is not unreasonable or arbitrary.

2. Municipal corporations 🔑122(2)

Every intendment is in support of the lawfulness of the exercise of the police power, and courts will not interfere with such exercise except in clear cases.

3. Municipal corporations 🔑600

An ordinance of the city of Los Angeles prohibiting the keeping of bees within the city except in designated areas is valid as enforced in a district devoted primarily to residence purposes, since bees may become a nuisance in residential areas. St. 1877–78, p. 642.

◆

In Bank.

Proceeding in the matter of the application of Edna Ellis for a writ of habeas corpus, to obtain release from custody under conviction for violation of a city ordinance.

Writ discharged and petitioner remanded.

See, also, 76 P.2d 516.

S. S. Hahn and W. O. Graf, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., John L. Bland, Deputy City Atty., and George William Adams, Deputy City Atty., all of Los Angeles, for respondent.

SHENK, Justice.

The petitioner seeks her release from custody in this proceeding in habeas corpus. She was charged and convicted of keeping bees on her home place in the city of Los Angeles contrary to the provisions of a city ordinance. She attacks the constitutionality of the ordinance.

The facts are stipulated. The petitioner owns five lots contiguous to her home at 4041½ Sequoia street in the city of Los Angeles. The lots have a frontage of fifty feet each on Sequoia street and a depth of 147.68. They abut upon lots of similar size which are improved with residences. The lots owned by the petitioner as well as other lots on Sequoia street are improved with residences. The neighborhood is built up with the exception of an occasional vacant lot. In the rear half of one of her lots the petitioner keeps several hives of bees which she alleges are "maintained in a sanitary condition, are neither vicious nor dangerous, and are not the source of offensive smells or odors." She also alleges that there are fruit trees and flowers growing upon her property.

The petitioner's property is near the northerly boundary of a general district which is about one half mile in width and extends southerly for about two miles. Beyond its westerly boundary is the Los Angeles river and beyond that is Griffith park, the nearest boundary of which is approximately a half mile from the petitioner's property.

The city ordinance under which the petitioner was convicted provides: "No person shall keep any bees in or upon any premises in this City. Nothing in this section shall be deemed or construed to prohibit the keeping of bees in a hive or box located and kept within a school house for the purpose of study or observation, or to prohibit the keeping of bees within that certain territory annexed to this city on May 22, 1915, and known as the 'San Fernando District', and that certain territory annexed to this city on June 14, 1916, and known as the 'Westgate District.'"

This ordinance is an outgrowth of a prohibition against the keeping of bees enacted by the city council in 1905 pursuant to the power conferred by Statutes of 1877–78, page 642, and the first freeholders charter of the city adopted in 1889, St.1889, p. 455. The statute referred to expressly included the power to regulate or prohibit the "keeping of bees", specified as one of the subjects of police regulation which included also gambling houses, bawdy houses, and "any and all obnoxious, offensive, immoral, indecent or disreputable places of business or practice." As new territory was annexed to the city of Los Angeles, exceptions were effected by ordinance as to the more rural communities, but as these communities became urban in character, they were included within the prohibition. Thus in 1917 an amended ordinance excluded from its provisions the Palms, San Fernando Valley, Bairdstown and Westgate additions to the city. In 1930 the Bairdstown addition was included within the scope of the ordinance, and in 1931 the Palms. So that when the return herein was made there were but two exceptions, San Fernando Valley and Westgate additions, within the corporate limits of the city of Los Angeles, where beekeeping was not prohibited. It is conceded that the petitioner commenced the keeping of bees in the section wherein she is a resident after the adoption of the ordinance prohibiting beekeeping in that locality.

[1] The propriety of regulating the use to be made of property in the interest of the public health and welfare, so long as the attempted regulation is not unreasonable or arbitrary, may not be questioned. Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248; Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L. Ed. 348, Ann.Cas.1917B, 927. The petitioner questions the reasonableness of the regulation in view of the fact that in the San Fernando Valley and in the Westgate addition there are some sections which are residential and others which are industrial in character, and she contends that to permit beekeeping in such sections and to prohibit it in the area where the petitioner resides is an unreasonable, arbitrary and unlawful discrimination in the exercise of the police power.

It would serve no purpose in this inquiry to dwell at length upon the extent and benefits of the bee industry in this state. The petitioner lays great stress on those advantages generally and stresses particularly the benefits to the residents in her community resulting from the cross-pollination of the fruit blossoms and flowers in addition to the commercial value of the bees. These advantages may be conceded. Nevertheless if there is still a reasonable basis for the exercise of the police power in prohibiting beekeeping within the city limits, and in excepting from that prohibition only the districts named, the ordinance will be upheld as a constitutional exercise of the power.

[2, 3] The stipulation of facts shows that, although in San Fernando Valley there have developed several densely populated districts, the greater part thereof is devoted to farming, gardening, fruit raising and ranching; that the portion of Westgate addition south of Beverly and Wilshire boulevards to the easterly line of the addition has become densely populated, but that all of that addition west and north of Beverly and Wilshire boulevards is rugged country, mainly uninhabited. The district in which the petitioner resides does not possess generally the characteristics of a farming or agricultural community. It is devoted solely to residence purposes, with the possible exception of some commercial, business or industrial enterprises. No contention can be made here such as was made and sustained in the cases of Pacific Palisades Association v. City of Huntington Beach, supra, Curtis v. City of Los Angeles, 172 Cal. 230, 156 P. 462, and In re Smith, 143 Cal. 368, 77 P. 180, to the effect that the ordinance was enacted under the guise of regulation and segregation but was in fact to insure a monopoly to a similar enterprise in an unrestricted district, and therefore oppressive and unreasonable. The cases just cited, as well as others, recognize that every intendment is in support of the lawfulness of the exercise of the police power and that "it is not the province of courts, except in clear cases, to interfere with the exercise of that authority." Pacific Palisades Ass'n v. City of Huntington Beach, supra, page 217, 237 P. page 540. The pleadings and stipulation of facts in the case at bar indicate that the question whether beekeeping may be pursued at all in a strictly residential district or within a city's confines is a question which is at least debatable and therefore one for the legislative body to determine. There is sufficient recognition in the decided cases that bees may become a nuisance in residential areas. Olmsted v. Rich, 53 Hun 638, 6 N.Y. S. 826; Town of Arkadelphia v. Clark, 52 Ark. 23, 11 S.W. 957, 20 Am.St.Rep. 154.

The Hadacheck decisions, above cited, sufficiently demonstrate that the facts appearing herein justify the ordinance prohibiting beekeeping within the city except in the designated areas, and that the ordinance is not unconstitutional for any reason. See, also, Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716; Reinman v. Little Rock, 237 U.S. 171, 176, 35 S.Ct. 511, 59 L.Ed. 900.

The writ is discharged and the petitioner remanded

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

11 Cal.2d 568

FERNANDEZ v. FERNANDEZ.

L. A. 16705.

Supreme Court of California.
July 25, 1938.

Rehearing Denied August 22, 1938.

1. Venue 🔑65

A motion for change of venue was properly denied, where movant failed to file both a notice of motion for change of venue and an affidavit of merits, since both are required by statute. Code Civ.Proc. § 395; § 396b, as added by St.1933, p. 1842.

2. Venue 🔑66

An affidavit of merits on motion for change of venue, alleging that movant was a resident of a certain city, giving her address, and that she resided in the city and certain county for more than one year last past, was insufficient, where it failed to allege that movant had fully and fairly stated the case and all the facts thereof to her attorney and that after such statement she was advised by her attorney and verily believed that she had a good and substantial defense on the merits. Code Civ.Proc. § 395; § 396b, as added by St.1933, p. 1842.

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In Bank.

Suit for divorce by Louis Fernandez against Rose Fernandez. From an order denying defendant's request for transfer of the cause, defendant appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred A. Shaeffer, of Santa Maria, for respondent.

WASTE, Chief Justice.

Plaintiff brought this action for divorce in the superior court of Santa Barbara county. Defendant filed a demurrer to the complaint with a supporting affidavit wherein she alleged that her legal residence was Los Angeles, and she prayed for a transfer of the cause to that county. Sec. 395, Code Civ.Proc. The court, after hearing the matter, overruled the demurrer and also made an order denying motion for change of venue. Defendant appealed from the latter ruling. Plaintiff now moves this court to dismiss the appeal or affirm the order.

[1] The denial of defendant's request for transfer of the cause was proper. Defendant failed to file a notice of motion for change of venue. Neither did she file an affidavit of merits. Both are required. Sec. 396b, Code Civ.Proc., as added by St. 1933, p. 1842.

[2] The affidavit filed by defendant with her demurrer merely alleged that she was actually a resident of Los Angeles, giving her address, and that she had resided in the city of Los Angeles, county of Los Angeles, for more than one year last past. If this was intended to be an affidavit of merits, it was clearly insufficient in that it failed to allege in substance that defendant had fully and fairly stated the case and all the facts thereof to her attorney, and that after such statement she was advised by her attorney and verily believed that she had a good and substantial defense on the merits. Roberts v. Roberts, 81 Cal.App. 499, 253 P. 1112; Henry v. Willett, 60 Cal.App. 244, 212 P. 698; People v. Larue, 66 Cal. 235, 5 P. 157; 25 Cal.Jur., p. 901, sec. 34.

The order is affirmed.

We concur: SHENK, J.; HOUSER, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.; CURTIS, J.

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12 Cal.2d 98

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. KINSLER et al.

EVERSOLE v. SAME (two cases).

Sac. 5130.

Supreme Court of California.
Aug. 4, 1938.

As Modified on Denial of Rehearing
Sept. 2, 1938.

1. Attorney and client 🔑134(2)

Where an attorney who is employed under a contingent contract, dependent on the successful outcome of the particular business in which services are proposed to be rendered, is discharged without cause, attorney may recover judgment against client for full amount provided by contract in an action for damages for breach of contract based on amount recovered in action in which attorney was discharged.

2. Attorney and client ⚷134(2)

Cause which in legal contemplation would justify the cancellation of a contingent contract for compensation to an attorney for legal services thereafter to be rendered must necessarily depend on the particular circumstances present in each case, and the cause must not only be good, but it must also be legally sufficient.

3. Attorney and client ⚷134(2)

Where it appears that an attorney's conduct has been such that the dignity of the profession has been seriously affronted with respect and germane to subject matter of a contingent contract for compensation for legal services thereafter to be rendered, "good cause" for termination of contract may exist, and acts of impropriety clearly inconsistent with a faithful, proper, and dignified discharge of his duties as an attorney and officer of the court may furnish a sufficient justification for termination of contract.

4. Attorney and client ⚷88

An attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action.

5. Attorney and client ⚷166(1)

Evidence did not support finding and conclusion of law that attorney, who was employed by client under a contingent fee contract providing for the payment of one-third of whatever judgment should be rendered in client's favor in a personal injury action as compensation for services to be rendered, was discharged for good and sufficient cause, and hence attorney was entitled to recover from client one-third of amount recovered in action to which contract related.

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In Bank.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Interpleader action by the Zurich General Accident & Liability Insurance Company, Limited, against Anna Kinsler, Keith C. Eversole, and others to have the respective rights of Anna Kinsler and Keith C. Eversole in a sum deposited in court determined by the court, wherein Keith C. Eversole filed a cross-complaint against Maurice E. Kinsler, Anna Kinsler, and others. From an adverse judgment, Keith C. Eversole appeals.

Judgment reversed, and cause remanded with directions.

Prior opinion, 75 P.2d 115.

W. H. Brunner, of Ukeah, for appellant.

Carlton D. Dethlefsen, of San Francisco (Harry W. Horton, of El Centro, of counsel), for Bar Ass'n of Imperial County, amici curiæ.

Phillips & Munck and James H. Phillips, all of Oakland, for respondents.

HOUSER, Justice.

The pertinent facts herein appear to be that following a personal injury which theretofore she had sustained in an accident, the defendant Mrs. Anna Kinsler, employed the defendant Eversole as an attorney at law to bring an action for the purpose of recovering a judgment against the person who was asserted to have been negligent in having caused said accident to occur. By the terms of the said contract, the compensation therein provided to be paid to said Eversole was contingent and, in effect, provided that the latter was to be paid for the services which he thereafter might render to Mrs. Kinsler in said matter to the extent and in the amount of one-third of whatever judgment that might be rendered in the action in her favor. Eversole not only brought the action, but also performed other services in connection therewith, which included his presence and services in the taking of the deposition of Mrs. Kinsler. Thereafter, by reason of certain misconduct asserted to have occurred on the part of Eversole, Mrs. Kinsler notified him that he was discharged from thereafter acting as her attorney in the action. Three days after having received such notice of said discharge, on the initiative of Mrs. Kinsler, Eversole consented in writing to the substitution of other attorneys in the litigation,—at the same time, in substance, orally informing Mrs. Kinsler that he waived none of his legal rights which purportedly had been conferred upon him by the terms of his contract of employment.

The result of the subsequent trial of the action was that Mrs. Kinsler was awarded a judgment for the sum of $2,000; which amount the insurer of the judgment debtor deposited in court and thereupon brought the instant action by which Mrs. Kinsler and Eversole were interpleaded for the purpose of having their respective rights in said sum determined by the court. From a judgment that was rendered in that action in favor of Eversole for the sum of $75 he has appealed to this court.

For the reason that such statutory provisions as are contained in section 284, Code of Civil Procedure, as amended in 1935 (St.1935, p. 1647), were not a part of that statute at the time when the rights of the respective parties herein accrued, it becomes unnecessary to devote attention to any of such provisions.

[1] By the force of a number of decisions which heretofore have been rendered by the appellate courts of this state, the law which has obtained with reference to a situation such as is presented by the instant record appears to have been well established to the effect that where, with respect to compensation for services thereafter to be performed, an attorney who was employed under a contingent contract, dependent upon the successful outcome of the particular business in which such services were proposed to be rendered, was discharged "without cause",—in an action for damages for such breach of contract thereafter brought by the attorney against his former client,—based upon the amount recovered in the action in which the attorney was discharged, he was entitled to recover a judgment for the full amount that was provided by the terms of such contract. Baldwin v. Bennett, 4 Cal. 392; Webb v. Trescony, 76 Cal. 621, 18 P. 796; Countryman v. California Trona Co., 35 Cal.App. 728, 170 P. 1069; McCully v. Gano, 116 Cal.App. 695, 698, 3 P.2d 348; see, also, as recognizing the rule: Green v. Sherritt, 17 Cal.App.2d 732, 736, 62 P. 2d 769; Elconin v. Yalen, 208 Cal. 546, 549, 282 P. 791; Kirk v. Culley, 202 Cal. 501, 506, 261 P. 994.

That part of the law which is applicable herein being established, the remaining question for determination relates to whether the attorney was discharged "without cause".

[2, 3] With respect to a determination of whether the discharge of an attorney has been "without cause", it is obvious that no precise act or fixed line of conduct on the part of the attorney may be accurately defined or specified as furnishing a sufficient reason for an application of the rule against him. Manifestly, "cause" which in legal contemplation would justify the cancellation of a contingent contract for compensation on account of legal services thereafter to be rendered, necessarily would have to depend upon the particular circumstances that were present in each case. In that regard, it is not improbable that its determination very properly might relate to "time, place and persons". A single act which had occurred at a certain time, at a designated place, and in the presence of specified persons, in all propriety might possibly be termed entirely out of keeping with the orderly and dignified conduct by which an attorney should demean himself, under different circumstances might present an entirely different aspect. It thus may become apparent that the question whether "cause" for the abrogation of such a contract exists or has existed may be one of fact; and it also should be clear that in connection with the facts which may be established, a legal question as to their sufficiency is more than likely to ensue. That is to say, that a conclusion with reference to the ultimate question of fact necessarily must rest upon substantial and sound reasons therefor, and not be made to depend upon mere whim, caprice, or arbitrary judgment. It is apparent that to judicially declare, without limitation, that for "cause" a covenant of contingent compensation to be paid to an attorney may be broken with impunity and without consequent pecuniary liability, in itself is so broad, elastic and so lacking in desirable precision, that if unrestrained and unrestricted would be but to open the door to the perpetration of fraud. The "cause" must be not only "good", but it also must be legally sufficient. As was said in Cummer v. Butts, 40 Mich. 322, 325, 29 Am.Rep. 530, "good cause", as used in a contract stipulating that it might be canceled by either party for good cause, "has no such distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever". Also in the case of State v. Common Council of City of Duluth, 53 Minn. 238, 55 N.W. 118, 120, 39 Am.St.Rep. 595, it is said, "'Cause', or 'sufficient cause', [to authorize a removal from office of a city officer] means 'legal cause', and not any cause which the council may think sufficient". Where, however, it appears that conduct of an attorney has been such that by reason thereof, the dignity of the profession has been seriously affronted with respect and germane to the subject-matter of the contract, "good cause" may exist; and in that connection, acts of impropriety that clearly are inconsistent with a faithful, proper and dignified dis-

charge of his duties as an attorney and officer of the court, may furnish a sufficient justification for the termination of a contract of employment. Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S.W. 178, 9 L.R.A.,N.S., 282, 119 Am.St.Rep. 1003, 10 Ann.Cas. 829; Hoboken Trust Co. v. Norton, 90 N.J.Eq. 314, 107 A. 67; 7 C.J.S., Attorney and Client, 1026, § 167.

[4] With such legal principles in mind, an examination of the record for the purpose of ascertaining in detail the existence of the particular facts upon which the judgment, from which the instant appeal has been taken, was founded, of necessity must be considered:

(a) It appears that on the evening of the day that preceded the date when the deposition of Mrs. Kinsler was to be taken, she went to Eversole's office, and in the course of a conversation then and there had between them she inquired of Eversole, "What do you think they will ask me?" As testified by Mrs. Kinsler, "He said, 'I don't know, might ask you anything; might ask you if you had corn flakes for breakfast, I can't tell you what they will ask you.' 'Well' I said, 'I meant I wanted to know what sort of answers', one can frequently get themselves terribly tangled up, and I wanted to know what sort of answers and questions might be asked, and he said he didn't know, have to wait till the(y) asked me, and then I said 'Well there were a number of things I wanted clear in my mind' and I spoke about that, and he said, 'Oh anyone as smart as you, to ask questions like that, you know the answers, you know, Mrs. Kinsler you can take care of yourself, you are quite a talker, aren't you?' "

(b) On the taking of her deposition, when in response to a question as to whether she was married, and Mrs. Kinsler had answered in the affirmative, Eversole interposed the remark, "Oh, that's going to be my next case for Mrs. Kinsler, her divorce".

(c) At another conversation that occurred between the parties, as testified by Mrs. Kinsler, "I asked him if anything had been done, and I mentioned I had learned about Mr. Anker, (the defendant in the action), and his driving, thinking it might be relevant, and he said if I would go out and dig up all the dirt I could about Lou Anker 'and bring it in here, we will produce it in court, the judge may not allow it, but it will have its effect upon the jury' ".

(d) The record discloses the further fact that the contingent fee contract contained a provision that Anna Kinsler and Maurice Kinsler "are to advance all outlays required in cash during the pendency of the litigation upon demand therefor; * * *". In that connection, shortly after her deposition had been taken, Mrs. Kinsler testified:

"Mr. Eversole said we must have a jury trial, because he said 'you are better off with a jury, in any jury picked in Mendocino County, at least two men on that jury would know that Lew Anker drinks'. I also said I felt I couldn't stand the expense of a jury trial, I had no money, and I asked him the approximate cost of a jury and he told me, and when I learned it might run into several hundred dollars I said I had no money. And he said 'you make me sick, always crying like you didn't have an egg left in your basket'. I told him the ranch was mortgaged to the fullest extent and we couldn't do anything about that and he said 'Well, we can't do anything without a jury, and we will have to have it'.

"Q. State whether or not you specified it to be tried before the Court? A. I said I couldn't have a jury, if I had a case I was willing it should stand on its merits. * *

"Q. And you stated you would have to have a trial by the judge? A. Yes. * * *

"Q. And he told you at that time that he wouldn't take the case unless there was a jury trial? A. Yes.

"Mr. Phillips: Wouldn't continue to take the case.

"Mr. Brunner: I accept your amendment.

"Q. That he wouldn't continue with the case unless there was a jury trial? A. Yes."

It will thus be observed that the substance of such asserted "professional" misconduct is:

(1) That Eversole declined to take seriously Mrs. Kinsler's inquiry as to what questions would be asked her on the taking of her deposition, but that at the same time he complimented her on her ability "to take care of herself";

(2) That in the presence of third persons he made a facetious remark with reference to a possible divorce suit that thereafter might be instituted between Mrs. Kinsler and her husband;

(3) That in response to information that voluntarily had been given by Mrs. Kinsler

to Eversole regarding the defendant in the action, Eversole told her to "go out and dig up all the dirt" she could about the said defendant;

(4) That in accordance with the provision of the written agreement between the parties, Eversole insisted that Mrs. Kinsler produce sufficient cash to meet the expense of trying her case before a jury.

Incidents, such as those to which reference just has been had, are not uncommon to the practice of nearly every lawyer of extensive trial experience. Of course, it was but natural that Mrs. Kinsler should be interested in ascertaining, if possible, how she should demean herself at a time when her deposition was about to be taken; but for her to anticipate that her attorney would specifically inform her regarding "what sort of answers" she should give to questions that might be propounded to her, in itself constituted an insinuation that well might have been considered an imputation or suggestion regarding Eversole's possible lack of integrity or his lack of observance of ethical conduct. In such circumstances, his forbearance was commendable, and his response not inappropriate. On the occasion when Eversole made the unfortunate remark with reference to a possible divorce suit for Mrs. Kinsler, although perhaps embarrassing to her, it was evident that no offense was intended, but that to the contrary, as was testified by Eversole, it was meant merely as facetious; and probably was just his way of "trying to be funny". It also is clear that the incident regarding the production by Mrs. Kinsler of sufficient money with which to pay the expense that necessarily would be incurred in a trial by jury, was of no great importance. It is common experience that attorneys and their clients frequently differ and even violently disagree between or among themselves with reference to the conduct or the procedure which should relate to the trial of the action. However, it is well established law that the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action; and in accordance with that law, if Eversole wished to have a jury trial he had a right to insist that the trial be so conducted. In the case entitled Price v. McComish, 22 Cal.App.2d 92, 70 P.2d 978, the court said that (page 980) subject to the rule that an attorney in the conduct of a case may not impair the substantial rights of his client, nevertheless, "* * * it is well established that, especially in what may be termed purely procedural matters * * an attorney is fully authorized" to bind his client. See, also, 6 C.J. p. 643; Deitz v. Bolch, 209 N.C. 202, 183 S.E. 384; 3 Cal. Jur., p. 653, 654; Armstrong v. Brown, 12 Cal.App.2d 22, 54 P.2d 1118; Lally v. Kuster, 177 Cal. 783, 171 P. 961; Boca, etc., R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718; Anglo California Trust Co. v. Kelly, 95 Cal.App. 390, 272 P. 1080; Electric Utilities Co. v. Smallpage, 137 Cal.App. 640, 31 P.2d 412. And again in the case entitled Union Central Life Ins. Co. v. Anderson, 291 Ill.App. 423, 10 N.E.2d 46, 52, the court said: "When one puts his case in the hands of an attorney, it is a reasonable presumption that the authority conferred includes such actions as the attorney, in his superior knowledge of the law, may decide to be legal, proper, or necessary in the prosecution of the suit. * * Attorneys may * * * of necessity make disposition of many things that arise in and about the trial of cases." Also, in the recent case entitled Shores Co. v. Iowa Chemical Co., 222 Iowa 347, 268 N.W. 581, 106 A.L.R. 198, wherein defendant's attorney waived a jury trial, allegedly without the knowledge or the consent of the defendant, and thereafter defendant's motion for a jury trial was overruled, the court set forth in a clear and complete manner a statement showing the extent of authority conferred upon an attorney in the conduct of an action, as follows (page 582): "When one hires an attorney to represent him in litigation, that attorney has full charge of the case as far as procedure and remedy are concerned. He is trained and skilled in the law. A client has no knowledge of procedure and intrusts this to the attorney he employs. In 2 R.C.L., § 63, p. 986, we find the following: 'An attorney of record, by virtue of his employment as such, subject to the approval of the court, has implied authority to do all acts necessary and proper to the regular and orderly conduct of the case, and affecting the remedy only and not the cause of action, and such acts, in the absence of fraud, will be binding on the client, though done without consulting him, *and even against his wishes.*' [Italics added.] In 6 C.J., section 146, at page 641, it is said: 'The general implied authority of an attorney by virtue of his employment includes the doing on behalf of his client of all acts in or out of court necessary or incidental to the transaction or management of the suit, or to the accomplishment of the purpose for which he has been retained, and which affect only the remedy and not the cause of action.

The choice of proceedings, the forum, the manner of trial, and all matters of procedure, and the like are within the sphere of his general authority, and as to these matters his client is bound by his action.' In 6 C.J., section 147, at page 643, it is said: 'The line of demarcation between the respective rights and powers of an attorney and his client is clearly defined. The cause of action, the claim or demands sued upon, and the subject matter of the litigation are all within the exclusive control of a client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent. But all the proceedings in court to enforce the remedy, to bring the claim, demand, cause of action or subject matter of the suit to hearing, trial, determination, judgment and execution are within the exclusive control of the attorney.' In the recent case of State v. Froah, reported in 220 Iowa, 840, at page 845, 263 N.W. 525, 528, this court said: 'The specifications of powers of an attorney contained in the Code do not exclude all other powers.' Ohlquest v. Farwell & Co., 71 Iowa 231, 32 N.W. 277, 279, speaking of the powers of an attorney, says: '"But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action." Rhutasel v. Rule, 97 Iowa 20, 65 N.W. 1013.'"

It follows that Mrs. Kinsler, having theretofore agreed to advance the necessary moneys for the expenses of the action, had no just right to complain of the fact that some time prior to the date when the action was to be tried Eversole had demanded performance of that condition, or that on her failure to do so he would retire as her counsel; but in that regard it is noteworthy that the question was left open and undetermined by the respective parties.

Apparently, the only real untoward incident that occurred during the course of the business relations that existed between the parties was that wherein Mrs. Kinsler asserted that Eversole suggested that Mrs. Kinsler "go out and dig up the dirt" about her legal opponent and that although such evidence properly might not be admissible on the trial of the action, nevertheless it would be "produced" and have an effect on the jury that would be unfavorable to the defendant. Unfortunately, it is a well-known fact that such conduct on the part of some attorneys is not infrequently observable in the trial of both civil and criminal actions. It is none the less unethical on that account. However, in that regard, as appears in the record herein, Eversole's testimony in that connection did not square with that which was given by Mrs. Kinsler. He testified as follows:

"Q. Did you ever at any time tell Mrs. Kinsler to go out and dig up all the dirt she could about Anker? A. No 'digging up dirt' isn't an expression of mine. I did tell her it was very important in this case what I know of Mr. Anker and what she herself told me about previous acts of Mr. Anker, she could help by finding out all about Anker. I was under the impression he had been in numerous accidents before—under the impression that he had been driving in a drunken condition often and had been picked up for that, and what she might secure would help very greatly. I never told her to go out and 'dig up dirt', I don't use that expression, it's not one of my expressions, I wouldn't say 'dig up dirt', as far as I remember I told her to dig up all she could, that's what I told her to the best of my recollection.

"Q. Did she ever tell you that she thought that you should do that, that you were the attorney in the case? A. Not until here on the stand yesterday. On the contrary Mr. Brunner, she said she would.

"Q. Did she bring in to you after that, as a result,—withdraw that. Q. After that conversation did she bring in to you any information about Anker? A. I think not, I wouldn't be positive to that. She may have. At any rate, if she did, it was to a very small extent. Wouldn't impress itself upon my memory."

In any event, from the fact that Eversole was discharged before the trial took place, it becomes evident that he did not actually produce inadmissible "dirt" for the purpose of improperly affecting the or any verdict that might be returned by the jury. At most, Eversole's "unprofessional" conduct (if any) consisted merely in the making of an unethical suggestion that never was acted upon in any way by either of the parties. On her own initiative, Mrs. Kinsler already had busied herself in "digging up the dirt", and even conceding that Eversole intimated that she continue along that line, it is unlikely that Mrs. Kinsler could have been greatly shocked by Eversole's conduct in that regard.

According to each of the asserted grievances upon which Mrs. Kinsler has relied the greatest weight to which in reason and good conscience it may be entitled, it amounts to nothing more than a triviality. Nor can all of them combined produce the effect of that substantiality in "professional" misconduct that is so properly demanded even for judicial censure. No one even approaches perfection either in his professional expression or in his official demeanor as an attorney and officer of the court. In truth, there is "so much bad in the best of us" that the faults of anyone should be rather glaring and clearly unethical before others may be justified even in indulging in serious adverse criticism thereof, much less, in adjudging drastic penalties as punishment therefor. In the instant case it results that the evidence upon which the judgment depended was insufficient to furnish legal support for the finding and conclusion of law that Eversole was discharged as an attorney for "good and sufficient cause".

The judgment is reversed. In addition thereto it is ordered that consistent with the views hereinbefore expressed, the cause be and it is remanded to the superior court for the sole purpose of determining, in accordance with the provisions of the contract between the parties, the amount of money as attorney's fees in the original action, and the damages as attorney's fees in the instant action, if any, to which Eversole may be entitled and thereupon to pronounce its judgment in consonance therewith.

We concur: WASTE, C. J.; LANGDON, J; EDMONDS, J.; SHENK, J.; CURTIS, J.

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11 Cal.2d 675

UNION BANK & TRUST CO. OF LOS ANGELES v. LOS ANGELES COUNTY et al.

L. A. 16274.

Supreme Court of California.

July 28, 1938.

1. Clerks of courts 🔑74

A county clerk and sureties on his bond are liable thereon for any dereliction of duty by him as ex officio clerk of superior court, as in embezzling money received in evidence at criminal trial. Pol.Code, §§ 954, 996, 4022, 4152, 4178; Const. art. 6, §§ 5, 14.

2. Officers 🔑131

Where a surety on an official bond becomes responsible for the defaults of a principal with respect to a particular office and the principal also holds a second office, the duties of which are by law made a part of the duties of the first, the surety is responsible for defaults in performing the duties of the second.

3. Clerks of courts 🔑74

A county clerk and sureties on his official bond were not liable under common-law principles of tort or agency for the acts of clerk's deputy, who was himself a public officer and not appointed by clerk, and who had embezzled money received in evidence at criminal trial in superior court, of which court the clerk was ex officio clerk. Pol. Code, § 4152; Const. art. 6, §§ 5, 14.

4. Clerks of courts 🔑74

A county clerk and sureties on his statutory bond containing condition that all his deputies shall faithfully perform all their duties, were liable for deputies' torts, and for deputy's embezzlement of money received in evidence at criminal trial at superior court, of which court the clerk was ex officio clerk, notwithstanding such deputies are independent statutory officers not appointed by clerk or subject to his personal control. Pol.Code, §§ 958, 959, 4022.

5. Clerks of courts 🔑74

A surety who expressly assumed liability on county clerk's bond, in consideration of premium demanded, could not claim that any condition thereof, such as condition that all of principal's deputies shall faithfully perform all their duties, was without consideration. Pol.Code, §§ 959, 4022.

6. Estoppel 🔑98(1)

A bankruptcy trustee who intervened in executor's action on county clerk's bond for money embezzled by his chief deputy, was not estopped from recovering portion of embezzled funds which had been assigned to bankrupt by testator, merely because testator's attorney had learned of certain improprieties in deputy's handling of money while still in safe deposit box, especially in view of facts that it was stipulated that trustee had no notice of the acts or conduct which it was charged constituted the estoppel and that clerk knew of bankrupt's interest in the money prior to the acts of testator's attorney. Pol.Code, §§ 959, 4022.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action on the county clerk's official bond by the Union Bank & Trust Company of Los Angeles, as executor of the estate of Charles H. Crawford, deceased, against Los Angeles County, L. E. Lampton, as clerk of such county, and others, to which Alfred E. Davies, as trustee in bankruptcy for the estate of A. C. Wagy & Company, Inc., intervened as a party plaintiff. Judgment for defendants, and plaintiff in intervention appeals.

Reversed.

Prior opinion, 74 P.2d 240.

A. I. McCormick, Guy Richards Crump, both of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, Hill, Morgan & Bledsoe, and Kenneth K. Wright, all of Los Angeles, for respondent L. E. Lampton.

Joe Crider and A. F. Mack, both of Los Angeles, for respondent Fidelity & Deposit Co. of Maryland.

John J. O'Toole, City Atty., of San Francisco, amicus curiæ.

PER CURIAM.

Upon further consideration of this case on rehearing we adopt the former opinion as modified:

"This action was brought against the defendant Lampton, as county clerk of Los Angeles county, and the sureties on his official bond, to recover certain money deposited with the said clerk and embezzled by his chief deputy.

"In 1930 a criminal trial was in progress in Los Angeles county, in which two persons were charged with an attempt to extort $75,000 from Charles H. Crawford. With his consent, 75 bills of $1,000 denomination were received in evidence at the trial. Thereafter the deputy clerk of the trial department delivered them to Liberty A. Hill, chief deputy in the county clerk's office. The practice of the defendant Lampton was to have such exhibits kept in a bank safe deposit box. He entrusted the keys of the box to his chief deputy, and delegated to him the care and custody of the exhibits. Hill put the bills in the box, but later withdrew them and embezzled the money.

"Thereafter plaintiff, executor of the estate of Crawford, brought this action. Prior to his death, Crawford had assigned the sum of $10,000 out of such fund, and plaintiff in intervention seeks the recovery of that sum. The trial court held that neither the defendant Lampton, county clerk, nor his sureties, could be held liable for the loss. From this judgment plaintiff in intervention appealed.

[1] "The first theory advanced to absolve defendants from liability is that the bond of the county clerk does not cover dereliction of duty in the separate office of clerk of the superior court, held ex officio. It is contended that these are separate and distinct offices; that defendant Lampton received the money in question as clerk of the superior court and not as county clerk; that, therefore, the bond which he furnished as county clerk does not cover the present loss. See San Bruno v. National Surety Co., 119 Cal.App. 27, 31, 5 P.2d 951; People v. Burkhart, 76 Cal. 606, 18 P. 776.

"In examining this contention, it may be well to bear in mind the consequences thereof. Defendant Lampton has given but one official bond, the only one required of him by law, that as county clerk. It appears, however, that in his capacity as ex officio clerk of the superior court he received during 1929 and 1930 over $3,000,000 in trust funds, fees and fines. Under defendants' theory this large sum was handled by a public officer with no security whatever for his faithful performance. In the case of defendant Lampton, this would be true for some eighteen years. Moreover, plaintiff points to section 996 of the Political Code, providing that an office becomes vacant upon the refusal or neglect of an officer to file his official bond within 30 days after notice of his election or appointment. The view of defendants, therefore, leads inevitably to the conclusion that either the office of clerk of the superior court in and for the county of Los Angeles is wholly without the protection of a surety bond, or the office is vacant. These alternatives are so startling, and the results so manifestly contrary to the public interest, that they must be rejected if it is possible to do so, and a brief examination of our Constitution and statutes makes it clear that the law is not as defendants assert it to be.

"The county clerk is by the Constitution made ex officio clerk of the superior court (art. 6, sec. 14), and the legislature is given power to prescribe the duties of the county clerk. Art. 6, sec. 5; see, also, Pol. Code, sec. 4152. These duties are set forth in the Political Code. In section 4178 of said code, the duties of the county clerk are stated, and it is therein provided that he must act as clerk of the superior court. Specific duties as clerk of the superior court are thus described as duties of the county clerk. Elsewhere the Political Code provides for the giving of a bond by the county clerk. Pol.Code, sec. 4022. The condition of an official bond is that the principal will faithfully perform 'all official duties then required of him by law, and also such additional duties as may be imposed on him by any law of the state of California'. Pol.Code, sec. 954. Defendant Lampton filed a bond providing that he should faithfully perform all official duties 'imposed upon or required of him by law, ordinance or the charter of the county of Los Angeles. * * *'

[2] "It follows that in his activities as clerk of the superior court defendant Lampton was carrying out the duties imposed by law upon him as county clerk, and for any dereliction in such activities, his surety is responsible. This conclusion is compelled by the terms of the statute, and needs no citation of other authority. However, there is support for the general doctrine that where a surety becomes responsible for the defaults of a principal with respect to a particular office, and the principal also holds a second office, the duties of which are by law made a part of the duties of the first, the surety is responsible for defaults in performing the duties of the second. See Redwood City v. Grimmenstein, 68 Cal. 512, 9 P. 560; Mechem, Public Officers, sec. 285; Throop, Public Officers, sec. 236.

"The second theory of defendants is that since the county clerk did not himself commit any wrongful act, it is necessary, as a basis of liability of the surety, to establish liability of the clerk for the wrongful act of his deputy; and they argue that the said clerk is not liable generally for torts of his deputies, who are themselves public officers, holding offices created by the charter adopted pursuant to constitutional authority, and serving under civil service regulations.

[3, 4] "It may be conceded that in the absence of statute the modern view is opposed to making public officers civilly liable for torts of deputies, where the latter are themselves statutory officers and not under the superior's unrestricted control or right of hiring and discharging. See Michel v. Smith, 188 Cal. 199, 205 P. 113 [municipal police officer]; Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772 [deputy marshal of municipal court]; Pavish v. Meyers, 129 Wash. 605, 225 P. 633, 34 A.L.R. 561 [police officer]; note, 43 Harv.L.Rev. 327. The other view is usually grounded upon the identity of the officer and his deputy or the unrestricted right of control. See Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St. Rep. 123; Duluth v. Ross, 140 Minn. 161, 167 N.W. 485; New York v. Fox, 232 N. Y. 167, 133 N.E. 434. In the instant case the clerk's deputies are independent statutory officers within the rule of such cases as Michel v. Smith, supra, and Van Vorce v. Thomas, supra. But this does not dispose of our problem. We are satisfied that defendant Lampton and his sureties are not liable under common-law principles of tort or agency. But liability may exist by reason of the language of the statute and the surety bond. See Grays Harbor Const. Co. v. Paulk, 179 Wash. 300, 37 P.2d 584; Chicago v. Southern Surety Co., 239 Ill. App. 628, 640. And upon an examination of the statute and the bond, it becomes clear that defendants are liable under their terms.

"Political Code section 958 requires all official bonds to contain 'such conditions as required by this chapter, or the law creating or regulating the duties of the office'. Section 959 provides: 'Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein for any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk.' In defendant Lampton's bond one of the conditions reads: 'and further that if all deputies, assistants, clerks and employees appointed by him, or otherwise, and all and each of them, shall faithfully perform all of the duties that are now, or hereafter may be lawfully imposed upon or required of them, and all and each of them as such deputies, assistants, clerks or employees, then this obligation to be void; otherwise to remain in full force and effect'. And the bond recites, in conformity with the statute, that 'we, L. E. Lampton' and the named surety, 'are jointly and severally bound'.

"The purpose and effect of these provisions are entirely clear; the liability imposed upon Lampton and his surety is one expressly required and fully contemplated by the parties; and the defendant surety has been compensated for the assumption thereof. Defendants suggest that section 959 of the Political Code was adopted at a time when the deputies of a public officer were not statutory officers but were employed by him and subject to his personal control, and that consequently the words 'his deputy' must be deemed to refer only to persons so controlled. There is no force in this argument. If the present 'deputies' of the county clerk are not 'his deputies', then what positions do they hold? His deputies did not cease to be such when they came under civil service regulations. The express terms of the statute are clearly applicable here, and the language requires no construction.

[5] "It is true that in Lorah v. Biscailuz, 12 Cal.App.2d 100, 54 P.2d 1125, the court held that neither the sheriff nor his surety was liable for torts of a deputy, even though the bond expressly covered acts of the deputies. The opinion is based upon two theories: First, that the plaintiff's right of action was derived solely from Political Code section 961 which mentions the officer but not his deputies; and second, that since the sheriff is not liable in tort for acts of his deputies, the bond was in this respect given without consideration. Upon careful study we are convinced that neither theory is sound. Political Code section 961 was not intended to limit liability, but rather to give a right of action; and it does not nullify the express provisions of section 959, placing the liability for acts of deputies upon 'the principal and sureties'. Under section 959 and the joint and several bond executed by defendant Lampton and his sureties, defendant Lampton is liable for the acts of his deputies in the sum mentioned in the bond. And the surety, having expressly assumed the liability of its bond for the premium demanded, cannot claim that any condition of the said bond is without consideration. We are therefore of the opinion that the case of Lorah v. Biscailuz was, on the question of liability under the bond, wrongly decided, and it is disapproved.

"It may be observed that the legislature in 1933 recognized the problem arising from unbonded subordinates and provided that appointed deputies may be required by the officer to give individual bonds, or be covered by a 'master official bond'. See Pol.Code, § 985, as amended by St.1933, p. 1525. This statute offers the innocent officer a means of protection against such liabilities as considered herein."

[6] Defendants also raise the defense of estoppel based upon evidence showing that in September, 1930, Crawford's attorney examined the bills which were then in the custody of Lampton and found that 70 of those which the court had ordered held as exhibits were in the safe deposit box with five different ones of the same denomination. The explanation made by Hill, who took the bills from the box for the attorney's examination, was that $5,000 had been placed in a bank account for the purpose of earning enough interest to pay the rental of the box. Two months before this time Lampton had been served with a restraining order issued out of the United States District Court in an action brought by the predecessor in interest of the appellant seeking a judgment for $40,000 against Crawford. The order of the federal court restrained Lampton from delivering the money in his custody to any one pending the further order of the court. The final decree in that case adjudged intervenor to be the owner of and entitled to the payment of $10,000 of the amount held by Lampton.

It was stipulated that the appellant had no notice of the acts or conduct which it is charged constitute an estoppel. On the other hand, from the time the restraining order was served upon Lampton he knew that the appellant's predecessor in interest claimed the money in his possession. Under these circumstances, the subsequent acts or omissions of Crawford or his attorney do not bar a recovery by the appellant.

The judgment is reversed.

11 Cal.2d 739

MILLER v. HART et al.

L. A. 15673.

Supreme Court of California.

August 4, 1938.

1. **Mortgages 🔑381**

The statute providing for judicial foreclosure of trust deeds merely provided a new and alternative method of applying the security to the indebtedness, in addition to the existing remedy of trustee's sale under the trust deed, and the new remedy neither added to nor detracted from the substantive rights of the debtor, as respects constitutionality of the statute as applied to trust deeds antedating its enactment. Code Civ. Proc. § 725a, added by St.1933, p. 1673.

2. **Mortgages 🔑381**

The pursuit of the remedy of judicial foreclosure by a beneficiary under a trust deed which antedates the creation of the remedy of judicial foreclosure is one of choice and not of compulsion. Code Civ. Proc. § 725a, added by St.1933, p. 1673.

3. **Mortgages 🔑381**

The remedy of a trustee's sale contemplated by trust instrument in event of default was not denied to or taken away from the beneficiary by the statute providing for judicial foreclosure of trust deeds, and the beneficiary was still free at his election to make written declaration of default and demand for trustee's sale. Code Civ.Proc. § 725a, added by St.1933, p. 1673.

4. **Mortgages 🔑381**

The beneficiary under a trust deed who pursues remedy of judicial foreclosure takes the remedy as he finds it, with such limitations thereon as have existed since its creation, even though the trust deed antedates the enactment of the statute granting the remedy of judicial foreclosure. Code Civ. Proc. § 725, added by St.1933, p. 1673, and § 726, amended by St.1933, p. 2118.

5. **Mortgages 🔑559(2)**

The statute requiring the appointment of an appraiser in the judicial foreclosure of trust deeds in so far as it affects right to a deficiency judgment was constitutional as applied to trust deed made prior to the effective date of the statute. Code Civ.Proc. § 725a, added by St.1933, p. 1673, and § 726, amended by St.1933, p. 2118.

6. **Mortgages 🔑381**

A trust deed beneficiary, who pursues alternative remedy of judicial foreclosure provided by statute, elects to accept all of the incidents of judicial foreclosure. Code Civ.Proc. § 725a, added by St.1933, p. 1673, and § 726, amended by St.1933, p. 2118.

7. **Mortgages 🔑381**

A new and purely alternative remedy afforded a beneficiary of a trust deed, which remedy was not in existence when the trust deed was executed, might be limited or restricted in the discretion of the legislative body, particularly in view of fact that the beneficiary was still free to pursue the old and existing remedy without loss of or detriment to the beneficiary's substantive rights. Code Civ.Proc. § 725a, added by St. 1933, p. 1673, and § 726, amended by St.1933, p. 2118.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Margaret M. Miller against Alfred E. Hart and others to foreclose a trust deed. From a portion of the decree ordering a deficiency judgment against defendants Alfred E. Hart and Beatric O. Hart, the named defendants appeal.

Reversed, with directions.

For prior opinion, see 66 P.2d 755.

Byron J. Walters and R. L. Carlisle, both of Los Angeles, for appellants.

V. A. Morgan, of Alhambra, for respondent.

Louis Ferrari, of San Francisco, Edmund Nelson, Freston & Files, Ralph E. Lewis, O'Melveny, Tuller & Myers, Walter K. Tuller, Louis W. Myers, and Pierce Works, all of Los Angeles, and C. H. White, of San Francisco, amici curiæ.

WASTE, Chief Justice.

Pursuant to the allegations of the complaint herein, judgment was entered for the plaintiff decreeing foreclosure of a trust deed and sale of the property covered thereby, and the entry of a deficiency judgment in a sum equal to the difference between the amount of the indebtedness and the amount procured at the commissioner's sale of the property. The defendants Hart appeal from that portion of the decree directing the entry of a deficiency judgment in such amount and contend that the trial court erred in denying their request for the appointment of an appraiser to determine the "fair value" of the property, pursuant to the provisions of section 726 of the Code of Civil Procedure, as amended in 1933, St.1933, p. 2118, and in refusing to confine and limit any deficiency judgment thereafter to be entered, as provided in the cited code section as amended, to "the amount by which the amount of the indebtedness with interest and costs of sale and of action exceeds the fair value of the property", as determined under the section. The trust deed here involved and the note which it secures, were executed prior to said 1933 amendment of section 726, supra, and prior to the enactment in the same year (1933, St.1933, p. 1673) of section 725a of the Code of Civil Procedure, which latter section, for the first time, provided for the judicial foreclosure of trust deeds.

[1] In answer to a debtor's contention that the remedy of judicial foreclosure provided by section 725a, supra, might not constitutionally be applied to trust deeds antedating its enactment, we had occasion to declare in Lincoln v. Superior Court, 2 Cal. 2d 127, 130-131, 39 P.2d 405, 406, that said section merely provided a new and alternative remedy looking to the application of the security to the indebtedness, in addition to the existing remedy of trustee's sale under the instrument, which new remedy neither added to nor detracted from the substantive rights of the debtor but only required the payment of the indebtedness as contracted. Specifically, it was declared in the Lincoln Case that the right of foreclosure provided for in section 725a, supra, "is given as an alternative to the exercise of the power of sale under a trust deed. The section is a remedial statute which merely affords a new and additional means of enforcing a right. * * * In conclusion, we reiterate that because the beneficiary *elects* to accept all the incidents of judicial foreclosure when he pursues the alternate remedy provided by section 725a, supra, and because the trustor loses no substantive right, but, in fact, gains a statutory right of redemption, by the *beneficiary's election,* the section is not unconstitutional as applied to trust deeds executed prior to its enactment."

[2-5] It is obvious from the foregoing that the pursuit of the new and alternative remedy of judicial foreclosure by a beneficiary under a trust deed which antedates the creation of such remedy, is one of choice and not of compulsion. The remedy of trustee's sale contemplated by the trust instrument in the event of default, was not denied to or taken from the beneficiary who, following the enactment of the new and alternative remedy of judicial foreclosure, was still free, at his election, to make written declaration of default and demand for trustee's sale. If, as stated, the pursuit of such new and alternative remedy of judicial foreclosure is optional with the beneficiary, we are of the view, regardless of the date of the trust deed, that he takes the right and pursues the remedy as it has existed from its inception, i. e., subject to the possible appointment of an appraiser and a determination of the "fair value" of the property, with any deficiency judgment thereafter entered being limited to the difference between the amount of the indebtedness and the "fair value" of the property. In other words, the beneficiary under a trust deed having an election of remedy, takes the new remedy of judicial foreclosure as he finds it with such limitations thereon as have existed since its creation and this even though his trust deed antedates the enactment of the statute granting such new remedy. Any detriment to or denial of the beneficiary's substantive rights under the trust deed, assuming such detriment or denial flow from an application of the pertinent provisions of section 726, supra, which have been incorporated into and made a part of such new remedy, are the result not of legislative edict but of his own voluntary act in pursuing such remedy. We conclude, therefore, that the provisions of section 726 of the Code of Civil Procedure do not impair the obligation of contract and do not fall within the constitutional inhibition against such impairment in so far as they are made to apply to trust deeds antedating the amendment of such section by the voluntary pursuit of the alternative remedy of judicial foreclosure. Anything to the contrary in Wilson v. Superior Court, 8 Cal.App.2d 14, 47 P.2d 331, or other similar cases, is expressly disapproved.

[6] It may not successfully be contended in opposition to the conclusion herein announced, that if the beneficiary, rather than electing to pursue the new and alternative remedy of judicial foreclosure, had caused sale to be made by the trustee under the power of sale and without decree of foreclosure, he would have been met by substantially identical provisions written into section 580a of the Code of Civil Procedure

in 1933, St.1933, p. 1672, and looking to the appointment of an appraiser and the fixation of the "fair value" of the security with a view to limiting any deficiency judgment after sale under the power, as in the case of the judicial foreclosure, to a sum equal to the difference between the amount of the indebtedness and the "fair value" of the security as so fixed. The problem presented by this attempted limitation on the existing remedy of sale under the power, in so far as it purports to apply to trust deeds executed prior thereto, is radically different from the problem presented by a similar limitation on the new and alternative remedy which the beneficiary may or may not elect to pursue. In the former case, the attempted limitation on the existing remedy of sale under the power in the trust deed, may not be given a retrospective application or operation for the reason that it would interfere with and detract from the substantive rights of the creditor. In Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712, we dwelt at some length upon the impropriety of attempting to work a change in the substantive rights of creditors under the guise of a change in the remedy, declaring, in part, that "the *existing* remedy cannot be so altered as to take away or impair any of the rights given by the contract". Prior to our decision in the last cited case, the reasoning therein expounded was given substantial expression and application by the District Court of Appeal in the case of Bennett v. Superior Court, 5 Cal.App.2d 13, 14, 42 P.2d 80, wherein it was held, in effect, that the provisions of section 580a, supra, looking to the appointment of an appraiser, the fixation of the "fair value" of the property and the limitation of any deficiency judgment *after sale by trustee under the power contained in the instrument* to the difference between the amount of the indebtedness and the "fair value" of the property so determined, could not be given a retrospective application for the reason that they constituted more than a mere procedural change in the *existing* remedy and, if applied retrospectively, would work a change in the substantive rights of the creditor under the guise of a change in the *existing* remedy. See, also, Central Bank of Oakland v. Proctor, 5 Cal.2d 237, 239, 54 P.2d 718, and Birkhofer v. Krumm, Cal.App., 81 P.2d 609. However, as stated above, this reasoning is without application to the new remedy as to which "the beneficiary elects to accept all the incidents of judicial foreclosure when he pursues the alternate remedy provided by section 725a * * *". Lincoln v. Superior Court, supra.

[7] What we have said sufficiently disposes of the cause. While this matter was resubmitted at an earlier date in order to permit interested persons to file briefs amicus curiæ as to any similarity or lack of it between this case and the recent case of Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 886, we are now of the view that even if the pertinent provisions of the statute here involved (sec. 726, supra), may be distinguished from those presented in the Wachovia Case, a point we do not decide, such distinction becomes immaterial in the face of our conclusion that the pursuit of the new and alternative remedy of judicial foreclosure was not compulsory (Lincoln v. Superior Court, supra), and that the beneficiary was still free to pursue the existing remedy of sale under the power unfettered by the limitations and restrictions fastened upon the new and alternative remedy. Bennett v. Superior Court, supra; Central Bank of Oakland v. Proctor, supra. The Wachovia Case would appear to be authority, however, for our conclusion that the legislature was free to attach such conditions as it desired to the new and alternative remedy of judicial foreclosure when, as has been held to be the fact, cases supra, the *existing* remedy of sale under the power continued as at the time of the execution of the trust deed, i. e., unchanged in so far as the substantive rights of the parties are concerned. In this connection the Wachovia Case declares that: "The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated *if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away.*" (57 S.Ct. 339.) Surely, if the existing remedy may be entirely abrogated provided another and equally effective remedy is provided, it follows, a fortiori, that a new and purely alternative remedy, not in existence when the trust deed was executed, may be limited or restricted in the discretion of the legislative body

particularly when, as shown, the beneficiary was still free to pursue the old and existing remedy without loss of or detriment to his substantive rights. As above indicated, an election to pursue the new and alternative remedy committed the party to take that remedy "as he finds it".

That portion of the judgment appealed from is reversed with directions to the trial court to proceed in conformity with the views herein expressed.

We concur: SHENK, J.; HOUSER, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.

11 Cal.2d 689

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15938.

Supreme Court of California.

July 29, 1938.

1. Insurance 🔑146(1)

A contract of insurance is to be construed so as to effectuate intention of the parties.

2. Insurance 🔑146(3)

If any ambiguity exists in terms of policy, it is to be interpreted against insurer and in favor of insured.

3. Insurance 🔑146(1)

Where provisions of policy are definite and certain, there is no room for interpretation, and courts will not indulge in a forced construction in order to cast a liability upon insurer which it has not assumed.

4. Insurance 🔑138(1)

An insurer has right to limit its contract of coverage.

5. Insurance 🔑435

A workmen's compensation policy which provided that if policy was issued to individual, it should cover only his liability as individual employer and not any liability as a member of a copartnership, which policy was issued to restaurant owner, individually, did not cover liability for injuries sustained by dishwasher after insured took in his sister as a partner in operating restaurant business.

In Bank.

Proceeding under the Workmen's Compensation Act by J. J. Packer, claimant, opposed by L. E. Sherbert and Dixie Henry, doing business as Dixie Club, and the National Automobile Insurance Company, insurance carrier, wherein the insurance carrier filed a petition to review an award of the Industrial Accident Commission in favor of the claimant.

Award annulled, and matter remanded.

S. Norman Hays, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

WASTE, Chief Justice.

This is a petition to review an award of the Industrial Accident Commission.

On May 25, 1936, L. E. Sherbert was operating a restaurant under the fictitious name of "Dixie Club Restaurant". J. J. Packer was employed as dishwasher. On that date a policy of workmen's compensation insurance was issued by petitioner, National Automobile Insurance Company, in the name of "L. E. Sherbert, an individual, doing business as Dixie Club Restaurant". On August 19, 1936, Sherbert took in Dixie Henry, his sister, as a partner, the business continuing in name as before. On August 23, 1936, Packer sustained a compensable injury. The commission made an award against petitioner as insurer of Sherbert, and against Dixie Henry, as an uninsured employer, in the total amount of $185.28.

Petitioner attacks the award on the ground that the policy did not cover the liability in question. Reliance is placed on the following provision of the policy: "If this policy is issued to an individual, it shall cover only his liability as an individual employer and not any liability as a member of a copartnership or any other organization." Petitioner's theory is that it insured the liability of Sherbert, an individual; that the liability here involved is that of the partnership of Sherbert and Henry; that liability is imposed upon Sherbert because he is a "member of a copartnership" composed of the named persons, and hence that such liability is not covered by the policy.

We see no escape from the logic of petitioner's reasoning. It was found by the commission that the injuries were incurred while the employee was in the employ of the assured and his sister doing business under the above-mentioned fictitious name. This finding can only be construed as a finding of employment by the partnership made up of the named persons. There can be no doubt, therefore, that under the circumstances here present, liability fastened upon the assured solely because he was a "member of a copartnership" that employed the injured person. But, as shown, the quoted provision of the policy clearly and concisely declares that it covers the liability of the assured only as an "individual employer" and does not cover "any liability as a member of a copartnership".

[1-3] The fact that the assured's liability to employees of the copartnership was no greater than that which would have attached to him had he retained the status of "individual employer" contemplated by the policy, is of no moment in our determination of the coverage thereunder. A contract of insurance, like any other contract, is to be construed so as to effectuate the intention of the parties. Of course, if any ambiguity exists in its terms it is to be interpreted against the insurer and in favor of the assured. But where, as here, the provisions of the policy are definite and certain there is no room for interpretation and the courts will not indulge in a forced construction in order to cast a liability upon the insurer which it has not assumed. Maryland Cas. Co. v. Industrial Acc. Comm., 209 Cal. 394, 397, 287 P. 468.

[4] In our opinion, it is obvious from the above-quoted provision of the policy that it was the intention of the insurer and the assured to limit the coverage of the policy to such liability only as was imposed upon the assured as an "individual employer" as distinguished from that which would arise by reason of being a "member of a copartnership". The right of an insurer to limit its contract of coverage may not be questioned. Zurich Gen. Acc. Ins. Co. v. Stadelman, 208 Cal. 151, 280 P. 687; Ocean Acc., etc., Corporation v. Industrial Acc. Comm., 208 Cal. 157, 280 P. 690.

[5] The holdings in Reed v. Industrial Acc. Comm., Cal.Sup., 73 P.2d 1212, 114 A.L.R. 720, and Zimmerman v. Industrial Acc. Comm., 119 Cal.App. 253, 6 P.2d 291, present no obstacle to the conclusion here announced. Neither of the cited cases presented a policy provision identical with or equivalent to that above quoted. In effect, the cited cases merely hold that the provisions of the policies there involved failed to sufficiently or clearly indicate an intention to cover only the respective assured's liability as an "individual employer" to the exclusion of any liability imposed upon him by reason of being a "member of a copartnership". Such intention is clearly and definitely evidenced in the policy now before us and "any liability as a member of a copartnership" is expressly excluded from coverage. We have no alternative, therefore, but to give effect to the plain meaning of the terms of the policy.

In passing, it may be mentioned that upon the hearing before the commission, the petitioner tendered a return of the premium because of the lack of coverage under the policy resulting from creation of the partnership.

The award is annulled in so far as it purports to dismiss L. E. Sherbert from liability and in so far as it purports to hold the petitioner liable as his insurance carrier, and the matter is remanded to the commission for further proceedings consistent with the views herein expressed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.

EDMONDS, Justice (concurring).

I concur in the decision, but I believe that the court should expressly overrule the case of Reed v. Industrial Accident Commission, Cal.Sup., 73 P.2d 1212, 114 A.L.R. 720, and disapprove the holding in Zimmerman v. Industrial Accident Commission, 119 Cal.App. 253, 6 P.2d 291. These cases reach a conclusion directly contrary to the position now taken by this court. Although the policy here considered limits the coverage to the liability of the insured as an "individual employer" to the exclusion of "any liability arising by being a member of a copartnership", the same restriction was at least impliedly made in the policies whose terms were construed in the two earlier cases.

In the Zimmerman Case, the insured was designated as an individual doing business under a fictitious name. He took in a partner and the court held the insurer liable for a compensable injury to an employee of the copartnership. The decision was based upon the conclusion reached in the case of First National Trust & Savings Bank v. Industrial Accident Commission, 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324, although the facts in that case were entirely different. There the policy insured the liability of two individuals, doing business under a firm name and described in the declaration as a copartnership. One of the named insured dropped out of the business and the other continued it as before but without having the policy changed. The court held the insurance carrier liable for a compensable injury to an employee which occurred after the retirement of the partner, stating as reasons therefor that the policy did not insure the partnership as an entity and also that in this state a copartnership is not usually considered a legal entity. The decision was also said to be compelled by the mandate of section 2557 of the Civil Code, as then in effect, which provided: "A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured."

The policy in this case included a schedule of questions asked of the insured, one of which was "Individual, copartnership, corporation or estate?" The answer to this question was "Copartnership". It is difficult to understand why such a policy should not have been held to be one which insured the liability of the copartnership. At the time this decision was rendered the Workmen's Compensation Act (Stats.1917, p. 835, ch. 586, sec. 7, as amended by St. 1929, p. 306) required the term "employer", as used in it, to be construed as including every firm and voluntary association. Although for some purposes a copartnership may not be a legal entity, the Workmen's Compensation Act expressly recognized it as such and the insurance contract disclosed that the individuals named were carrying on their business as a copartnership. The right of an insurer to limit its contract of coverage cannot be questioned (Zurich Gen. Acc. Ins. Co. v. Stadelman, 208 Cal. 151, 280 P. 687; Ocean Acc., etc., Corporation v. Industrial Acc. Comm., 208 Cal. 157, 280 P. 690) and courts must uphold the agreement of the parties.

The additional reason which the court gave for its decision is a doubtful one. The code section specifying that a transfer of interest by one of several co-owners does not avoid insurance might properly have been applied where there was "an alienation of the thing insured". But the policy of workmen's compensation insurance which the court was there considering covered the liability imposed by law upon an employer. Was the withdrawal of one member of a copartnership "an alienation of the thing insured" within the meaning of such a policy?

Under the policy in the Reed Case the liability of W. B. Mellott, designated as an "individual", was insured. Later Irwin G. Gordon became interested in the insured's business and it was thereafter conducted as "W. B. Mellott and Irwin G. Gordon, doing business as Gordon and Mellott". The insurance company, so far as the record shows, had no knowledge of Mr. Gordon's connection with the business but was held liable for a compensable injury to one who was employed by the copartnership of Gordon and Mellott. No distinction can properly be made between the liability of the insurer under that policy and the one issued to Mr. Sherbert in the present case.

I concur: HOUSER, J.

11 Cal.2d 694

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 16578.

Supreme Court of California.

July 29, 1938.

Rehearing Denied Aug. 25, 1938.

1. Insurance ⇐435

A workmen's compensation policy insuring "Merrill Parlas, Frank Parlas, Howard Crawthers, Donald Morris and George Riche, jointly and not severally, a copartnership doing business as Red Top Cab Co. and Airline Taxi Co." covers such liability only as is imposed upon named persons by reason of membership in the copartnership, and necessarily excludes from coverage any liability imposed on named persons as individual employers, or as members of a copartnership composed of persons other than those designated in policy.

2. Insurance ⚿435

A workmen's compensation policy insuring named persons "jointly and not severally, a copartnership doing business as Red Top Cab Co. and Airline Taxi Co." did not cover liability for injuries sustained by driver of cab which was owned by one of such named persons and a third party.

3. Insurance ⚿138(1)

An insurer has right to limit its contract of coverage.

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In Bank.

Proceeding under the Workmen's Compensation Act by Lorne E. Lackey, claimant, opposed by Frank Parlas and others, employers, and by the National Automobile Insurance Company, insurer, wherein the insurer filed a petition to review an award of the Industrial Accident Commission in favor of the claimant.

Award annulled, and matter remitted.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Industrial Accident Commission.

WASTE, Chief Justice.

This is a petition to review an award of the Industrial Accident Commission.

The employee, Lorne E. Lackey, was a taxi driver employed in San Bernardino. On September 18, 1936, he sustained a compensable injury and filed a claim with the respondent commission. After hearing, the commission found that his employers were Frank Parlas and Leslie Mohr, and that petitioner, National Automobile Insurance Company, was the insurance carrier. On rehearing, the commission found that the employers were "Frank Parlas, Leslie Mohr, The Airline Taxi Company, Merrill Parlas, Howard Crawthers, Donald Morris and George Riche". The employers were released and discharged from liability and an award was made against petitioner as their insurance carrier.

The principal issue is whether petitioner is the insurance carrier of the employer or employers of Lackey. Frank Parlas originally commenced the taxi business under the fictitious name of Air Line Taxi, and later he and his associates also used the name of Red Top Cab Company. Other parties were eventually brought into the organization. Their association was not under any formal articles of partnership, nor was there ever a fixed group of partners directing a specific business. The new parties owned or purchased interests in cars which were operated by drivers under the above-mentioned fictitious names. The particular cab driven by Lackey, the injured employee, was owned jointly by Frank Parlas and Leslie Mohr, and the proceeds from its operation, after expenses were deducted, were divided between Parlas and Mohr. The other parties had no interest in this particular cab. Mohr also acted as general manager of the taxi business under Parlas. Lackey received instructions from Mohr, as well as from Parlas. His cab was marked with signs of "Air Line Taxi".

The insurance coverage was obtained through Walter W. Robinson, an authorized agent of petitioner. Only one application was made, in 1932; thereafter all policies were renewals obtained by the agent. Occasionally the agent inquired as to the persons composing the group doing business under the fictitious names and specified these as the assureds under the policy. In a policy prior to that in force at the time of the accident, the parties were named as "Frank Parlas and Merrill Parlas, doing business as the Red Top Cab Company, the Yellow Cab Company, and Air Line Taxi". On December 16, 1935, Frank Parlas told the agent that he had sold certain of the cars to others, and requested that the coverage be made to include them. The company then issued its endorsement in the names of "Merrill Parlas, Frank Parlas, Howard Crawthers, Donald Morris and George Riche, jointly and not severally, a copartnership doing business as Red Top Cab Co. and Airline Taxi Co." This policy was renewed by one commencing May 14, 1936, with the same parties named. The agent testified that all his dealings were with Frank Parlas; that when he renewed the last policy he inquired as to any changes in the names, but that he had not specifically requested Parlas to let him know when changes occurred in the names of associates or car owners of the cabs.

We have discovered but one case dealing with a policy which insured two or more persons "jointly and not severally, a copartnership doing business as", etc. In such case the petitioner here was involved. National Automobile Insurance Co. v. Industrial Acc. Comm., Cal.App., 80 P.2d 1024. The decision in the cited case was handed down by the District Court of Appeal of the First Appellate District, Division Two, on June 22, 1938, since the filing of the briefs in the present cause. It is held in the cited case, in substance, that a policy containing the above-quoted words insured against the liability of the then existing copartnership as employer and clearly provided that it did not insure against the liability of the named individuals as employer. In announcing this result, the District Court of Appeal referred to the case of First National Bank v. Industrial Acc. Comm., 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324, wherein it was definitely indicated that by appropriate language a partnership entity may be covered and concluded that the policy appeared to be precisely the type of policy which the court there had in mind.

[1, 2] We are satisfied that the policy involved in the present case, insuring by its express terms "Merrill Parlas, Frank Parlas, Howard Crawthers, Donald Morris and George Riche, jointly and not severally, a copartnership doing business as Red Top Cab Co. and Airline Taxi Co.", covers such liability only as is imposed upon the named persons by reason of membership in the named copartnership and necessarily excludes from coverage any liability imposed on the named persons as individual employers or as members of a copartnership composed of persons other than those designated in the policy. As indicated at the beginning of this opinion, the cab driven by the injured employee was owned and operated jointly by Frank Parlas and Leslie Mohr, the latter not being designated in the policy as a member of the copartnership entity therein covered. It follows that the policy issued by petitioner does not cover any liability of Frank Parlas by reason of his individual interest in or ownership of the cab driven by the injured employee, and any status as an individual employer resulting therefrom, nor does it cover any liability of said Parlas arising out of the joint venture or separate or subsidiary partnership arrangement under which he and Mohr, joint owners of the cab, operated the same. The cab was not operated by the partnership composed of the five persons named in the policy, but, instead, was owned and operated jointly by only one of such persons in conjunction with a person (Mohr) not therein designated.

[3] The fact that from time to time changes in membership of the partnership entity intended to be covered were reflected in the policy, tends strongly to indicate that it was the intention of the parties that the coverage extended only to the entity made up of the parties so designated. The right of an insurer to limit its contract of coverage may not be questioned. National Auto. Ins. Co. v. Industrial Acc. Comm., Cal.Sup., 81 P.2d 926, this day filed; Zurich Gen. Acc. Ins. Co. v. Stadelman, 208 Cal. 151, 280 P. 687; Ocean Acc., etc., Corporation v. Industrial Acc. Comm., 208 Cal. 157, 280 P. 690. Mohr not being designated in the policy as a member of the partnership entity covered thereby is not entitled to the protection of the policy, and Merrill Parlas, Howard Crawthers, Donald Morris and George Riche having no interest or ownership in the cab driven by the injured employee at the time of the accident, and not having employed him to operate the same, do not require the protection thereof. As already indicated, any liability imposed upon Frank Parlas by reason of his employment of the injured person in conjunction with Mohr under a joint venture or separate or subsidiary partnership arrangement between them is likewise excluded from the coverage of the policy which by its express terms covers only the partnership entity made up of the five persons named in the policy. See Hartigan v. Casualty Co. of America, 227 N.Y. 175, 177-179, 124 N.E. 789.

The award is annulled in so far as it purports to dismiss and release Frank Parlas and Leslie Mohr from liability and in so far as it purports to hold the petitioner liable as insurance carrier, and the matter is remanded to the commission for further proceedings consistent with the views herein expressed.

We concur: EDMONDS, J.; SHENK, J.; SEAWELL, J.

HOUSER, J., being disqualified, did not participate herein.

BROCK, Director of Agriculture, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 15994.

Supreme Court of California.

July 28, 1938.

Rehearing Denied Aug. 25, 1938.

1. Injunction ⚿74

The superior court has power to restrain acts of a public officer where it is determined, after trial, that the officer is acting illegally, notwithstanding statutory provision that injunction will not lie to prevent the execution of a public statute by an officer for the public benefit. Code Civ.Proc. § 526; Civ.Code, § 3423.

2. Injunction ⚿136(1), 150

In action for injunction restraining director of agriculture from enforcing provision of Milk Control Act for establishment of minimum wholesale and retail prices for fluid milk in designated county, superior court had jurisdiction to grant temporary restraining order and temporary injunction where complaint tendered issues of fact as to invalidity of act complained of, as against contention that issuance of temporary restraining order and temporary injunction was improper under statute making injunction unavailable to prevent execution of public statute by an officer for the public benefit. St.1935, p. 922, § 735 et seq., as amended; Code Civ.Proc. § 526; Civ.Code, § 3423.

3. Injunction ⚿135

The issuance of a temporary injunction growing out of a factual situation is usually within the sound discretion of the trial court.

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In Bank.

Original proceeding for a writ of prohibition by A. A. Brock, as Director of Agriculture of the State of California, against the Superior Court of the State of California, in and for the County of Los Angeles, and another. On order to show cause.

Petition denied.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for applicant.

Lewis D. Collings, Edward M. Selby, and Cupp & Cupp, all of Los Angeles, for respondents.

CURTIS, Justice.

Petitioner seeks a writ of prohibition to issue out of this court directed to the Superior Court of the County of Los Angeles and the Honorable Emmet H. Wilson, a judge thereof, "commanding the said superior court and the Honorable Emmet H. Wilson, as judge thereof, to immediately cease and desist from any further proceeding in connection with the restraining order" or the preliminary injunction in a certain action pending before said court and instituted by G. S. Ray, and others against A. A. Brock, the petitioner herein, as director of agriculture of the state of California. The action of Ray, and others, versus Brock was instituted for the purpose of enjoining the petitioner from enforcing chapter 10 of division 4 of the Agricultural Code of this state. Stats.1935, chap. 241, p. 922, § 735 et seq., as subsequently amended, Stats.1937, chaps. 3, 57, 413 and 710, pp. 42, 151, 1372, 1988.

In the action of Ray, and others, versus Brock, the plaintiffs asked for a restraining order and a temporary injunction, pending the trial of said action, against Brock as director of agriculture of the state of California, and upon the trial of the action, for a permanent injunction to restrain him from enforcing any of the terms and provisions of said chapter 10 of division 4 of the Agricultural Code as amended by the legislature of 1937. After a hearing, the court on February 8, 1938, granted a restraining order against the defendant, as director of agriculture of the state of California, in which said director of agriculture was enjoined and restrained until the further order of said court from in any manner enforcing as against the plaintiffs, or either of them, any of the terms or provisions of chapter 10 of division 4 of the Agricultural Code of the state of California, or "of said amended Stabilization and Marketing Plan" of the Los Angeles area as amended, or of the order of the said A. A. Brock, as such director, "for the Establishment of Minimum Wholesale and Minimum Retail Prices for Fluid Milk" for said Los Angeles County Marketing Area.

Prior to the issuance of any temporary injunction, but after the issuance of said restraining order, this proceeding was instituted in this court for a writ of prohibition commanding said court and the judge thereof to cease and desist from any further proceeding in connection with said restraining order, except to dissolve said restraining order. While an alternative writ of prohibition was issued by this court it was subsequently set aside, and thereafter said superior court issued said temporary injunction of date, February 18, 1938. At the date of the filing of the petition herein, said temporary restraining order was in force, and there was pending before said superior court an order to show cause why a temporary injunction should not issue. It was to restrain the trial court from further proceeding in either of these matters that this proceeding was commenced.

Chapter 10 of Division 4 of the Agricultural Code, together with its amendments, is frequently referred to as the Milk Control Act, and for the sake of brevity we will use that designation as we may have occasion to refer to the chapter in the course of this opinion. It is not necessary for our present purpose to set out in any detail the various provisions of the Milk Control Act. The title of the Milk Control Act is as follows: "An act to add Chapter 10 to Division IV of the Agricultural Code, relating to the stabilization and marketing of fluid milk and fluid cream, declaring the urgency of this act, to take effect immediately." In general, the act provides for the establishment of market areas in the several sections of the state by the director of agriculture, the fixing by the director of minimum wholesale and retail rates at which fluid milk may be sold in any certain marketing area after its establishment, and the enforcement of the orders of the director general fixing such rates within said areas. Acting upon the purported authority conferred upon him as director of agriculture by the terms of the Milk Control Act, said director had established the Los Angeles County Marketing Area, and under a Stabilization and Marketing Plan of date, May 15, 1937, had fixed the minimum wholesale and retail rates for the sale of fluid milk and fluid cream to be charged in said marketing area, and was proceeding to enforce said rates against all persons engaged in the sale of milk and cream within said area, including the plaintiffs in the action of Ray et al. v. Brock, hereinbefore referred to. As stated before, this last named action was instituted to enjoin A. A. Brock, as director of agriculture, from enforcing the terms of the Milk Control Act.

In support of their demand for an injunction against the director of agriculture, the plaintiffs allege that the director of agriculture failed to comply with the provisions of the Milk Control Act in the formation of said area and in the establishment of the amended Stabilization and Marketing Plan for the sale of milk and cream within said area. The allegations to that effect are set forth in Paragraph X of their complaint as follows:

"That defendant did not prior to the formulation of said Amended Stabilization and Marketing Plan for the purported area, conduct a hearing in said area, or at all, for the purpose of determining whether or not the producers who produce sixty-five per cent of the fluid milk for said area and whose major interest is in the production of fluid milk for said area, or of the producers who produce sixty-five per cent of the fluid cream for said area and whose major interest is in the production of fluid cream for said area, desire that a stabilization and marketing plan as to fluid milk or fluid cream be formulated for such area. That there was not prior to the formulation of said Amended Stabilization and Marketing Plan, or at any time, presented any petition for a Plan by the producers who produce sixty-five per cent of the fluid milk for said purported area, or for any area in or including the County of Los Angeles, or any part thereof, and whose major interest is in the production of fluid milk for said area, or by the producers who produce sixty-five per cent of the fluid cream for said purported area, or for any area in or including Los Angeles County, or in any part thereof, and whose major interest is in the production of fluid cream for the area."

In said complaint, other grounds are advanced, some legal and some based upon certain alleged facts in support of their claim that the defendant was acting illegally in attempting to enforce said Stabilization and Marketing Plan, but the allegations of fact set forth in Paragraph X of said complaint are sufficient for our present purpose. The defendant in said action, the director of agriculture, was present both upon the application for a restraining order, and at the hearing of the order to show cause why a temporary injunction should not issue. His contention on these occasions, and his contention now, is that the Milk Control Act is presumed to be valid, and that the defendant as a public officer is presumed to have regularly performed his official duty in the organization of said area and in the establishing of said stabilization and marketing plan, and, therefore, no injunction may be issued to prevent the execution of said statute by him as such public officer without the establishment, after due hearing, of the invalidity of his acts, and that until such hearing and the final determination that his acts are illegal, the courts are without jurisdiction to issue an injunction restraining him from attempting to enforce the statute.

On the other hand, the trial court was of the view that, even conceding the constitutionality of the statute, there were still questions of fact tendered by the complaint as to whether the director of agriculture had regularly followed the provisions of the statute in the formation of the area and in the establishment of the marketing plan, and that until these questions of fact were determined by a trial of the case, the court might properly restrain the director from putting said plan in force.

[1] Petitioner relies upon section 526 of the Code of Civil Procedure and section 3423 of the Civil Code. The fourth subdivision of each of these sections provides that an injunction will not lie to prevent the execution of a public statute by an officer of the law for the public benefit. But petitioner concedes, as we understand his position, that if it be determined after a trial that the officer is acting illegally, then it is within the power of the court to restrain his acts. These code sections therefore do not answer our present inquiry.

[2] Petitioner cites us to no authority in support of his contention that the courts will presume the statute valid and that the officer has regularly pursued his authority thereunder and therefore no injunction will issue until it has been determined that his acts are illegal and unauthorized. He cites in support of his claim that prohibition is the proper remedy the following cases: Reclamation District v. Superior Court, 171 Cal. 672, 681, 154 P. 845; Glide v. Superior Court, 147 Cal. 21, 27, 81 P. 225; Richardson v. Superior Court, 138 Cal.App. 389, 32 P.2d 405, and Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127. But in none of these cases, was there any issue of fact tendered in the proceeding before the tribunal before which the proceeding was pending. The issues were all legal, and the ruling of the courts was uniform in holding that in such cases the trial court had no jurisdiction to enjoin an officer when the facts before it showed that he was acting within his legal authority. In the case of Brock v. Superior Court, supra, an express stipulation was entered into eliminating all issues of fact, and in the other cited cases it clearly appeared that no issues of fact were involved. Such was not the case in the pending action before the trial court when the application for a restraining order or a temporary injunction was before that court. Specific issues of fact had been tendered by the complaint in that action. If these issues should be determined in favor of the plaintiffs, then it would be the duty of the trial court to issue an injunction restraining the officer from attempting to enforce the statute. The case before the trial court in that instance was precisely like that involved in a recent case decided by this court where we held that as there were issues of fact tendered by the complaint in an injunctive proceeding, the trial court had jurisdiction to try these issues of fact, and that prohibition would not lie to restrain the trial court from issuing an injunction against an officer in an attempt to enforce a public statute, until these issues of fact were determined. Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 55 P.2d 495. In that case our decision upon this point is as follows (page 513): "In the injunction suit before the respondent court the plaintiffs therein made the claim that the prorate district in which the applicants were purporting to act as officers was never legally formed or organized in that the petition for the formation of said district was never signed by the necessary two-thirds of the lemon producers residing in said proposed district or zone, and therefore the commission had no authority to make its order organizing said district without an election being held therein to pass upon the question of the formation of said district. This claim on the part of said plaintiffs was set forth in paragraph XX of their complaint in which it is alleged, among other things, that 'said petition was not signed by two-thirds or more in number of the producers of lemons in California, nor by the owners of two-thirds or more of the producing factors of lemons in California.' If that allegation is true, then the district was not legally formed or organized, and if it was not so organized, an injunction against the applicants restraining them from executing the terms of said act would lie. On the hearing of the application for a temporary injunction, an affidavit was filed which purported to deny the allegations of paragraph XX of the said complaint. There is nothing, however, in the record before us to indicate that the respondent court has ever passed upon the issue tendered by the allegations of said paragraph XX. In fact, it would be rather unusual for the court to finally pass upon an issue of fact on an application for a temporary injunction. This issue of fact, however, was presented by the plaintiffs in

the injunction suit, and the court had jurisdiction to decide it. So far, it has never done so. The injunction suit is still in the respondent court, and that court has exclusive jurisdiction to hear and determine all undecided issues of facts presented by the pleadings in said suit. Should it determine that said district was legally organized and that the orders which the plaintiffs in said action seek to restrain are valid and binding upon those to whom they are directed, then it would be the duty of said court to deny the injunction and dismiss the suit. On the other hand, should the trial court find in favor of the plaintiffs in said suit upon the allegations of said paragraph XX, then it would necessarily follow that said orders would have no legal support and the defendants in said suit should be enjoined from enforcing them. For this reason, the application for a writ of prohibition directed to respondents restraining them from proceeding in said action should be denied."

[3] We see no reason to recede from the position taken in the decision of that case. It appears to us to be the only reasonable conclusion that can be reached in proceedings of that nature. To hold otherwise would be to tie the hands of the court in cases in which great and irreparable injury might be done private citizens by officers acting under a mistaken belief of their authority. The issuance of a temporary injunction growing out of a factual situation is usually one within the sound discretion of the trial court.

The constitutionality of the Milk Control Act is also raised by the respondents. In view of our conclusion that the trial court still has jurisdiction of the injunction suit, and therefore the petition herein must be denied, it is not necessary for us to pass upon the constitutionality of said act, and a majority of this court deem it improper to do so. We, therefore, express no opinion upon the constitutional question raised by respondents.

The petition is denied.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.; SEAWELL, J.

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11 Cal.2d 781

BROCK, Director of Agriculture, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 16674.

Supreme Court of California.

July 28, 1938.

Prohibition ⚷5(3)

The state director of agriculture was not entitled to a writ of prohibition prohibiting the superior court and the judge thereof from taking any action in an injunction suit against the director of agriculture except to dissolve the temporary injunction issued in the action.

In Bank.

Original proceeding for a writ of prohibition by A. A. Brock, as Director of Agriculture of the State of California, against the Superior Court of the State of California, in and for the County of Los Angeles, and another, wherein an order to show cause was issued.

Petition denied.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for applicant.

Mark M. Cohen, Irwin M. Fulop, and Victor Ford Collins, all of Los Angeles, for respondents.

PER CURIAM.

This proceeding to prohibit the Superior Court of the County of Los Angeles, and the judge thereof, from taking any action in an injunction suit brought against the director of agriculture, except to dissolve the temporary injunction issued in said action, is in all respects, except as to the names of the parties plaintiff in said injunction suit, like action, 81 P.2d 931, this day decided. In that case we denied the petition for the writ of prohibition for reasons stated in our opinion in said proceeding. For the same reasons, and upon the authority of our decision in said proceeding, the present petition for a writ of prohibition is denied.

In re LACEY.

S. F. 15929.

Supreme Court of California.

July 29, 1938.

Rehearing Denied Aug. 25, 1938.

1. Attorney and client ⚿3, 61

The Supreme Court has inherent power to admit an applicant to the practice of law or to reinstate a previously disbarred applicant, despite an unfavorable report by the board of bar governors of the state bar.

2. Attorney and client ⚿7, 54

The recommendation of the board of bar governors in matters of admission and discipline of attorneys is entitled to great deference, but is advisory only, and final determination rests with the Supreme Court, whose powers are plenary and whose judgment is conclusive.

3. Attorney and client ⚿61

Evidence that a disbarred attorney performed services of a legal nature, though having another attorney act for him when court action was necessary, *held* to require denial of attorney's application for reinstatement on ground that he had practiced law after disbarment.

LANGDON, J., dissenting.

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In Bank.

Proceeding in the matter of the application of Joseph P. Lacey for readmission to practice law after his disbarment.

Application denied.

Edwin V. McKenzie, Leo R. Friedman, Walter E. Hettman, and Edward P. Murphy, all of San Francisco, Joseph Scott, of Los Angeles, and Hettman & Scampini, of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, and John A. Sutro, of San Francisco, for respondent.

PER CURIAM.

Application of Joseph P. Lacey for readmission to practice law in this state after his disbarment by this court on the ground of his conviction of a felony involving moral turpitude. The application for reinstatement is based upon the ground and claim that the applicant since his disbarment has rehabilitated himself and now possesses the necessary moral qualifications and mental attainments to entitle him to be restored as a member of the bar and to practice as an attorney in all the courts of this state. The application was made in the first instance to the board of governors of the State Bar of California. Upon presentation of said application the board of governors of the State Bar appointed one of its members, Richard Belcher, Esq., as a committee to hold a hearing on said application and to take evidence both in support of and against said application. The committee held such a hearing which continued eight days at which a large number of witnesses were sworn and gave testimony as to the issues involved in said application. There were also filed with the committee numerous testimonials in support of said application. The applicant was present both in person and by counsel during the entire time of said hearing and the State Bar was represented by a duly appointed examiner during the last five days of said hearing. At the conclusion of said hearing the committee made findings of fact favorable to applicant and recommended his reinstatement to practice law in this state.

[1, 2] Before passing upon the report and recommendation of said committee and after said report had been filed with said board, it appointed one of its members, Newton M. Todd, Esq., as a "Reviewing Governor" to review the evidence and proceedings before said committee, and report his conclusions to the board of bar governors. The "Reviewing Governor" complied with the order appointing him, and reported to the board his recommendation that the application of said Joseph P. Lacey for reinstatement and readmission as attorney at law be denied. After the receipt of this report and recommendation, the board of bar governors held a hearing upon said application for reinstatement, at which hearing petitioner and his counsel and the examiner of the State Bar were present and presented arguments before the board for and against the reinstatement of petitioner. After argument of counsel, the matter before the board was submitted for decision. The vote upon this motion resulted in a tie, six members voting in favor of and six against said motion. Two members of the board deemed themselves disqualified and refrained from voting and one member of the board was absent. At a subsequent meeting of the board held one month thereafter, the previous vote upon the

resolution to reinstate applicant was unanimously rescinded by the board. Thereupon the board proceeded to again vote upon said motion to recommend the reinstatement of applicant, with the result that the motion was lost, nine members voting against said motion and four in favor. The two members who deemed themselves disqualified refrained from voting as they had done at the previous vote on said motion. This final action by the board of bar governors was taken on March 19, 1937. On October 15, 1937, applicant filed in this court his petition to be reinstated to the practice of law notwithstanding the adverse action of the board of bar governors upon his application for reinstatement made before that body. That this court has the inherent power and authority to admit an applicant to practice law in this state or to reinstate an applicant previously disbarred despite an unfavorable report upon such application by the board of bar governors of the State Bar, we think is now well settled in this state. Brydonjack v. State Bar, 208 Cal. 439, 446, 281 P. 1018, 66 A.L.R. 1507; Vaughan v. State Bar, 208 Cal. 740, 284 P. 909. The recommendation of the board of bar governors is advisory only but as that body has been provided by legislative enactment as an arm of this court for the purpose of assisting in matters of admission and discipline, the greatest deference should be, and always has been, accorded to its recommendation by this court. Nevertheless the final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive. Fish v. State Bar, 214 Cal. 215, 225, 4 P. 2d 937; Brydonjack v. State Bar, supra.

The reinstatement of applicant was resisted on two grounds, first, that the evidence showed that applicant since his disbarment had not become rehabilitated morally to such an extent as to entitle him to be restored to the practice of law, and secondly, that since his disbarment and while he was under the disability of disbarment he had practiced law contrary to the order of the court made in said disbarment proceedings.

[3] In support of his application for reinstatement, and for the purpose of showing that he had rehabilitated himself morally since his disbarment, the applicant presented before the committee both oral and documentary evidence consisting of letters of recommendation from members of the judiciary, members of the bar and business men and personal friends. Many of these same persons appeared personally before the committee and gave oral evidence favorable to the applicant as to his moral fitness to again become a member of the bar of this state. On the other hand, both the trial judge who presided at applicant's trial and the prosecuting officer at said trial reported adversely upon applicant's application. As we have before stated, the report of the committee appointed by the board of bar governors was favorable to the applicant, while the "Reviewing Governor" made a contrary report. In this state of the record the application came before the board of bar governors, with the result as stated above. We do not find it necessary to pass upon the question thus presented, for we are satisfied that other considerations determined a majority of the board of bar governors to refuse approval of applicant's application. At the hearing before the board of bar governors, different members of the board and the examiner appointed by the board, entered into an extended discussion with applicant's attorney relative to the evidence bearing upon the question as to whether or not the applicant had practiced law during the period of his disbarment. It is apparent to us that the final action of the board of bar governors in denying the petition of applicant for reinstatement was based to a large extent upon evidence before it that petitioner had practiced law during the period of his disbarment. We are of the opinion after a review of the entire evidence upon the issue as to whether petitioner violated the order of disbarment by practicing law thereafter, that the preponderance of such evidence is in favor of the final conclusion of the board of bar governors.

In a number of instances it was shown that applicant gave legal advice, consulted with attorneys representing interests opposed to those he represented, agreed to represent litigants in proceedings pending in court or which might be the subject of court action, and that he was paid for the services rendered by him. In none of these matters did applicant ever appear in court for any of the parties whom he agreed to represent but when it was necessary for a court appearance an attorney who is referred to in some instances in the record as Mr. Davis, although that was not his true name, acted for him in proceedings before the court, his retention as their attorney having been arranged by applicant.

The Sheldon Matter. In this matter, Mrs. Sheldon testified that Lacey told her he was an attorney and would take care of her legal troubles. Her father had died and she was concerned regarding the property belonging to his estate. She testified that she paid Lacey $100 for services to be performed in connection with her father's estate. While she testified that Lacey accepted the money, she claimed that he failed to perform the services agreed upon. We are not particularly concerned with the claim in our consideration of the present issue. Applicant contended and testified that he received this fee for Mr. Davis, and that the legal services were to be performed by Mr. Davis and not by applicant. Applicant so testified and so did Mr. Davis. Applicant further testified that this fee was paid to Mr. Davis. It seems that Mr. Davis had been regularly admitted to practice law in this state, and thereafter had left the state for some considerable period of time. While out of the state he had failed to pay his dues as required under the State Bar Act and for such failure had been suspended from practice by order of this court. After such order of suspension, Mr. Davis returned to the state, but neglected to pay his dues and to be reinstated to practice. Some time subsequent to his return to the state, he was brought before the State Bar in a disciplinary proceeding in which he was charged with practicing law without a license. At the present hearing, after Mr. Davis had testified that this $100 was paid to Mr. Lacey and the latter paid it to Mr. Davis, for the purpose of impeaching him as a witness, he was shown a transcript of the proceedings in his own case before the State Bar. The transcript showed that he had represented himself in that proceeding, and that by questions propounded by him to Mrs. Sheldon, she testified that she never employed Mr. Davis to act as her attorney in the matter of her father's estate; that she employed Mr. Lacey as such attorney; and that she never paid Mr. Davis any money, although Mr. Davis had given her a receipt for the $100 some six months after it had been paid. The transcript of the proceedings in that matter further showed that Mr. Davis, when asked, "Why did you sign a receipt for money you had never received?" answered, "Foolishly, to protect the fellow. I saw he was in trouble there." There is no question that by the use of the term, "the fellow", Mr. Davis referred to the present applicant. This is made apparent from further testimony given by Mr. Davis in his own case, as shown by the transcript. He was asked the following question, "So your explanation is that you signed this receipt in order to help out Mr. Lacey?" to which he answered, "I did, but I had known the man for years. I knew he received the money, and probably spent it and I signed the receipt." These prior statements made by Mr. Davis, not only served to completely impeach him as a witness, but taken in consideration with other facts and circumstances surrounding the relations of these two men, place the applicant in a most unfavorable light and justify an inference that the use of Mr. Davis' name in these legal proceedings was only a ruse and a subterfuge to escape the technical charge that he was practicing law.

It further appears without any contradiction that during a considerable part, if not the entire time, applicant claims that he was acting in these and other matters, hereinafter considered, as the clerk of Mr. Davis, the latter was under suspension for failure to pay his dues to the State Bar, that for that reason he had no right to practice law at that time, that he had no office at which he held himself out as practicing law, and that he was then engaged as an employee in a local bank. Furthermore, it appears without conflict that when in the legal proceedings in which applicant was acting, it was necessary to state the place where notice should be sent to the attorney of the person for whom applicant was acting, the place so designated in one instance was not the office or place of business of Mr. Davis, but the home of applicant, and in another instance, the place where applicant was employed was given as Davis' address. In no case was Davis' home or place of business designated as the place where notice was to be sent to the attorney. To hold that these proven facts do not show that applicant was practicing law would be to sacrifice form to substance and to permit one, indirectly and by subterfuge to do that which he is prohibited from doing directly. He performed all legal services required, except appearing in court, and he was paid by these people for services rendered in their behalf.

The Mary Coghlan Matter. Mary Coghlan testified that she paid applicant $50, part of which was to cover costs and filing fee and the balance of his fee, in a proceeding pending in court. In that proceeding when it was necessary for a court appearance, Mr. Davis acted for Mr. Lacey. However, Mrs. Coghlan testified as to Mr. Davis' court appearance. "Of course, Mr. Lacey did not go in court. Mr. Davis did, although I didn't know at the time Mr. Davis was connected with me. I hadn't employed him." Mr. Davis was then under suspension for non-payment of dues, and, as stated before, had no established law office and was a bank employee.

In another case, Mr. Lacey wrote to the attorney for the plaintiff asking for additional time in which the defendants might appear, but subsequently when a court appearance was necessary, it was made either by Mr. Davis or in his name. Other instances are shown in which the applicant was consulted on legal matters, and in which he advised those seeking advice. According to his evidence he always referred these parties to Mr. Davis when court proceedings were required even though during all this time Mr. Davis was employed in a local bank, had no law office and was under suspension from practicing law.

The evidence shows without question that applicant acted as the attorney for Mrs. Sheldon and Mrs. Coghlan in legal matters involving court appearances. He did not personally appear in court for either of these parties but when court action was necessary, had Davis act for him. In the Sheldon matter while he and Davis contend otherwise, the evidence in our opinion shows that he received the entire fee of $100 for services performed for Mrs. Sheldon. In the Coghlan matter, the latter testified that she paid Lacey for the services rendered for her, and there is no credible evidence to the contrary. In the other instances, the proof is not as satisfactory as it is in the two matters just mentioned, but the evidence in these matters show that he operated under a general system or plan the same as that followed by him in the Sheldon and Coghlan matters. It seems apparent to us that he for some years during the period of his disbarment carried on the practice of law using Davis as a subterfuge when the interests he represented required court action. The evidence will not support his claim that he was simply the clerk for Davis and that the services performed by him were that of a ministerial character as an employee of Davis. The great weight of the evidence is not only against this claim but is to the effect that he was the principal in these matters and employed, or at least arranged with, Davis to assist him. "If it were true that he has been in fact acting as an attorney and counselor at law, or by his conduct has been attempting to do under cover that which he could not lawfully do at all, then, of course, his application should be denied." In re McKelvey, 82 Cal.App. 426, 429, 255 P. 834, 836.

The evidence above shows that applicant has been guilty of such conduct, and, therefore, his present application should be denied. It is so ordered. When applicant can satisfy this court that he has in good faith hereafter refrained from the practice of law for a reasonable time, a further application by him may receive more favorable consideration by this court.

LANGDON, Justice (dissenting).

I dissent. The applicant's petition to the board of governors of the State Bar first resulted in an even division of the members thereof on the question of his right to readmission to practice. A subsequent vote showed four members in favor of the application. The chief issue was, as it must be in all such cases, whether the applicant had so rehabilitated himself as to warrant reinstatement. The majority opinion does not deal with this issue, and instead relies upon doubtful and conflicting evidence of his activities in recent years to hold that he was guilty of practicing law during the period of disbarment.

In my opinion this evidence is unsatisfactory and unconvincing. The real question, in my mind, is whether petitioner has, in addition to paying the price of his misdeeds, actually rehabilitated himself and proved that he possesses the necessary character and integrity to entitle him again to pursue the only profession for which he is fitted. On that question the opinion is silent, but the record is eloquent. An honor roll of nineteen judges, over one hundred prominent attorneys, including four former members of the board of governors of the state bar, officials of the prison board, and other civic leaders, has been presented to us by letters and oral testimony, to show the widespread feeling among those who know the applicant that he may now be safely entrusted with the duties and responsibilities of the practice of law.

On such a record I believe that the application of Joseph Lacey should be granted.

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11 Cal.2d 666

PEOPLE v. O'DONNELL.

Cr. 4134.

Supreme Court of California.

July 28, 1938.

Rehearing Denied Aug. 25, 1938.

1. Criminal law 🔑29

One who commits lewd acts with child without intent to commit rape, but subsequently conceives such intent and commits rape, may be convicted of lascivious acts with child because of previous conduct, as well as of rape. Pen.Code, § 288, as amended by St.1933, p. 1028.

2. Criminal law 🔑366(7)

In prosecution for committing lewd acts with, and rape of, three-year-old child, child's accusatory statements, made to child's mother immediately after the offense, were not res gestæ and were inadmissible.

3. Criminal law 🔑363

In order to be admissible as part of res gestæ, declarations must have been uttered contemporaneously with and grow out of the act upon which they have a bearing so as to be spontaneous and not narrative; and must qualify, illustrate, explain, and unfold its character or significance, so that the declaration and the act form a single and indivisible transaction.

4. Infants 🔑20

One who exposes the private parts of himself and of a child is guilty of lewd acts with children, independently of his guilt of rape. Pen.Code, § 288, as amended by St. 1933, p. 1028.

5. Criminal law 🔑1186(4)

In prosecution for committing lewd acts with, and rape of, three-year-old child, wherein evidence concededly sustained conviction of rape, error in admitting child's accusatory statements to her mother concerning lewd acts was not reversible, since proof of rape necessarily implied commission of lewd acts and there was no miscarriage of justice. Pen.Code, § 288, as amended by St.1933, p. 1028; Const. art. 6, § 4½.

6. Criminal law 🔑1170½(2)

Permitting district attorney, in prosecution for committing lewd acts with child and for rape, to ask defendant's brother whether he had had difficulty with defendant concerning defendant's conduct with brother's daughter, was not prejudicial error, where answer was favorable to defendant.

7. Criminal law 🔑1037(1)

Alleged error in permitting district attorney to propound improper question in bad faith cannot be raised for the first time on appeal, in absence of assignment of misconduct.

8. Criminal law 🔑656(8)

A trial judge is rigorously prohibited from action or words having the effect of conveying judge's personal opinion of the truth or falsity of evidence to the jury.

9. Criminal law 🔑1166½(12)

Alleged improper remarks of trial judge were not prejudicial error, where evidence of guilt was conclusive and judge charged jury to disregard any remarks from which jury might gain impression that court had an opinion concerning any facts, and charged that facts were for jury's exclusive consideration.

EDMONDS, HOUSER, and SEAWELL, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Charles O'Donnell was convicted of rape and of violating section 288 of the Penal Code, as amended by St.1933, p. 1028, and he appeals.

Affirmed.

For prior opinion, see 70 P.2d 238.

Rehearing denied; SEAWELL, EDMONDS, and HOUSER, JJ., dissenting.

Wm. L. D. Southwell and Peter J. Mullins, both of San Francisco (P. J. Murphy, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., August Fourtner, Asst. Dist. Atty., and John R. Golden, Asst.

Dist. Atty., all of San Francisco, for the People.

PER CURIAM.

This case was heard and decided by the District Court of Appeal, First Appellate District, Division One. Thereafter a hearing was granted by this court, and we now adopt portions of the opinion of Mr. Presiding Justice Tyler, with certain additions, as the opinion of this court:

"Appellant was originally charged with a violation of section 288 of the Penal Code (as amended by St.1933, p. 1028), relating to crimes against children. To this charge he pleaded not guilty and not guilty by reason of insanity. At the time set for trial appellant withdrew his plea of not guilty and went to trial on his plea of not guilty by reason of insanity. On this trial the jury disagreed. Thereafter the district attorney amended the information and added a second count charging the offense of rape. To both counts of this amended information appellant pleaded not guilty and not guilty by reason of insanity. Subsequently he withdrew his plea of not guilty by reason of insanity. After trial the jury found appellant guilty on both counts. In its verdict of guilty on the rape charge it recommended that the appellant be punished by imprisonment in the county jail. Motions for a new trial and in arrest of judgment were made and denied, whereupon appellant was sentenced to San Quentin on the charge of violating section 288 of the Penal Code and to the county jail for one year on the rape charge, the sentences to run concurrently. This is an appeal from the final judgment and the order denying a motion for a new trial. It is conceded there is sufficient evidence in the record to support the conviction on the rape charge, but it is claimed there is none to support the charge under count one relating to lewd or lascivious acts against children. The further claim is made that the trial court by its conduct stripped appellant of a fair and impartial trial and erred in admitting the declarations of the child in evidence and in its instructions to the jury.

"The evidence reveals a heinous crime of the most loathsome and sordid character. Such of the facts as are necessary for a discussion of the case show that on the 5th day of September, 1936, appellant, a man sixty-two years of age, visited the home of Mr. Jannsch for dinner. There were present, Jannsch, his wife, a Mrs. Pedersen and her infant daughter three years of age. Shortly after 9 o'clock the child was put to bed. Later Mrs. Pedersen complained of a headache and she, accompanied by Jannsch and his wife, went to a drug store to obtain some aspirin. When the party returned home about half an hour later they heard the Pedersen child crying frantically in the bathroom. Mrs. Pedersen pounded on the front door and called upon appellant to open it. Receiving no response, Mrs. Jannsch requested her husband to hurry and open the door. When opened, Mrs. Pedersen accompanied by Mrs. Jannsch proceeded to the bathroom where they found the baby. She was bleeding between her legs and from her crotch. Mrs. Pedersen then went to the living room, where appellant was sitting in a chair with his eyes closed apparently asleep. She shook him and asked him what he had done to the baby. He replied that she must have fallen and cut herself. Mrs. Pedersen then returned to the bathroom and the child still crying, informed her in her simple language that appellant had put his finger into her vagina and rectum. Mrs. Pedersen took the child to the emergency hospital and notified the police. They went to the house and found appellant still in the chair with his eyes closed. When accused of having harmed the child he denied the charge. He was then taken to the bathroom by the officers and his clothes examined. The front of his trousers, at the fly, were stained with a whitish substance mixed with blood. He was returned to the living room, where one of the officers asked the little child in the presence of appellant who had injured her, and she pointed to appellant. He was then taken to his home and his clothes were taken charge of by the officers. Upon examination by a physician the child's vagina was found torn and bleeding, and inside the vaginal cavity were found male procreative germs. Appellant's trousers and the cushion of the chesterfield in the living room, where he had been, were examined, and blood and spermatozoa were found on both. Blood was also found on the slip which had been worn by the child. This in substance constitutes the evidence in the case.

[1] "It is difficult to understand why the jury, having found defendant guilty of rape, could have made the recommendation it did. It is admitted that the evidence is sufficient to sustain that charge,

but it is claimed there is no evidence tending to show that appellant violated section 288 of the Penal Code. In this connection it is claimed that the lewd and lascivious acts were part of and became merged in the rape charge, for which reason appellant could not be punished under the provisions of section 288 of the Penal Code. The fact that appellant was convicted upon the charge of rape does not necessarily prevent him from being punished under section 288 for any of the acts committed prior thereto. If any one of the antecedent acts of lewd and lascivious conduct was committed without the intent to commit rape, but simply to gratify appellant's lustful passion, and then later, emboldened by his success and further inflamed with passion, he conceived the further nefarious intent to penetrate the body of the child, the antecedent acts prior to the rape are punishable under the section involved. This question is fully discussed in People v. Parker, 74 Cal.App. 540 [241 P. 401] and need not be pursued further here. In People v. Lind, 68 Cal.App. 575 [229 P. 990], it was held that one who had committed lewd and lascivious acts leading up to the consummation of the crime of sodomy might be punished for his preliminary acts under section 288 of the Penal Code. So, also, in People v. Bronson, 69 Cal.App. 83 [230 P. 213], it was held that acts committed upon the body of a child immediately preceding the accomplishment of the act of sexual intercourse would bring such conduct within the condemnation of the section. (See, also, People v. Agullana, 4 Cal.App.2d 34 [40 P. 2d 848]; People v. Meyer, 94 Cal.App. 696 [271 P. 751]; People v. Piburn, 138 Cal.App. 56 [31 P.2d 470])."

[2, 3] The statement made by the child to her mother should not have been admitted in evidence. It was not a part of the res gestae but a declaration of a past event. In People v. Perkins, 8 Cal.2d 502, 66 P.2d 631, this court recently said that to be within the rule of res gestae "the declaration must be the 'natural and spontaneous outgrowth of the act or assault,' and not a mere narration of a past transaction." (Page 638.) In the earlier case of People v. Mahoney, 201 Cal. 618, 258 P. 607, the court laid down the requirement that to come within the rule allowing declarations to be admissible as part of the res gestae they must possess the characteristics defined in Underhill's Criminal Evidence as follows: "First, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing so as to be spontaneous and not narrative; second, they must qualify, illustrate, explain and unfold its character or significance, so as, third, to be connected with it in such a manner that the declaration and the act form a single and indivisible transaction." These cases state and apply a fundamental rule which has long been part of the law of evidence. Measured by that rule the declaration of the child was inadmissible as evidence against the defendant.

[4, 5] However, aside from the testimony relating the statement of the child, there is other evidence directly connecting him with the commission of the offense. To have accomplished the act of rape he must have exposed his private parts and those of the child. Such acts constitute a violation of section 288 of the Penal Code and were independent of the rape. People v. King, 65 Cal.App. 306, 223 P. 1001. The evidence challenged by the defendant was, therefore, fully covered by other evidence which was properly admitted and an examination of the entire record shows that there has been no miscarriage of justice. The error complained of does not, therefore, entitle the defendant to a reversal of the judgment. Art. 6, sec. 4½, Const.

[6-9] "Numerous charges of misconduct on the part of the court during the presentation of the evidence are assigned as prejudicial error. To many of these remarks no assignment of error was claimed, nor was a request made that the jury be instructed to disregard them. Complaint is also made that the district attorney was guilty of prejudicial misconduct in the examination of appellant's brother. The witness was asked if he ever had any difficulty with appellant concerning his conduct toward his daughter. Appellant claims that the question was propounded in bad faith, and that it was prejudicial to him. Assuming the question to have been improper, the answer was favorable to appellant and could not have been to his prejudice. (8 Cal.Jur., p. 628.) Moreover, no assignment of misconduct was made, and in the absence thereof the question cannot be raised for the first time on appeal. People v. Fodera, 33 Cal.App. 8, 164 P. 22. The record shows that the trial judge was impatient with counsel for the defense and also with the district attorney as to the manner in which the

trial was being conducted and made many remarks that may well have been left unsaid. We do not deem a recital of these remarks to be necessary. We have considered them and no doubt some of them were improper and beyond the privilege of the court. A trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. This rule should be strictly adhered to. We cannot say, however, considering the conclusiveness of the evidence, that any of them resulted in a miscarriage of justice. At the conclusion of the case the court instructed the jury to disregard any remarks that were made from which it might gain the impression that the court had an opinion concerning any fact, and it was instructed that the facts were for its exclusive consideration. And finally, complaint is made of certain instructions which it is claimed were prejudicial to the rights of appellant. We have carefully examined the instructions and see no error therein."

The judgment and order are affirmed.

EDMONDS, Justice (dissenting).

I dissent. The record in this case shows that the defendant was convicted upon a trial during which the judge was guilty of misconduct which no appellate court should either excuse or ignore. The fact that the evidence points very conclusively to the defendant's guilt does not take from him his right to a fair and impartial trial. One charged with crime is presumed to be innocent until the contrary is proved. The privilege of a trial judge to comment upon the evidence does not authorize him to either assume the role of prosecutor or to convey to the jury his personal opinion concerning any question of fact. People v. Talkington, 8 Cal.App.2d 75, 47 P.2d 368; Hunter v. United States, 5 Cir., 62 F.2d 217, 220. It is his duty to insure the defendant his constitutional rights, and to maintain an attitude of unswerving impartiality between the prosecution and the defense, regardless of the seriousness of the crime or his own certainty of the defendant's guilt. People v. Sheffield, 108 Cal.App. 721, 732, 293 P. 72, 77; People v. Brady, 56 Cal.App. 777, 789, 206 P. 668; People v. Hartman, 103 Cal. 242, 245, 37 P. 153, 42 Am.St.Rep. 108.

Throughout the trial of this case the judge showed intense animosity toward the defendant and his counsel. Thirty-five instances of asserted misconduct are cited as grounds for reversal of the judgment. Apparently the nature of the offense with which the defendant was charged improperly influenced the judge and caused him to make rulings which have no legal support. Upon the hearing of a motion for a new trial he very frankly stated that having a belief in O'Donnell's guilt, "perhaps the Court was incapable of concealing entirely his strictly personal sentiments toward the defendant". A more accurate statement would be that from the beginning of the trial to its conclusion his "sentiments toward the defendant" were expressed by statements made to or before the jurors which could only mean that he expected and desired them to return verdicts of guilty. Moreover, his comment upon the conduct of defendant's counsel was both intemperate and unjustified. It indicated that he believed they were presenting a defense which was entirely without merit.

For example, in a discussion concerning the proceedings upon a former trial of the defendant, it was stated that he had entered a plea of not guilty by reason of insanity to the information as originally filed. "And that," said the judge, "implies guilt upon his part". In his instructions to the jury the judge again referred to this plea. After stating that the defendant had been tried upon the original information to which the defendant pleaded not guilty by reason of insanity, he said that "the jury were unable to agree as to whether the defendant was sane or insane at the time he committed the offense of violating section 288 of the Penal Code". The record also shows that the defendant was asked about this plea when he testified as a witness in his own behalf. He explained that he entered it upon the advice of his then counsel "not knowing that when I made that plea of not guilty by reason of insanity that I was making a plea of guilty, until I heard the judge make the assertion here, and when I tried to get my attorneys to contradict the judge they said 'Sit down and shut up' ". The deputy district attorney then stated he had no further questions, whereupon the judge said, "Yes, get away. I do not know whether he has attorneys any more. Do you gentlemen still appear for him?"

The reply of Mr. Mullins to this question was, "Yes, your Honor, and will continue to." The judge concluded with the remark, "I sympathize with counsel for the defendant now."

The defendant also cites as misconduct many remarks of the trial judge which were made during the examination of witnesses. During the cross-examination of an expert who testified concerning the result of certain chemical tests the judge said, "I am not going to permit the character of the testimony of a perfectly disinterested expert to be questioned, not when there is very good reason for it." Another expert witness for the prosecution, the examining physician for the San Francisco juvenile court, testified that she had thrown away the slides containing smears which had been analyzed. On cross-examination she was asked: "You do not consider there is any further value to these smears?" The deputy district attorney objected to this question, whereupon the judge said: "Objection sustained. I said yesterday, counsel, that I am not going to permit counsel, even by inference, to throw discredit upon the testimony of public officials who come here to testify, who are perfectly disinterested, and testify to facts within their own knowledge." At another time he said: "That is a silly theory, counsel. You are so subtle that you are over my head altogether."

Although many of the statements made by the judge were not assigned as error at the time of their occurrence, the record shows that with one exception, every claim of misconduct which was made during the trial was disregarded by him. The general rule that remarks which are relied upon as misconduct must be objected to at the time they are made and the court requested to admonish the jury concerning them or they will not be considered as ground for reversal of the judgment upon appeal, has one well-recognized exception to it: where an examination of the entire record shows a persistent course of conduct from which it is apparent that objection would have been useless, or, if the acts complained of are of such a character that no admonition to the jury would have removed their effect, then the absence of an assignment of error at the time the remark was made will not preclude one from raising the point upon appeal. People v. Mahoney, 201 Cal. 618, 622, 258 P. 607; People v. Frank, 71 Cal.App. 575, 585, 236 P. 189. The present case clearly comes within the exception and is a striking example of the necessity for it.

Nor does the fact that a record shows evidence which, if believed, points unmistakably to the defendant's guilt, save the judgment from reversal under article 6, section 4½, of the Constitution. Even convincing proof of a defendant's guilt does not necessarily mean that there has been no miscarriage of justice. People v. Mahoney, supra; People v. Patubo, 9 Cal. 2d 537, 71 P.2d 270, 113 A.L.R. 1303. A defendant is presumed to be innocent until conviction and is entitled to a fair trial. When that right is violated it amounts to a denial of due process of law. Powell v. Alabama, 287 U.S. 45, 52, 53 S.Ct. 55, 58, 77 L.Ed. 158, 84 A.L.R. 527. The purpose of a trial is to present the facts in a given case. From those facts and the law applicable to them, the determination of guilt or innocence is to be reached.

When a trial judge persists in statements before the jury which plainly indicate his belief in the defendant's guilt, extols the prosecution's witnesses, forbids their cross-examination, belittles defendant's counsel by frequent comments concerning the presentation of the defense and generally discredits their efforts, every principle of law demands a new trial.

For these reasons both the judgment and the order denying a new trial should be reversed.

I concur: HOUSER, J.

SEAWELL, Justice (concurrence in dissent).

It is my view of the law that the errors pointed out in the main dissenting opinion are not curable under any remedial provisions of the statute or Constitution and compel a reversal of the order and judgment. I therefore join in the views expressed by my associates that the order and judgment appealed from should be reversed.

11 Cal.2d 621

TITLE GUARANTEE & TRUST CO. v. MONSON et al.

S. F. 15735.

Supreme Court of California.

July 28, 1938.

Rehearing Denied Aug. 25, 1938.

1. **Mortgages 🔑199(2)**

Where trust deed authorized beneficiary to take possession and collect rents and profits in event of default, beneficiary's right to rentals was dependent solely upon the agreement, not upon statute requiring mortgagee to show, in applying for appointment of receiver, that mortgaged land "is probably insufficient to discharge the mortgage debt." Code Civ.Proc. § 564.

2. **Mortgages 🔑199(2)**

Where trust deed authorized beneficiary to take possession and collect rents and profits in event of default, beneficiary need not, in order to be entitled to rentals, exhaust its primary security by foreclosing before maturity. Code Civ.Proc. § 564.

3. **Mortgages 🔑199(2)**

Where mortgage authorizes mortgagee to enter into possession and collect rents and profits in event of default, the possession to which mortgagee is thus entitled is entirely distinct from the contract of hypothecation, and constitutes a separate specific security for the debt. Code Civ.Proc. § 564.

4. **Mortgages 🔑274**

Where purchasers of lands subject to trust deed sold their interest after beneficiary had brought action to "specifically enforce" the trust deed, but did not notify beneficiary of the sale, though knowing of beneficiary's rights to take possession and collect rents and profits, such purchasers were liable for rents subsequently collected by their grantees after purchasers had lost possession.

5. **Mortgages 🔑199(2)**

The parties to a trust deed may insert any lawful conditions as a part of the consideration, and give beneficiary, upon default in payment, the right of possession and right to rentals.

6. **Mortgages 🔑274**

A covenant in trust deed giving beneficiary right to take possession and collect rents and profits in event of default is binding upon a subsequent grantee.

7. **Mortgages 🔑199(2)**

Under trust deed authorizing beneficiary to take possession and collect rents and profits in event of default, the land itself became primarily liable for payment of the debt, and hence beneficiary's right to rentals could not be defeated by a change in possession.

8. **Mortgages 🔑274**

Under trust deed authorizing beneficiary to take possession and collect rents and profits in event of default, insurance and similar expenses incurred and actually paid by purchasers of the land or their grantees, between time of actual surrender of possession by grantees, should be deducted from the amount of rents collected by purchasers or their grantees, for which purchasers were liable.

9. **Mortgages 🔑274**

In suit by beneficiary in trust deed against purchasers of mortgaged land, for damages for withholding possession notwithstanding provision authorizing beneficiary to take possession and collect rents and profits in event of default, account should be taken of rents collected by either such purchasers or their grantees up until date of actual surrender of possession by grantees.

10. **Appeal and error 🔑1026**

That defendants' attorneys at trial, without authority, made damaging admissions of facts, was not ground for reversal where the record as a whole showed that no other inference concerning such facts could have been reached from the entire evidence.

11. **Judgment 🔑713(2), 728, 735**

A judgment generally operates as an estoppel to subsequent action between same parties as respects issues that actually were raised or might have been litigated in the former action, but not as respects issues not germane to or essentially connected with issues actually raised, nor as respects rights, claims, or demands constituting separate or distinct causes of action, which were not put in issue in the former action.

12. **Judgment 🔑728**

In action for "specific enforcement" of trust deed, instituted by beneficiary only twelve days after demand for possession, the issue of beneficiary's right to recover rentals under provision authorizing beneficiary to take possession and collect rents and profits in event of default was merely incidental and constituted a separate cause of action, and hence judgment therein that beneficiary was entitled to possession did not bar beneficiary's suit against defendants in the former action to recover rentals subsequently collected by such defendants and their grantees.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Title Guarantee & Trust Company against Charles E. Monson and another, to recover damages for rentals collected by defendants on mortgaged property. From a judgment for plaintiff, defendants appeal.

Affirmed.

For prior opinion, see 73 P.2d 272.

Sven H. Svenson, of San Francisco, for appellants.

Lillick, Olson, Levy & Geary, and Allen E. Charles, all of San Francisco, and Hansen & Sweeney, of Los Angeles, for respondent.

HOUSER, Justice.

As a foundation for the instant action, the record herein discloses the existence of the following pertinent facts, to-wit:

On the 6th day of September, 1928, Joseph P. Stein and his wife Annie, executed 140 promissory notes in favor of American Mortgage Company, which notes aggregated the sum of $145,000. To secure the payment of said notes, the makers thereof executed their deed of trust on certain real property in favor of the plaintiff Title Guarantee and Trust Company. Thereafter the said Steins conveyed their interest in said property to the defendants Monson. On June 6, 1932, certain interest that was then due on the indebtedness had not been paid. By the terms of said deed of trust, on the happening of said default, plaintiff was authorized to enter upon and take possession of the trust estate and to collect the rents, issues and profits thereof. On the 29th day of July, 1932, in writing the plaintiff demanded of the defendants that they deliver possession of said estate to the plaintiff. Thereupon, the defendants neglected and refused to accede to such demand. On the 10th day of August, next ensuing, the plaintiff commenced an action against the defendants to "specifically enforce" the terms of said deed of trust; and on the 17th day of November of the said year it obtained a judgment to the effect that since the 29th day of July, 1932, it was entitled to the possession of the above-mentioned property, and that the defendants forthwith deliver such possession to the plaintiff. Notwithstanding the terms of said judgment the defendants, both personally and constructively (through their grantees) continued in possession of the said property until February 28, 1933. Furthermore, it appears that in such interim, the defendants and their grantees had collected rents, issues and profits appertaining to said property, which they withheld and still withhold from the plaintiff. After the plaintiff had been let into possession of the said property, it commenced the instant action to recover from the defendants damages in the amount of said rentals. From an ensuing judgment that was rendered in favor of the plaintiff the defendants have appealed to this court.

[1-3] In substance, it is contended by defendants that the complaint failed to state a cause of action against them because it contained no allegation to the effect that plaintiff's primary security had been exhausted or that a sale of the apartment house building under the terms of the deed of trust had resulted in leaving unpaid a part of the indebtedness secured by said deed of trust; and that the property itself might have been ample to discharge the debt without recourse to the rents, issues, and profits from said property. It seems clear that in order for such contention to be tenable, the express stipulation in the deed giving to plaintiff the right to collect the rentals upon default would have to be ignored. Obviously, upon default, plaintiff's right to the rentals was not dependent upon any statutory right such as is contemplated by the provisions of section 564, Code of Civil Procedure, under which section, in an application for the appointment of a receiver, a mortgagee is required to show that the mortgaged premises "is probably insufficient to discharge the mortgage debt"—with the consequence that a resort to the rents and profits is necessary. 18 Cal.Jur. 300, 301. But the right asserted here is dependent solely upon the express agreement of the trustors that upon default, recourse may be had to such rentals by the beneficiary. American Trust Co.

v. England, 9 Cir., 84 F.2d 352. Furthermore, it would appear that this contention is necessarily postulated upon the proposition that notwithstanding the provision in the deed of trust conferring the right here sought to be enforced by plaintiff, upon default, it became the duty of the latter to exhaust its primary security, necessarily by foreclosure action, or other appropriate proceeding (even though the debt were not matured), and in the event of a deficiency arising thereupon, to have taken action, then and not prior thereto, to have the rentals subjected to the payment of the said deficiency. In that regard, it may be said that it does not appear that either by statutory provision or by the terms of the deed of trust, was the plaintiff obligated to foreclose its lien prior to maturity of the debt. With reference to the general situation, in 17 California Jurisprudence, pages 1018-1019, it is pointed out that "possession is entirely distinct from the contract of hypothecation"; and that "possession of the land is a specific security for the debt, distinct and separate from the mortgage, which has been conferred by the act of the debtor". And in the case of Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L.R.A. 137, 22 Am.St. Rep. 314, it also was said (page 204), "This right [in a mortgagee] to retain possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt". Furthermore, in the case of Cory v. Santa Ynez Land & Imp. Co., 151 Cal. 778, 91 P. 647, it also was said that, where a mortgagor allows the mortgagee possession of the mortgaged property "as additional security, the mortgagee thereby acquires the right to retain possession as long as the indebtedness so secured remains unpaid—a right additional to, and independent of, his right to foreclose * * *" (page 648).

[4-7] Appellants urge the additional point that since they were not one of the original parties to the notes and deed of trust, nor were in personal possession of the premises during a considerable portion of the time that elapsed after demand therefor was made and before judgment was obtained—they should not be held liable for such rents. With respect to the latter situation, it appears that, although the action was commenced on August 10, 1932, on September 20, following, the defendants sold their interest in the property, and thereafter were neither in personal possession thereof, nor after that date did they receive any of the rents that accrued and were paid therefor. However, in that connection, it also should be noted that, although the defendants sold their interest, at no time did they notify the plaintiff of that fact, nor did the plaintiff acquire either notice or knowledge thereof until after the judgment had been rendered against the defendants. But considering the fact that the defendants had knowledge of the asserted rights of the plaintiff, including that of the incidental right of possession of the property on the failure of the defendants to pay the installment interest, as well as of the right of the plaintiff to collect and to retain to its own use the rents as they thereafter might accrue, it would be most inequitable to permit the defendants by the means of effecting a conveyance of their interest in the property, to escape the consequences of the provisions of the deed of trust with respect to their liability. The deed by which title of the defendants was passed to some third person had the effect of enabling that person to collect the rents and thus do the very thing that created the alleged liability in favor of the plaintiff. If by sale of the incumbered property the incumbrancer were permitted to escape his just liability with respect to his covenants, nothing would prevent his grantee from granting to some other person, and so on, ad infinitum, to the irreparable damage of the beneficiary of the trust. It becomes apparent that the contention of the appellants in this regard, likewise, cannot be upheld. Within, and as a part of the deed of trust, the parties thereto had the right to insert any lawful conditions as a part of the consideration for the creation of the debt for which the property was hypothecated, and therein, upon default in payment, to invest in the plaintiff not only the right of possession, but also the right to the rentals. Snyder v. Western Loan & Building Co., 1 Cal.2d 697, 702, 37 P.2d 86. And this covenant was equally binding upon a subsequent grantee of the land. To hold that, to the loss of the creditor, the covenants agreed upon between the debtor and the creditor thereafter could be repudiated by a subsequent grantee, as in effect is contended here, would be contrary to reason and fairness. The rights of the defendants were measured by the conditions and terms of the original trust deed. In volume 41 C.J. p. 714, it is said: "The purchaser of mort-

gaged premises will be entitled, as against the mortgagee, to recover or retain the possession only in case his vendor would have been so entitled. * * * The purchaser is ordinarily entitled to all rents of the property accruing after the date of his purchase, unless they are expressly pledged in the mortgage as part of the security." Again, in the case entitled Equitable Life Assur. Soc. v. McCartney, D. C., 20 F.Supp. 37, the court says (page 40): "The rights of the grantee of the mortgagor are no greater than that of her grantor, for she takes the property subject to the right to enforce the lien upon the rents." It may not be doubted that the plaintiff here would have been entitled to collect the rentals from the trustors from the date of demand had the latter been in possession instead of their grantees; and just so should the plaintiff be entitled to recover from these defendants the rentals wrongfully collected by them and their assignees during a period of time when, in contravention of the terms of a judgment theretofore rendered against them, the defendants wrongfully withheld the possession and rentals from the plaintiff, and thereafter effected a conveyance of the property and transfer of possession to persons other than the plaintiff, with full knowledge of the right in the latter thereto, and without notification to it of such change in ownership and possession; and where the circumstances show that in fact plaintiff did not become aware of such change of ownership and possession until after judgment had been rendered in the premises. Furthermore, in the first instance, by virtue of the original contract between the trustors and the beneficiary, it may be said that the land itself became primarily liable for the payment of the debt. In the case of Occidental Life Ins. Co. v. McCracken, 19 Cal.App.2d 239, 240, 65 P.2d 130, 131, it was said, "* * * where a vendee takes land subject to a mortgage, the land becomes, so far as the mortgagor is concerned, as between him, the creditor, and the vendee, primarily liable for the payment of the debt, * * *." See, also, Braun v. Crew, 183 Cal. 728, 192 P. 531. And in 41 C.J. p. 716, it was also said: "A conveyance of land subject to a certain mortgage subjects the land to the payment of interest which has accrued in accordance with the terms of the mortgage * * *." In the case entitled Owsley v. Neeves, 179 Ill.App. 61, 63, appellant was deeded the premises "subject to whatever lien appellees secured thereon by virtue of the trust deed"; and the court there said: "Appellant cannot get away from the fact that his rights in the premises are subject to whatever lien was created in favor of appellees by their trust deed. Rents and profits are the subject of mortgage. A mortgagee has a specific lien upon rents and profits of mortgaged land when they are expressly pledged by the mortgage as part of his security. * * * Appellant, as subsequent purchaser, was bound by those terms of the trust deed * * *." And in the case of Townsend v. Wilson, 155 Ill.App. 303, 308, it appeared that the purchasers of the premises there involved took the land "subject to" a mortgage conferring the right to the rentals therefrom upon the mortgagee or his agent, at the time of foreclosure. In referring to the purchasers, the court said: "But their implied agreement * * * by accepting the deed with that proviso that it was subject to the mortgage, was that the land and the rents and profits mortgaged * * * should stand good for that debt and be charged with that debt as against any right they received by virtue of the deed. Their action in this case in claiming these rents simply amounts to a breach of their contract and they have no standing in law or equity in their claim to the rents." It follows that the right to the rentals which plaintiff is asserting here could not be defeated by a subsequent change in possession by virtue of a conveyance of the land.

[8, 9] From that which hereinbefore has been indicated, it should be apparent that in the circumstances the trial court committed no error in admitting in evidence certain testimony of which the appellants complain regarding the amount of rent that was collected by the defendants or by their grantees. But it is equally clear that whatever proper expenses (such as taxes, insurance and the like) were incurred and actually paid by either of the defendants or by their grantees during the interim of the respective dates when demand was made by the plaintiff upon the defendants for possession of the property, and that upon which possession was actually surrendered to the plaintiff by the grantees of the defendants, should be deducted from the total amount of the rents that accrued and were collected by the defendants or by their grantees. And in that regard the appellants have no just right to complain, because it clearly ap-

pears that in computing the damages for which the plaintiff was entitled to recover judgment, account of the rents was taken to December 20, only, when in fact it should have included the additional rents that were collected by the defendants or their grantees between that date and February 28, next ensuing. In addition thereto, the sum of all proper operating expenses was deducted from the total of all the rents that were collected.

[10] For the reason, as alleged by the defendants, that both preceding and during the trial of the action the attorneys who represented them made certain damaging admissions of asserted facts, which the appellants assert were not only untrue, but also that as concerning such admissions the said attorneys were unauthorized to make —the appellants contend that a new trial of the action should be granted. At the outset, it should be noted that the substance of that situation was pleaded by the defendants as an answer to the complaint; but that as to the underlying and foundational facts thereof, the trial court made findings of facts which were directly contrary to each of the contentions of the defendants in that regard. However, although from an examination of the record herein, it may appear that some of such findings were not entirely supported by the evidence, on consideration of the entire record, it is clear that even though it should be adjudged that the attorneys for the defendants were neither specifically nor impliedly empowered to make the representations to which the defendants have referred, nevertheless, relying upon the same source of information, it is obvious that as a legal conclusion from the situation then existent, the several so-called unauthorized admissions that were made by such attorneys were either patently true or were such that, the entire evidence considered, no inference with reference to such facts other than that of which appellants complain, could have been reached. It therefore becomes apparent that, in the abstract, even conceding that the point that has been urged by the appellants is not entirely lacking in merit, nevertheless it is not available to them as affording a sufficient reason for an order by which the judgment might be reversed.

But the principal point upon which the appellants rely for a reversal of the judgment depends upon the application of the equitable principal of estoppel by former judgment, or by that which is known as the doctrine of *"res judicata"*. In that regard the facts appear to be as follows: In the action that was brought by the plaintiff against the defendants for the possession of the property and which was asserted by the plaintiff to be an action "in specific performance", no claim for damages of any sort was made by the plaintiff, and particularly were no damages demanded on account of any rents that either theretofore had been, or which thereafter might be collected by the defendants. By the judgment in that action, among other things it was ordered "that the covenant (as set forth in the deed of trust), that possession of the property * * * shall be delivered to the plaintiff * * * be specifically enforced * * *." But other than for costs of the action, the judgment awarded no damages to the plaintiff. As hereinbefore has been indicated, in the instant action, the only claim that was asserted by the plaintiff against the defendants was for damages on account of such rents as had been collected by the defendants and their assignees during the time that they were wrongfully in possession of the property. With respect to the institution of the former action between the same parties, in part, it was alleged in the complaint:

"That on or about the 10th day of August, 1932, an action No. 344,861 was brought in the Superior Court of the State of California in and for the County of Los Angeles by the plaintiff herein as plaintiff and against * * * the defendants herein as defendants, in which it was prayed that the covenant, that possession of aforesaid trust estate be delivered to the plaintiff herein contained in said deed of trust be specifically enforced and that the defendants herein be ordered to deliver possession of said trust estate to the plaintiffs herein in order that the plaintiff may carry out all of the covenants contained in said deed of trust.

"That thereafter, towit, on or about the 17th day of November, 1932, a judgment was duly given and made by said Court in said action in favor of the plaintiff herein and against the defendants Charles E. Monson and Nellie Monson herein. * * *"

The answer of the defendants failed to set up any defense by way of estoppel by former judgment or "res judicata". But as hereinbefore has been indicated, the appellants urge the point that since the first action was for "specific performance", notwithstanding the fact that the judgment that was rendered therein was for "possession" only, plaintiff is thereby estopped from now maintaining an action for rentals that already had been, or which thereafter were collected wrongfully by the defendants or by their grantees.

[11] Although it is a general rule that a judgment operates as an estoppel to the maintenance of a subsequent action as between those persons who were parties to the former action, not only as it may affect each issue that actually was raised in such action, but also as to every other issue which properly might have been litigated and determined therein, nevertheless, in each of many jurisdictions, exceptions to that rule have been announced, which include a situation wherein it has appeared that the questioned issue in the subsequent action was neither germane to nor essentially connected with the actual issues that were raised in the former action, even though, with propriety such issues might have been presented therein. 34 C.J. 818, 823. Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action. 34 C.J. 823. See also, to the same effect: Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82, 161 N.W. 852; Townsley v. Niagara Life Ins. Co., 218 N.Y. 228, 112 N.E. 924; Cook v. Conners, 215 N.Y. 175, 109 N.E. 78, L.R.A. 1916A, 1074, Ann.Cas.1917A, 248; Beavans v. Groff, 211 Ind. 85, 5 N.E.2d 514, 108 A.L.R. 694; Eisenberg v. Thorne, 49 Misc. 617, 96 N.Y.S. 1020; Fourche River Lumber Co. v. Walker, 96 Ark. 540, 132 S.W. 451; Moore v. Snowball, 98 Tex. 16, 24, 81 S.W. 5, 66 L.R.A. 745, 107 Am.St.Rep. 596, and Paris v. Golden, 96 Kan. 668, 153 P. 528, 529. In the case of Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916, 918, it was said: "The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." And in Beronio v. Ventura County Lumber Co., 129 Cal. 232, 236, 61 P. 958, 959, 79 Am.St.Rep. 118, it was said: "In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. * * * 'Every estoppel must be certain to every intent, and not to be taken by argument or inference.' Co. on Litt. 352b. 'If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' * * * By section 1908, subd. 2, Code of Civ.Proc., the effect of a judgment is conclusive 'in respect to the matter directly adjudged'; and by section 1911, 'that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.'" Also in the case of Journe v. Hewes, 124 Cal. 244, 254, 56 P. 1032, the rule is followed. There a lessee for a period of years had an option to purchase. After the lease had expired the lessee gave notice of his intention to purchase to a son of the lessor, the latter of whom was then deceased, and also to an agent of deceased in his lifetime, stating that he would pay for the property when the probate proceedings were concluded. About a year after the expiration of the lease, he brought an action to compel specific performance of his option to purchase. Thereafter an action was brought against him by his grantor for the collection of rentals alleged to have accrued prior to the time of conveyance. The defendant claimed that the action in specific performance established the relation of vendor and purchaser and not that of landlord and tenant. The court there said (page 1036): "It is sufficient answer to defendant's contention that the claim for rent presented in this action was not litigated in that proceeding so far as the petition and decree disclose what was done, and the question of defendant's liability for rent was not necessarily involved. * * *" Also in the case of Buick v. Boyd, 37 Cal.App. 508, 174 P. 913, the same principle is followed. There the court said (page 915): "The present action is different from the original action, and the rule is that in such case the judgment in

the first action operates as an estoppel only as to those matters actually litigated and determined and not as to matters which might have been litigated." To the same effect, see, also, Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108; McCormick v. Gross, 135 Cal. 302, 67 P. 766; Patterson v. Mills, 138 Cal. 276, 71 P. 177; St. John v. Consolidated Const. Co., 182 Cal. 25, 189 P. 276, and Richardson v. City of Eureka, 110 Cal. 441, 42 P. 965.

[12] From the foregoing, in the instant case, it becomes obvious that even though it be conceded that after the plaintiff, within its contractual rights in the premises, had properly demanded of the defendants that they surrender possession of the affected property to the plaintiff, and thereupon that the defendants had refused to deliver such possession—in the ensuing action for specific performance an issue of damages on account of rents of the property that either theretofore or thereafter had been, or which might be collected by the defendants, might have been raised in such action—nevertheless it was not a necessary or indispensable issue therein. To the contrary, it was incidental only to the main issue in the action, and may be considered as constituting a separate and distinct cause of action. The justice of such conclusion may become more readily discernible when it is remembered that but twelve days had elapsed between the date when demand for possession was made, and that upon which the action for possession was commenced; and that although approximately two months thereafter judgment in that action was rendered, the defendants or their grantees remained in possession for more than three months following the date of the rendition of such judgment—thereby causing additional and unanticipated damages to the plaintiff. It also should be noted that instead of awarding damages for rentals that had been collected by the defendants or by their grantees during the entire time that they unlawfully retained possession of the property, by the terms of the judgment the defendants were excused from liability for more than two months of such period.

It becomes unnecessary to devote attention to any of the other points that have been suggested by the respective parties to the appeal, including those which relate to the effect of the allegations that are contained either in the complaint or in the answer, particularly with respect to the plea of estoppel by judgment or "res judicata".

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.

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11 Cal.2d 724

MUDRICK v. MARKET STREET RY. CO. et al.

S. F. 15995.

Supreme Court of California.

Aug. 1, 1938.

Rehearing Denied Aug. 29, 1938.

1. Carriers 🔑318(1)

In action for injuries sustained by 13 year old boy passenger who was allegedly precipitated from street car by sudden jerks of car and thrown under its wheels, evidence was sufficient for jury's finding that accident was caused by unusual jerking of the car.

2. Carriers 🔑316(3)

In action for injuries sustained by 13 year old boy passenger who was allegedly precipitated from street car by sudden jerks of car and thrown under its wheels, res ipsa loquitur doctrine was applicable, notwithstanding that both general and specific negligence were alleged.

3. Carriers 🔑321(21)

In action for injuries sustained by 13 year old boy passenger who was allegedly precipitated from street car by sudden jerks of car and thrown under its wheels, instructions that proof that injury was caused by operation or movement of car raised presumption of negligence of carrier were not erroneous for failure to limit operation or movement of car to an "unusual" operation or movement.

4. Negligence 🔑121(2)

Under the rule of res ipsa loquitur, an inference and not a presumption arises on proof by plaintiff of the necessary facts.

5. Appeal and error 🔑1064(1)
Carriers 🔑321(21)

In action for injuries sustained by 13 year old boy passenger who was allegedly precipitated from street car by sudden jerks of car and thrown under its wheels, instructions that proof that injuries were caused by operation or movement of car raised "presumption" of negligence of carrier, though erroneous for use of word "presumption," were not prejudicially erroneous.

6. **Carriers** ⊂⊃321(3)

In action for injuries sustained by 13 year old boy passenger who was allegedly precipitated from street car by sudden jerks of car and thrown under its wheels, instruction that carrier of passengers owes to child passengers a greater degree of care than it owes to adults, was proper.

7. **Damages** ⊂⊃96
New trial ⊂⊃157

The amount of damages in personal injury cases is committed first to jury's sound discretion and next to the discretion of the trial court, who, in ruling on the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is unjust.

8. **Appeal and error** ⊂⊃1004(3)

On appeal, the decision of the trial court and the jury on the subject of damages in personal injury case, cannot be set aside unless the verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on part of jury.

9. **Damages** ⊂⊃127

Courts, in ruling on verdicts fixing the amount of damages in personal injury cases, should endeavor to establish some uniform standard applicable to cases of such character.

10. **Damages** ⊂⊃132(11)

A judgment for $42,500, in favor of a boy, 13 years of age, in good health, for the loss of both legs below the knees, was not excessive.

11. **Appeal and error** ⊂⊃933(5)

The Supreme Court was required to assume that the trial court, because of its denial of defendants' motion for new trial, was not satisfied with correctness of allegations in defendants' affidavit concerning alleged misconduct of plaintiff's counsel in closing statement, and was of the opinion that the explanation given by plaintiff's counsel as to the reasons that prompted certain portions of the closing statement was well founded.

12. **Appeal and error** ⊂⊃1060(1)
Trial ⊂⊃109

In personal injury action against street railway company, statements of plaintiff's counsel in opening statement that equipment of defendant's street car was not of standard kind and character at time and place of accident, was improper, where plaintiff did not attempt to prove such statements and knew at time they were made that they could not be proved but did not constitute prejudicial error, where trial court instructed jury that there was no evidence that equipment of defendant's car was not of standard kind and character.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Charles Mudrick, a minor, by Antonio Mosloff, his guardian ad litem, against the Market Street Railway Company and others for injuries sustained when he was allegedly precipitated from street car by sudden jerks of car and thrown under wheels of car. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Prior opinion, see 74 P.2d 328.

Rehearing denied; EDMONDS and HOUSER, JJ., dissenting.

Wm. M. Abbott, Cyril Appel, Ivores R. Dains, and K. W. Cannon, all of San Francisco, for appellants.

Vincent W. Hallinan and Charles H Fish, both of San Francisco (William F. Herron, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

We adopt the following statement of facts and conclusions of law from the opinion of the District Court of Appeal rendered in this action when it was before said court.

"From a judgment awarding the plaintiff damages in the sum of $42,500, the defendants have appealed and have brought up a typewritten record.

"On September 18, 1934, the plaintiff, then thirteen years of age, was injured in an accident between Eighteenth and Nineteenth streets on Castro. In the accident a street car operated by Market Street Railway Company, hereinafter referred to as railway, ran over the feet of the plaintiff and both legs were amputated below the knees. One of the defendants, G. Hageman, was the gripman and C. J. Heffernan was the conductor. It was the theory of the plaintiff that he boarded a Fillmore street car, paid his fare, took a transfer to a Castro street car, transferred at Church and Market, took a transfer and at Eighteenth and Castro he changed to the cable car. Continuing, he claimed that in doing so he took a position standing on the running board at the extreme front end on the right-hand side, and was facing to the south, that is to the front, and was holding on to a stanchion with his left hand. After the car had moved about half a block the plaintiff claimed that the car jerked several times, that he lost his grip, slid down the stanchion, fell off the car, and that his legs passed forward under the front wheel and were run over. On the other hand it was claimed by the defendants that immediately prior to the accident the plaintiff ran along the street by the side of the car, attempted to board it, slid and fell, and that his legs pressed forward under the right front wheel of the car and were run over.

"Castro street cable car number five, the car involved in this accident, left Eighteenth street and was traveling south in the direction of the Lick school. There were on board several adults, but the larger part of the passenger list was made up of students on their way to attend the Lick school.

"On the day of the accident Arthur B. Minaker, a police officer, called on the plaintiff at the hospital, asked him certain questions and later made a report to his superior officer. Either on the day of the accident or the following day, Mr. J. C. Bowman, principal of Lick school, called all students who had been on the car into the auditorium. He asked each child who claimed to know anything about the accident to write out and hand in a written statement. Many such statements were handed in. After the accident and before the trial representatives of the plaintiff called on various witnesses and obtained written statements. During the same period representatives of the defendants called on several of the witnesses and obtained written statements. Many of those written statements were produced at the trial.

[1] "The defendants earnestly contend there is no testimony credible, or otherwise, from which it could be fairly inferred that there was any unusual jerking of the car of sufficient violence to cause plaintiff to fall therefrom, and giving full faith and credit to every scrap of testimony in the record pertaining to jerking, results in the inevitable conclusion that such jerking as did occur was not the cause of plaintiff's fall or injury. The plaintiff took the stand as a witness in his own behalf and testified that when car number five was at a standstill at Eighteenth and Castro he boarded the car and took the position hereinabove indicated. He testified regarding several jerks of the car and that finally he was thrown to the street, run over, and suffered the injuries complained of. Herbert McCulla testified that he boarded the car at the same time and place, took a position on the same side of the car about three feet behind the plaintiff and was holding on to the second stanchion. Continuing he gave testimony corroborating the plaintiff. Frank Petalas, another schoolmate, testified that he boarded the car at the same time and place, took a position at the extreme rear end on the right-hand side, and from that position he observed the plaintiff at all times, and saw him fall off the car into the street. Other schoolmates testified to other facts corroborating the plaintiff in part. The plaintiff did introduce some testimony that the car jerked. Taking that testimony in connection with the fact that the plaintiff fell or was thrown to the street, the determination of the issue was properly left to the jury. McIntosh v. Los Angeles Ry. Corporation, 7 Cal.2d 90, 96, 59 P.2d 959. In this connection we understand the defendants to claim that the plaintiff did not say his fall and the jerking happened simultaneously. As we read his testimony we gather the same impression. The defendants contend the plaintiff testified the jerking occurred at one spot and that he fell off the car at a point 260 feet distant therefrom. That statement is true but the witness testified to several different jerks. He did not testify his falling and jerking were simultaneous events, nor did he testify to the contrary. However, taking all of the testimony given by all of the witnesses produced by the plaintiff, the record was such that the jury was entitled to find that from the time the plaintiff boarded the car and until he fell into the street there were several jerks and that one of the jerks caused him to fall. That there was evidence to the contrary will be freely conceded. However, we think it is equally true there was sufficient evidence for the

jury to base a finding and it may not be said, as a matter of law, that such evidence was incredible, improbable, or impossible.

[2] "The next point made by the defendants is that the trial court erred in instructing the jury on the doctrine of res ipsa loquitur. It was the contention of the plaintiff, as set forth in his amended complaint, that the accident arose by reason of (1) the negligent operation of the car and (2) the negligent overcrowding of the car. To those claims, in his opening statement, the plaintiff attempted to add that the car (3) was old and obsolete, (4) that the car was undermanned, (5) that the railway jammed the school children into the car like sardines, (6) that when the car was overcrowded the cable would move the car by jerks, and (7) at such times the children would be jerked forward and backward. In his brief the plaintiff adds a further specification (8) that immediately before he fell the plaintiff called to the gripman to stop the car and the call was ignored. Pointing to the fact that after alleging general negligence the plaintiff alleged specific negligence, to-wit, overcrowding of the car, the defendants assert that there was no place in this case for the application of the doctrine of res ipsa loquitur. The point has been directly ruled against the contention of the defendants. McComas v. Al. G. Barnes Shows Co., 215 Cal. 685, 697, 12 P.2d 630. The other contentions made by the plaintiff during the presentation of his case and by us numbered 3, 4, 5, 6, 7 and 8, if they had also been alleged in his pleading would have constituted other specific allegations of negligence and would not have changed the rule."

At the request of the plaintiff, the court gave three instructions upon the doctrine of res ipsa loquitur. These instructions are as follows, except that we have inserted in brackets the word, "unusual" before the word, "operation" in two of said instructions, and before the word, "movement" in the other.

"XVIII

"Proof of an injury to a passenger on the car of a common carrier, caused by the [unusual] operation of the car, raised the legal presumption that the injury was caused by the negligence of the carrier and casts upon the carrier the burden of proving that such injury was caused by some unavoidable casualty or by some other cause which human care and foresight could not prevent or by the contributory negligence of the passenger, unless these facts be shown by evidence adduced by the plaintiff.

"XIX

"When it is shown that a passenger is injured from some [unusual] movement of the car by those in charge of it or from something connected therewith or in the control of the defendant, the law presumes prima facie that the particular thing thus shown to have caused the injuries was due to the defendant's neglect, and the burden is then thrown upon the defendant to establish that such injury was not caused by its neglect but by some inevitable casualty or other cause which human care and foresight could not have prevented or by the contributory negligence of the passenger, unless such facts be shown by evidence adduced by the plaintiff.

"XX

"If you believe from the evidence that the plaintiff became a passenger upon the cable car of the defendant Market Street Railway Company and that thereafter, owing to some [unusual] operation of the car by the persons in charge of it, he was injured, then the law presumes that he was injured through the negligence of the defendant Market Street Railway Company, and if you find that his injury was caused by some negligence, however slight, of defendant or of its agents or employees acting in the course and scope of their employment, and that the plaintiff was free from contributory negligence, then your verdict shall be in favor of the plaintiff and against the defendant Market Street Railway Company."

Defendants contend that these instructions as given incorrectly apply the rule of res ipsa loquitur in this case, and that the word, "unusual" should have been inserted before the word, "operation" and "movement" as indicated by the instructions as set forth above.

In support of their contention that these instructions are erroneous by reason of the omission of the word, "unusual" as applied to the operation or movement of the car, the defendants mainly rely upon the cases of Steele v. Pacific Electric Railway Company, 168 Cal. 375, 143 P. 718, and Rystinki v. Central California Traction Company, 175 Cal. 336, 165 P. 952. In the Steele Case the plaintiff claimed to have been injured while she was stepping off of defendant's car, due to the negligent starting of the car by defendant's employees. Defendant denied the charge, and claimed that plaintiff was guilty of contributory negligence by attempting to step off of the car while it was in motion. The court gave the following instruction, the italicized portion of which was held to be erroneous (page 719): "You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury, but must be proved. *On the other hand, the proof of injury of plaintiff on a car of the defendant casts upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff.*"

It will be noted that in this instruction the jury was told that the mere proof of injury to plaintiff on defendant's car cast upon the defendant the burden of proving the absence of negligence on its part, or contributory negligence. In that instruction nothing was said as to the injury being caused by the movement or operation of the car. For such omission the instruction was erroneous. It differed materially from the three criticized instructions in the present case which expressly referred to the injury as, "caused by the operation [or movement] of the car". This difference in the wording of the instruction in that case and those in the instant case was pointed out in the opinion in the Steele Case in the following language: "It is not the law, as the argument of the plaintiffs implies, that the mere fact that a passenger is injured while aboard a car, or while alighting therefrom, creates a presumption that the injury was caused by want of care on the part of the defendant operating such car. It must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant. When this is done, the law then presumes prima facie that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made. Such negligence is presumed because such accidents do not ordinarily happen if due care is used, and because the defendant is usually better able than the plaintiff to show the actual truth of the matter." To the same effect is the case of Wyatt v. Pacific Electric Ry. Company, 156 Cal. 170, 103 P. 892.

[3] It will thus be seen that Steele v. Pacific Electric Ry. Co., supra, not only fails to support defendants' contention that the three instructions are erroneous by reason of the omission of the word, "unusual" therefrom, but it is express authority for upholding them against the particular attack which defendants make, for it is stated therein in plain words that if injury "came from the movement of the car by those in charge of it * * * the law then presumes prima facie that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made".

It will be noted that the court in referring to the movement of the car which was the cause of the plaintiff's injury does not state that this movement must be "unusual" nor is there anything in the whole opinion that intimates in the slightest degree that the movement of the car in causing an injury to a passenger must be unusual before the rule contended for in said three instructions is applicable.

It is only fair to defendants to state that they do not rely upon the case of Steele v. Pacific Electric Railway Co., supra, standing alone to support their contention, but they contend that that case taken in connection with the case of Rystinki v. Central California Traction Co., supra, sustains them in their contention that these three instructions are erroneous.

In this last named case, the instruction was as follows (165 P. 956): "You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury but must be proved. On the other hand, proof of the injury, *coupled with proof that it proceeded from a sudden, unusual or violent jerking, or swinging, or swaying of the car, while the plaintiff was preparing to alight,* casts upon the defendant, the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff." In commenting upon this instruction, the court used the following language: "With the exception of the italicized portion, this is the same instruction condemned by this department in Steele v. Pacific Electric Ry.

Co., 168 Cal. 375–377, 143 P. 718; but the addition of the words in italics rescues the instruction from the vice of the court's direction to the jury which we there reviewed. It is true that the mere injury to the passenger does not place upon the carrier the duty of explanation but the establishment of such injury, coupled with proof of coincident and causal collision, derailment, or other unusual happening to the car, does cast upon defendant the burden of exculpation as indicated by the instruction."

Defendants seize upon the word, "unusual" as used by the court in the above statement, and contend that the court has by its use determined that before the rule of res ipsa loquitur can be applied in a case where a passenger is injured by the movement of a street car, he must show that the movement was an unusual one. Evidently in the language used, the court simply followed the wording of the instruction which contained the word, "unusual". We have been cited to no other authority which holds that the movement of a car which inflicts injury upon a passenger must be shown to be an unusual movement before the rule of res ipsa loquitur can be applied. We have already referred to the cases of Wyatt v. Pacific Electric Railway Company, supra, and Steele v. Pacific Electric Railway Company, supra, where the true rule is announced and where there is no mention or any intimation which supports defendants' contention. Undoubtedly many other authorities could be cited if necessary, but we deem the above cases and the authorities therein cited to be sufficient for our present purpose.

An instruction alike in principle to these three criticized instructions was approved by the District Court of Appeal in the case of Lynch v. Market Street Railway Company, 130 Cal.App. 433, 438, 19 P.2d 1009, in which we denied a petition for a hearing. In that case the court goes into the question in great detail, citing many authorities, including those cited herein and many others, and holds that the instruction was proper, and affirmed the judgment in favor of plaintiff in said action.

The defendants cite the case of McIntosh v. Los Angeles Railway Corporation, 7 Cal.2d 90, 95, 59 P.2d 959. There is nothing in that case that conflicts with anything that we have stated herein. No question was raised in that case involving the rule of res ipsa loquitur. We simply held there that a passenger upon a street or electric car assumed the ordinary risks arising from the operation of such car, and that any injury thus sustained could not be attributed to the negligent operation of the car, but that the carrier was liable for any injury sustained by a passenger as a result of an unusual movement of the car.

[4, 5] It is further contended that these three instructions are erroneous for the reason that the words "presume", and "presumption" are used therein instead of the words, "infer" and "inference". While it appears to be well settled that under the rule of res ipsa loquitur an inference and not a presumption arises on proof by plaintiff of the necessary facts (Sweeney v. Erving, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815, Ann.Cas.1914D, 905; O'Connor v. Mennie, 169 Cal. 217, 146 P. 674; Dowd v. Atlas Taxicab & Auto Service Company, 187 Cal. 523, 202 P. 870; Crooks v. White, 107 Cal.App. 304, 290 P. 497, and Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912), these terms are often erroneously used interchangeably, and as conveying the same meaning. We find that many lawyers and courts as well make this same mistake. We question whether the ordinary layman, to say nothing of many members of our profession, clearly comprehends the difference in the meaning of these two expressions. While courts have frequently called attention to the erroneous use of the terms, "presume" and "presumption" in stating the rule of res ipsa loquitur, no decision has been called to our attention in which a judgment has been reversed by reason of the erroneous use of these words. While it may be error, the error, in our opinion, has not prejudiced the defendants in any of their rights.

[6] The instruction as to contributory negligence was not erroneous. Brizzolari v. Market Street Railway Company, 7 Cal. App.2d 246, 46 P.2d 783; Shannon v. Central-Gaither Union School Dist., 133 Cal. App. 124, 23 P.2d 769; 19 Cal.Jur. 623. In this instruction, the court admonished the jury that a carrier of passengers owes to children who are passengers on its cars a greater degree of care than it owes to adults. Such an instruction is proper. 10 Cor.Jur. 898; 4 R.C.L. 1161.

It is further contended by defendants that the verdict, even after its reduction from $50,000 to $42,500 is excessive. This contention presents a most difficult question, made so principally by reason of the fact that the law furnishes no yardstick by which to measure damages for personal injuries. As a result there is no unanimity in the decisions of the various courts of this and other jurisdictions. The question may probably be rendered more simple if we confine our investigations to decisions of the courts of our own state, without extending our explorations into the myriad of decisions rendered in foreign jurisdictions.

[7, 8] While the law furnishes no accurate means of measuring damages in personal injury cases, the rule is well established respecting the power and duty of an appellate court in considering that subject and has been stated as follows: "The amount of damages in such cases is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury.' Aldrich v. Palmer, 24 Cal. 513, 516; Wheaton v. North Beach & M. R. R. Co., 36 Cal. 590, 591; Lee v. Southern Pacific Co., 101 Cal. 118, 35 P. 572; Howland v. Oakland, etc., Co., 110 Cal. 513, 523, 42 P. 983; Swain v. Fourteenth St. Co., 93 Cal. 179, 185, 28 P. 829." Hale v. San Bernardino Valley Traction Company, 156 Cal. 713, 715, 106 P. 83, 84; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644.

[9, 10] In following this well established rule, however, the courts should endeavor in ruling upon verdicts fixing the amount of damages in personal injury cases to establish some uniform standard applicable to cases of this character. This can only be done by reference to other cases in which damages have been fixed and determined in personal injury cases of the same, or like, general nature. By reference to our decisions, we find that verdicts have been sustained in the following cases: $20,000 for the loss of one foot, Rogers v. Interstate Transit Company, 212 Cal. 36, 43, 297 P. 884; $20,000 for serious injury to one foot, Kraft v. Acme Stevedore Company, 112 Cal.App. 653, 297 P. 585, hearing denied by this court; $28,191 for fracture of one leg and crushing of one foot, Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 203 P. 768; $25,000 reduced from $35,000, loss of one leg slightly below the knee, Jaques v. Southern Pacific Company, 8 Cal. App.2d 738, 741, 48 P.2d 63, hearing denied by this court; $50,000 serious injury to brain, Kirschbaum v. P. H. McCarthy, Jr., 5 Cal.2d 191, 54 P.2d 8; $70,000 reduced from $100,000 for loss of both legs and one arm, Zibbell v. Southern Pacific Company, 160 Cal. 237, 116 P. 513; $100,000 for serious brain injury to officer in navy with life expectancy of 32½ years, McDonald v. Standard Gas Engine Company, 8 Cal.App.2d 464, 473, 47 P.2d 777. To these might be added many others of a similar character. It will be noted that in one case a verdict of $20,000 for a loss of one foot was sustained and in another case a verdict of $25,000 for loss of one leg slightly below the knee, and in still another, a verdict of $20,000 for serious injury to one foot was sustained. In the other cited cases, the verdicts are still larger. In comparison with these amounts, it cannot be said that the present judgment for $42,500, in favor of a boy, thirteen years of age, in good health, for the loss of both legs below the knees is out of line with the former amounts sustained by us in actions of this character. The size of the verdict in this case was undoubtedly given the most careful consideration by the trial court as evidenced by its action in reducing the verdict to the sum of $42,500. In view of the very serious injury sustained by plaintiff, and taking into consideration the former adjudications of this court respecting verdicts in personal injury cases similar to that in the instant case, we cannot say that the amount of the judgment in this case is excessive.

Finally it is contended that the counsel for the plaintiff was guilty of prejudicial misconduct. The specifications of misconduct include remarks made by counsel in his opening statement before the jury, in the cross-examination of witnesses during the trial, and in his opening and closing address to the jury after the close of the evidence. Plaintiff objects to our consideration of any statement purported to have been made by counsel in his opening or in his closing argument to the jury on the ground that these statements are not properly before us. The reporter's transcript contains counsel's opening statement to the jury, the evidence taken at the trial including the criticized remarks of counsel during the cross-examination of witnesses, but does not contain his opening or closing argument before the jury. It does, however, contain the proceedings before the court on motion for a new trial which includes an affidavit of counsel for the defendants purporting to set forth the material parts of the opening and closing argument of plaintiff's counsel, and an affidavit of plaintiff's counsel in which he denied making many of the statements included in opposing counsel's affidavit, and also attempted to explain many of the other statements made by him and included in his argument before the jury as called forth by the argument of defendants' counsel.

[11] We must assume as the trial judge denied defendants' motion for a new trial that he was not satisfied with the correctness of the allegations in the affidavit of defendants' counsel and was of the opinion that the explanation given by plaintiff's counsel as to the reasons that prompted certain portions of his closing statement were well founded. In this state of the record, we find it impossible to properly pass upon those assignments of misconduct of plaintiff's counsel which are based upon statements made by him in his opening and closing argument to the jury. This leaves only the remarks of counsel for plaintiff in his opening statement to the jury, and remarks made by him during the progress of the trial.

[12] It is contended that in his opening statement plaintiff's counsel represented to the jury the existence of certain facts which plaintiff was prepared to prove, but which plaintiff did not attempt to prove, and knew at the time they were made that they could not be proved. These statements were objected to by the defendants' counsel and they referred in the main to the equipment of the defendant corporation being old and obsolete; that the company undermanned the operation of its cars at the time and place of the accident, and failed to maintain proper guards to prevent a passenger thrown from a car from going under its wheels. A few other and similar statements were likewise made by counsel. The practice indulged in by plaintiff's counsel has frequently been condemned by the courts, and it is held that where it is clearly made to appear that prejudice has resulted from such improper statement, a new trial will be awarded. Posell v. Herscovitz, 237 Mass. 513, 130 N.E. 69, and Baker Matthews Lumber Company v. Lincoln Furniture Mfg. Co., 148 Va. 413, 139 S.E. 254. The trial court instructed the jury that there was no evidence that the equipment of the company's car was not of standard kind and character. It also upon denying the motion for new trial necessarily held that the remarks complained of resulted in no serious prejudice to the defendants. While we are not willing to place our stamp of approval upon such conduct, under all the circumstances before us, we are not prepared to say that the defendants were prejudiced by these remarks of counsel.

Respecting the misconduct of counsel occurring during the trial and while he was cross-examining witnesses, the defendants cite us to five separate occasions in which they claim that counsel transgressed the rules of propriety. On the first occasion, defendants objected to a line of questions asked one of the defendants' witnesses by plaintiff's counsel. The objection was sustained and no request was made that the court direct the jury to disregard the evidence and no such direction was given. On two occasions, the court struck out the evidence objected to and instructed the jury to disregard the same. The two other instances concern matters of such small importance that even if the remarks of counsel were improper they could not have had any material effect on the jury. The situation before us is much like that which confronted this court in a former case in which it was said: "The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. This, we think, may not fairly be said here." Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538, 540.

We are satisfied that none of the objections to the judgment raised by defendants is of such a serious character as to have materially prejudiced the defendants in the trial of the case and for that reason conclude that the judgment should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.

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11 Cal.2d 707

TEN WINKEL et al. v. ANGLO CALIFORNIA SECURITIES CO.

S. F. 15774.

Supreme Court of California.

July 29, 1938.

Rehearing Denied Aug. 25, 1938.

1. Mortgages 🔑186(5)

In action to quiet title to apartment in community apartment house, evidence *held* to authorize finding that plaintiff took subject to a trust deed on the apartment house executed by promoter of the project, on ground that, by their conduct in completing an exchange of lot for apartment, plaintiff and her husband assented to terms of promoter's written acceptance of their offer to exchange lot for apartment, and that such acceptance, which made their interest subject to the trust deed, was part of the exchange agreement.

2. Exchange of property 🔑3(1)

A written acceptance of an offer to exchange lot for apartment in a community apartment house, which varied terms of original offer by providing that apartment should be subject to trust deed on the apartment house, was at most a qualified acceptance and in effect a counter offer.

3. Exchange of property 🔑3(1)

In action to quiet title, wherein plaintiff introduced plaintiff's duly acknowledged offer to exchange realty, admitting in evidence an acceptance of offer purportedly signed by offeree with an assumed name, but not acknowledged nor proved to be signed by offeree, was error.

4. Trial 🔑84(3)

Where counsel objected to the admission of an instrument accepting offer to exchange realty, on ground that no proper foundation had been laid, and then offered to stipulate that the instrument was part of public records but had not been acknowledged, but refused to stipulate to the signature, there was a sufficient objection on ground of lack of proof of execution.

5. Vendor and purchaser 🔑231(15)

An unacknowledged acceptance of an acknowledged offer to exchange realty was not entitled to recordation, and, like other unrecorded instruments, was subject to requirement of proof of execution, though it was in fact recorded in conjunction with the offer.

6. Evidence 🔑370(1)

In action to quiet title involving exchange of realty, which had allegedly been effected by written offer and acceptance, unacknowledged acceptance of acknowledged offer was not admissible without proof of its due execution, notwithstanding statute providing that a declaration, act, or omission forming part of a transaction, which is itself the fact in dispute or evidence thereof, is evidence as part of the transaction. Code Civ.Proc. § 1850.

7. Contracts 🔑16

An acceptance is essential to a completed contract.

8. Mortgages 🔑186(3)

In action to quiet title to apartment in community apartment house, against purchaser at foreclosure sale under trust deed covering entire apartment house, plaintiff had burden of proving that under contract for exchange of lot for apartment she acquired interest before trust deed was executed.

9. Mortgages 🔑186(5)

In action to quiet title to apartment in community apartment house, against purchaser at foreclosure sale under trust deed covering entire apartment house, conduct of the parties and other evidence *held* to establish that offer by plaintiff and her husband to exchange lot for apartment was not accepted, so as to give plaintiff an interest, until after trust deed was executed, as against contention that earlier acceptance of deed to lot by promoter of apartment project was binding as an "acceptance of the consideration" within terms of statute. Civ.Code, § 1584.

10. Exchange of property ⚷3(1)

In an exchange of lot for an apartment in a community apartment house, a contract between owners of lot and promoter of apartment project, in name of a corporation that was never actually incorporated, did not affect rights of the parties.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Suit by Florence L. Ten Winkel, individually and as executrix of the last will of her deceased husband, and others, against the Anglo California Securities Company, to quiet title to an apartment in a community apartment house. From a judgment for defendant, plaintiffs appeal.

Affirmed.

For prior opinion, see 74 P.2d 317.

Tobias J. Bricca and James, Brann & Rowe, all of San Francisco, for appellants.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

PER CURIAM.

This is a suit to quiet title by plaintiff, individually, and as executrix of the last will of her deceased husband, to one of the fifteen apartments in the community apartment house, known as View Tower Apartments, located on Hyde street in the city of San Francisco, and to an undivided one-fifteenth interest in the real property upon which the community apartment house was built. Plaintiff sought a decree against the defendant, Anglo California Securities Company, which claimed to be the owner of the title to the community apartment building in its entirety and to the realty upon which it was constructed. The defendant company based its claim of ownership upon a trustee's deed issued after a sale under a trust deed which covered the realty and the community apartment house building. The defendant filed a cross-complaint to recover the rent of the apartment collected by plaintiff subsequent to the date on which the defendant claims to have acquired title by purchase under the foreclosure sale. Judgment was rendered by the trial court in favor of the defendant, quieting its title to the property set forth in plaintiff's complaint, and giving judgment for $1,235, rent already accrued on said apartment, and for $65 a month rent until the surrender of possession of said apartment by the plaintiff.

The sole question presented for determination is whether plaintiff acquired her interest in the community apartment house free and clear of all encumbrances or whether such interest was acquired subject to a certain deed of trust placed upon the property as a whole on April 30, 1927, and foreclosed on December 21, 1933, upon default in the payment of the promissory note secured by said trust deed.

A summary of the various business transactions relative to the acquisition of their interest in said community apartment house by the Ten Winkels, in chonological form, is necessary in order to obtain an accurate picture of the situation.

Prior to 1926, the plaintiff, Florence L. Ten Winkel, and her husband owned an unencumbered lot, located on Southard court, north of Greenwich street, in San Francisco, on which stood a two-story building consisting of two flats. The upper flat was occupied by the Ten Winkels and the lower flat was occupied by their tenants. At the same time, title to an adjoining vacant lot, hereinafter referred to as the "Hyde street lot", stood in the name of Mary Thomas, encumbered by a deed of trust for $13,000 in favor of Anglo California Trust Company. It was stipulated at the trial that the name, Mary Thomas, was a fictitious name used in business transactions by one Cleve Shaffer, a realtor. Each lot had an extensive marine view except that the building on the Southard court lot partially obstructed the view from the Hyde street lot. During 1926, Cleve Shaffer and Geneva Shaffer, his sister, commenced the promotion of a plan to build a class "A" community apartment house on the Hyde street lot. This plan involved the acquisition of the Southard court lot and the tearing down of the two-story building on said lot in order to protect the view of the proposed community apartment house. The proposed community apartment house was to be fifteen stories high with one apartment on each floor. This plan included the incorporation of a nonprofit, nonstock corporation, originally called, "Tower View Community, Inc.", but subsequently known as "View Tower, Inc.", to hold title to said property. Each member of the corporation was to enter into a lease for one or more apartments, and all the lessees, acting through a board of directors of the corporation, were to maintain and manage the apartment house. The sale price of the different apartments was to vary, and the total sale price of all the apartments was to be $320,365. As a result of the negotiations with the Shaffers, the Ten Winkels became interested in exchanging their Southard court property for an apartment in the proposed community apartment house. On October 25, 1926, the Ten Winkels acknowledged an instrument signed by them and dated October 18, 1926, entitled "Agreement to Exchange Real Property". The pertinent portions of said agreement read as follows:

"It is agreed that F. W. Ten Winkel and wife, residents of the City and County of San Francisco. State of California, owners of the following described property situated in the City and County of San Francisco, State of California, to-wit:

"All that certain lot, piece or parcel of land situated on the East line of Southard Court, about 107 feet north of Greenwich Terrace, designated and known as No. 1 Southard Court, size of lot being 30 feet by 56 feet, which we desire to exchange for property owned or to be acquired by Tower View (a corporation to be organized), which said property is now in the name of Mary Thomas, widow, and is situated in the City and County of San Francisco, State of California, and described as follows, to-wit:

"All that certain second floor and its appurtenances, in that certain Class 'A' building to be erected on the lot situated on the East line of Hyde Street, 112 feet 9 inches north of Greenwich Street running thence Easterly to the Westerly line of Southard Court. Lots 25 feet by 56 feet. Said apartment to be built and constructed as per plans and specifications hereto attached and made a part hereof.

"Terms of Exchange, being as follows:

"In lieu of a cash payment, grant, bargain and sale deed to first property hereinabove described, shall be immediately deposited in escrow with the Title Insurance Company of San Francisco, upon conditions and terms herein specified and not otherwise;

* * * * * *

"4. It is further understood and agreed that all costs of upkeep, and expenses for maintaining and running said Tower View apartment building, shall be based and proportioned to said Ten Winkel, his heirs, successors or assigns, on a valuation of Fifteen Thouand ($15,000) Dollars, and no more.

"G. A. Shaffer is authorized to act as agent in negotiating said exchange, and we agree that if the owner of the property secondly above described will exchange said property on said terms and conditions herein specified, we will, within ten days furnish a certificate of title from a reliable abstract company, and a good and sufficient grant, bargain and sale deed, with the restriction above mentioned, conveying title to the property firstly above described.

"It is also agreed that when said agent has secured an acceptance in writing upon the terms and conditions herein contained to make said exchange, and when notice in writing is given to said Ten Winkel that half the apartments in said Tower View are sold, we will deposit with said Title Insurance Company, Fifteen Hundred ($1,500) Dollars, balance of purchase price of said apartment, being the total purchase price of Fifteen Thousand ($15,000) Dollars, and will allow sixty (60) days for the furnishing of satisfactory certificate of title or title search of said property secondly described.

"Dated October 18, 1926.

"Florence L. Ten Winkel
"F. W. Ten Winkel."

(Duly acknowledged.)

On the same day of its acknowledgment, October 25, 1926, this instrument, together with another instrument, entitled, "Acceptance" bearing the purported signature of Mary Thomas, but not acknowledged, was recorded in the office of the recorder of the city and county of San Francisco. Said acceptance is in the following words and figures:

"Acceptance

"This agreement witnesseth: That Mary Thomas, or Tower View (a corporation to be organized), or agents or assigns, owner of the piece of real estate secondly herein described, hereby accepts the said proposition of exchange upon the terms and conditions herein mentioned, and agree to furnish a certificate of title to said second floor cooperative apartment, the price of which is Fifteen Thousand ($15,000) Dollars free and clear of all liens or encumbrances except those on building as a whole and then to deliver a proprietary lease and proportionate interest in the said cooperative apartment building to F. W. Ten Winkel and wife, or their assigns, or agrees to pay said Ten Winkel the sum of

Thirteen Thousand Five Hundred ($13,500.00) Dollars for said real property first above described, or redeed said property to said Ten Winkel.

"And we further agree to pay customary commission.

"Dated at 560 Sutter St. this 25 day of September, 1926.

"Mary Thomas."

(Not acknowledged.)

"Recorded at the request of G. A. Shaffer, Oct. 25, 1926, at 42 min. past 2 p. m."

The question of whether or not the date, September 25, 1926, was the correct date, or was a clerical error, the correct date being October 25, 1926, is a minor controversy between the parties.

On the same day, October 25, 1926, an escrow with the California Pacific Title and Trust Company was opened and an executed deed of the Southard court lot to Mary Thomas, together with a copy of the "Exchange Agreement" was deposited by Ten Winkel. (It cannot be determined from the record whether or not the "Exchange agreement" included the purported acceptance of Mary Thomas.) It was stipulated that this particular deed was never recorded and at the time of the trial remained in the possession of the title company.

On November 23, 1926, a deed from Mary Thomas to Cleve Shaffer to both the Hyde street lot and the Southard court lot was executed.

On December 23, 1926, a deed from Cleve Shaffer to View Tower, Inc., of both pieces of property, the Hyde street property and the Southard Court property was executed. (Said corporation was not incorporated at the time of the execution of this deed.)

On March 30, 1927, Mary Thomas executed a deed of trust covering the Hyde street lot to Western American Realty Company, as trustee, in favor of Anglo California Trust Company to secure the payment of $10,000. (This trust deed renewed an existing trust deed on this same property dated April 12, 1922, by Mary Thomas to the same trustee and in favor of the same beneficiary to secure the payment of $13,000.) Mr. and Mrs. Ten Winkel upon the request of the Anglo California Trust Company joined in the execution of this $10,000 trust deed. On April 4, 1927, this deed of trust was recorded. On April 25, 1927, a reconveyance of this $10,000 trust deed was executed.

On April 30, 1927, Cleve Shaffer obtained a building loan of $175,000 from the Anglo California Securities Company to finance the building of the said community apartment house. ($150,000 was actually loaned by the trust company, and $25,000 was allowed as a consideration to the trust company for long term financing in lieu of a bond issue discount.) The method of handling the transaction took the following unusual form. Cleve Shaffer signed an installment promissory note, payable $1,486.74 per month, naming Mary Thomas, as payee. This note was endorsed by Mary Thomas and delivered to Anglo California Securities Company. The note on its back contained a guarantee by Mary Thomas and G. A. Shaffer. The deed of trust, executed by Cleve Shaffer, given to secure the payment of said promissory note, named Mary Thomas as beneficiary, and the Anglo California Trust Company, as trustee. (It may be noticed that the deed from Mary Thomas to Cleve Shaffer, dated November 23, 1926, had not yet been recorded and record title to the Hyde street property stood in the name of Mary Thomas; likewise that there had been no recordation of the deed of Ten Winkels to Mary Thomas of the Southard court property. It was stipulated at the trial, however, that title to the "View Tower property" was at the date of the execution of the $175,000 trust deed in Cleve Shaffer.) It is to be particularly noted that the Ten Winkels did not join in the execution of this note or trust deed.

On May 9, 1927, the Ten Winkels entered into a written agreement with "Tower View Community, Inc." (never incorporated). This agreement was signed by Cleve Shaffer, as president, and contains the following provisions: "And the undersigned hereby agrees to purchase an interest in and a lease of Apartment 2 * * * of the proposed building, and the undersigned agrees to pay for the same the sum of $15,000 in the following manner: As per trade agreement in escrow with the California Pacific Title Company."

On May 13, 1927, the Ten Winkels paid the $1,500 balance due, and receipt for said payment was given to them by the assistant trust officer of the Anglo California Trust Company.

On May 23, 1927, the trust deed covering both the Hyde street property and the Southard court property, in which

Mary Thomas was named as beneficiary and the Anglo California Trust Company, as trustee, given to secure the payment of the $175,000 note was recorded.

On June 1, 1927, another deed from the Ten Winkels to Mary Thomas to the Southard court lot was executed by the Ten Winkels and on June 4, 1927, recorded.

On June 4, 1927, there was likewise recorded the deed from Mary Thomas to Cleve Shaffer of the Hyde street and Southard court property, dated November 23, 1926, and also the reconveyance by the trustee of the $10,000 trust deed to Mary Thomas which had been executed on April 25, 1927, was recorded.

On July 11, 1928, the certificate of the secretary of state certifying the incorporation of View Tower, Inc., was issued, and on August 8, 1928, the by-laws of View Tower, Inc., were adopted.

In November, 1928, the building was completed, and the Ten Winkels moved into apartment No. 2.

On November 10, 1928, a deed from Cleve Shaffer to View Tower, Inc., was recorded, and on November 13, 1928, the board of directors of View Tower, Inc., accepted the property subject to the deed of trust for $175,000.

On November 14, 1928, Ten Winkels signed as lessees a membership holder's lease. On the same day, November 14, 1928, a membership certificate was issued to the Ten Winkels by View Tower, Inc., signed by Cleve Shaffer as president, and by the secretary of the corporation.

In 1930, the Ten Winkels leased the apartment to tenants.

On August 23, 1933, a notice of default in the payment of the obligation to secure which the trust deed was given was recorded.

December 21, 1933, defendant, Anglo California Securities Company, purchased the property on foreclosure for $100,000.

On January 11, 1934, a deed from the trustee to Anglo California Securities Company was recorded.

On May 26, 1934, this suit to quiet title was commenced.

On November 5, 1934, Florence L. Ten Winkel and the Anglo California Securities Company entered into a written agreement for the collection and escrowing of the rental of said apartment until the final determination of this litigation, said accrued rental to be paid over in accordance with the final judgment in this action.

At the outset it should be stated that no question is raised as to the regularity and legality of the sale upon the foreclosure of the trust deed other than to question whether the trust deed was actually in default at the date of the notice of default. The evidence is amply sufficient, not only to support, but to compel the conclusion, that the obligation was in default on said date. Neither is any question raised with reference to the title to the Southard court property. The sole question, therefore, for determination is whether the plaintiff acquired any interest in the Hyde street property of such a nature that she could not be divested of said interest by the foreclosure of the $175,000 trust deed.

[1] An analysis of the transactions between those interested in the exchange of properties prior to April 30, 1927, the date of the execution of the $175,000 trust deed, discloses two possible theories upon which the trial court could justifiably base its decision in favor of defendant. One theory is based upon the acceptance of the authenticity of the written acceptance, and the fact that it constituted a part of the "Exchange Agreement". The other theory is predicated upon an entire elimination of the written acceptance from consideration. Whichever theory the trial court adopted in reaching its decision in favor of the defendant, its conclusion was amply supported by the evidence relative to the transactions occurring before April 30, 1927, and is strongly corroborated by the conduct of the Ten Winkels subsequent to said date. Appellant claims that there is another possible construction of the effect of these transactions which would warrant a judgment in her favor. Such construction, however, in the light of the record does not appear plausible to us, and moreover this theory is completely contradicted by the evidence relative to the course of conduct of the Ten Winkels subsequent to April 30, 1927. We shall discuss all three theories.

Respondent argues that the Ten Winkels proceeded with the transaction for the exchange of properties upon the basis of the written accepance of Mary Thomas, introduced in evidence in the form of a certified copy attached to the written offer of the Ten Winkels which had been recorded. Ignoring for the moment the question of the due execution of said document by

Mary Thomas, there can be no doubt of the existence of such a document by reason of the fact that it was recorded in conjunction with the written offer of the Ten Winkels, and counsel for the appellant so stipulated. There is evidence in the record in the form of carbon copy receipts of the California Pacific Title and Trust Company establishing the fact that on October 25, 1926, the same day on which said offer and acceptance were recorded, Mr. Ten Winkel opened up an escrow with said title company and deposited therein a deed from himself and wife as grantors to Mary Thomas of their Southard court property, together with an "Exchange Agreement". If the exchange agreement consisted of the offer by the Ten Winkels and the written acceptance by Mary Thomas, then the trial court was amply justified in concluding that the Ten Winkels, by depositing their deed, together with the exchange agreement, in escrow with the California Pacific Title and Trust Company, signified their assent to the terms of said written acceptance, and consummated said deal with full knowledge that one of the terms thereof was that the owner of the Hyde street property was to furnish a certificate of title to the second floor cooperative apartment free and clear of all liens and encumbrances *except those on the building as a whole.* If the completed contract provided that the interest acquired by the Ten Winkels was to be subject to all liens and encumbrances on the building as a whole, the Anglo California Securities Company who loaned the promoters of the community apartment house the sum necessary for the erection of the apartment house, was justified in loaning their money upon the assumption that the entire building was covered by the trust deed given to secure the $175,000 promissory note and was justified in its contention that upon a regular and proper foreclosure of said trust deed upon default in the payments, it secured title to the community apartment house free from any claim by the Ten Winkels.

[2] The written acceptance, in that it varied the terms of the original offer, at most constituted a qualified acceptance and in effect constituted a counter-offer on the part of the original offeree, Mary Thomas. There is no contention made that there was ever any express written acceptance by the Ten Winkels of this counter-offer, but the fact that the Ten Winkels deposited their deed to the Southard court property, together with this "Exchange Agreement", (assuming that the exchange agreement included a copy of the qualified acceptance by Mary Thomas) indicates that they accepted the terms of the counter-offer.

The conclusion that the Ten Winkels had knowledge of the written acceptance of Mary Thomas and were cognizant of its terms, although perhaps not fully aware of the possible effect of the inclusion therein of the provision that the certificate of title to be furnished for the community apartment house should show title free and clear of all liens and encumbrances, except those on the building as a whole, and signified their acceptance of said terms by the deposit of said documents in escrow, is strongly fortified by their conduct in the business transactions which occurred subsequent to April 30, 1927, the date on which the $175,000 encumbrance was placed upon the property. On November 13, 1928, the board of directors of View Tower, Inc., by resolution authorized the acceptance from Cleve Shaffer of the apartment house building subject to the $175,000 encumbrance, thereby recognizing the obligation against the property. On November 14, 1928, the Ten Winkels received their membership certificate which provided that "The member above named (Florence L. Ten Winkle and F. W. Ten Winkle) hereby consents to and accepts the Articles of Incorporation and By-Laws of this corporation as obligatory upon him". In the by-laws, which had been adopted August 8, 1928, it was provided that "the property, business and affairs of the corporation shall be managed and controlled by a Board of Directors", and that "all leases shall be subject to any mortgage or deed of trust which may be of record at the time of the execution of such lease". Furthermore, on November 14, 1928, the Ten Winkels entered into a written membership holder's lease which contained this provision: "And it is expressly stipulated and agreed that this lease is subject to any mortgage or mortgages, or trust deed that may from time to time be executed by the corporations as above specified and duly recorded, or that may have been so executed or assumed by the corporation to secure the erection of said building." It is not reasonable to suppose that the Ten Winkels signed the membership holder's lease which by express terminology subjected their interest to the encumbrance already on the property and duly recorded, or accepted the membership certificate upon the condition that the by-laws of View Tower, Inc., should be binding upon them, which by-laws likewise subjected their interest to said encumbrance, if they in fact owned an absolute interest in the community apartment house property free from any encumbrance thereon, and had never agreed by previous contract that they should take their interest subject to an encumbrance. It it true that these transactions occurred subsequent to the date on which the $175,000 encumbrance was placed on the property, but they are convincing corroborative circumstances of the correctness of the conclusion that the Ten Winkels knew and acquiesced in the exchange of property upon the terms included in the written acceptance. It is not incredible that the Ten Winkels were willing to enter into such an agreement, although it has turned out to be a bad bargain for them by virtue of this particular provision subjecting their interest to an encumbrance on the building as a whole. It must be borne in mind that the transaction occurred previous to the depression and if all those who had purchased leases in the community apartment house had been able to perform their obligations, doubtless the transaction would have been a financially advantageous one for the Ten Winkels. Although now, in the light of the bitter lessons learned from the depression, such an agreement seems highly imprudent, at the time it was entered into it may well have seemed to the Ten Winkels to present an excellent opportunity for financial gain.

This view of the transactions of the parties, that the Ten Winkels accepted the counter-offer of Mary Thomas, expressed in the written acceptance, as evidenced by the escrow transaction, affords a reasonable explanation for the action of the defendant company in requiring the Ten Winkels to join in the execution of the trust deed executed by Mary Thomas, dated March 30, 1927, for $10,000, given to renew the loan which had previously been for $13,000, and its failure to require the Ten Winkels to join in the execution of the promissory note for $175,000 and the trust deed given to secure its payment. The latter encumbrance was on the "building as a whole" and was given "to secure the erection of said building," and if the Ten Winkels had acquired an interest in the Hyde street property, by virtue of the agreement between the parties, subject to such encumbrance, their signatures would not be necessary to subject their interest to that encumbrance. It would, however, have been necessary to subject their interest to the $10,000 trust deed which was not on the building as a whole but was given to renew a prior encumbrance in no way related to the erection of any building on the property.

There are two objections to the theory of an acceptance by the Ten Winkels of the counter-offer contained in the written "acceptance" of Mary Thomas. The first objection is that it cannot be ascertained with certainty that the documents deposited in escrow by Mr. Ten Winkel actually included the written acceptance. The written offer of the Ten Winkels was entitled, "Agreement to Exchange Real Property," and the receipt of the title company admitted the receipt of the deed from the Ten Winkels, and an "Exchange Agreement." It is possible, therefore, that the receipt only referred to the written offer, and that the Ten Winkels did not in fact have notice of the written acceptance.

[3-6] The other objection, and we think it is a valid one, is that the written acceptance was improperly admitted in evidence over the objection of counsel for the plaintiff, and cannot, therefore, form a basis for affirming the judgment on appeal. Upon the offer in evidence of the written acceptance in the form of a certified copy of the records of the recorder's office, showing both the written offer and immediately following it, the written acceptance, counsel for plaintiff objected to its admission upon the ground that no proper foundation had been laid. During the discussion which followed, counsel for the plaintiff stated that he was willing to stipulate that the document formed part of the records of the office of the recorder, but that it had not been acknowledged, and he could not stipulate to the signature of Mary Thomas. We think this was a sufficient objection to the evidence upon the ground that no proof of the due execution of the document had been offered by the counsel for the defense. It was not acknowledged and was, therefore, not entitled to recordation. The fact that although not entitled to be recorded it was in fact recorded in conjunction with another document which was entitled to be recorded, cannot give said document any greater sanctity than it is entitled to in its own right, and cannot grant it immunity from the requirement,

applicable to all unrecorded instruments, that their due execution must be established as a proper foundation for their introduction in evidence. Neither was it rendered admissible in the absence of proof of its due execution by virtue of the provisions of section 1850 of the Code of Civil Procedure to the effect that: "Where * * * the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence as part of the transaction." Until its due execution by Mary Thomas had been established, there was no proof that this written acceptance was any part of the transaction for the exchange of the properties. In addition to the objection to the admission of this instrument in evidence, a motion to strike was made, which through inadvertence was not acted upon by the trial court. In the absence of the slightest attempt to prove the due execution of said document, the objection to its admission should have been sustained, and having been improperly admitted, the motion to strike should have been subsequently granted.

[7, 8] We have deemed it advisable to give consideration to the written acceptance by reason of the fact that both parties in their briefs have discussed at considerable length its authenticity and possible effect. However, we are of the opinion that the judgment of the trial court was predicated, not upon a consideration of the written acceptance and the conclusion that the Ten Winkels had accepted said counter-offer, but upon the fact that plaintiff utterly failed in the trial court to sustain the burden upon her of establishing by competent proof a consummated contract whereby she and her husband acquired an absolute interest in the Hyde street property prior to April 30, 1927, the date of the execution of the $175,000 trust deed. Plaintiff repudiated any knowledge of said written acceptance and testified upon the stand that she did not remember ever having seen the document other than in her attorney's office after her suit to quiet title was commenced. However, if the written acceptance be eliminated from consideration, we are confronted with the situation where we are left with only the written offer. The existence of an acceptance is necessary and essential to a completed contract. The burden was upon the plaintiff in order to recover to establish such a completed contract that by its terms she had acquired an interest in said Hyde street property prior to the execution of said $175,000 trust deed. The first evidence of a definite contract is to be found in the membership holder's lease entered into between the Ten Winkels and View Tower, Inc., on November 14, 1928, in which she acquired her interest subject to the prior encumbrance upon the property. There is an absence of evidence of any contract coming into being prior to April 30, 1927, whereby the Ten Winkels acquired an interest in the Hyde street property.

[9] A perusal of the findings of the trial court indicates that its decision was based upon a conclusion that the Ten Winkels acquired no interest by virtue of a consummated contract prior to April 30, 1927, for the findings expressly state with reference to the undivided one-fifteenth interest in the realty claimed by appellant, that, "It is not true that plaintiffs or either of said plaintiffs *ever have been* or now are the owners" of any interest in said real property. The findings with reference to the apartment are to the effect that "It is not true that Florence L. Ten Winkel, individually or as executrix of the last will and testament of F. W. Ten Winkel, deceased, was at any time subsequent to December 21, 1933 (the date of the sale under foreclosure) the owner or in possession of the following described property" (describing the apartment). The membership holder's lease provided merely for the owning of a lease by the Ten Winkels of the designated apartment, the title to the realty and to the community apartment house being held by View Tower, Inc. These findings would indicate therefore that the Ten Winkels acquired their interest by virtue of their membership holder's lease subsequent to April 30, 1927, since the trial court found that they never did become the owners of any interest in the realty. If the Ten Winkels acquired said interest upon the execution of said membership holder's lease, this interest was of course subject to the $175,000 trust deed, a prior encumbrance upon the property, and was wiped out upon the sale under the foreclosure of the $175,000 trust deed. However, it is sufficient simply to say that the record fails to show that the proposition for the exchange of the Southard court property by the Ten Winkels for an interest in the Hyde street property ever progressed to the state of a consummated contract prior to April 30, 1927. The burden was upon the

plaintiff to establish this fact, and having failed to do so, the court was compelled to find in favor of the defendant.

It is plaintiff's claim, as we understand it, that the contract was a unilateral contract which consisted of the original offer of the Ten Winkels, duly acknowledged and recorded, and the acceptance by Mary Thomas of the consideration offered with the proposal (the deed by the Ten Winkels to their Southard court property). Section 1584 of the Civil Code provides that, "acceptance of the consideration offered with a proposal is an acceptance of the proposal". The written offer, together with an acceptance of the benefit therefore, according to plaintiff, constituted the contract. It may be conceded that such an inference could possibly be drawn. But such inference is absolutely contradicted by the subsequent conduct of the original offerors, that is to say, by the acceptance of the membership certificate by the Ten Winkels and their execution of the membership holder's lease subjecting their interest to the encumbrance on the building as a whole. However, it suffices to say, that the trial court did not accept this theory of the transactions of the parties. In our opinion, as we have previously indicated, the trial court was amply warranted in reaching the opposite conclusion.

[10] We have not included in our discussion any reference to the written contract between the Ten Winkels and Tower View Community, Inc., of May 9, 1927, to exchange their property as "per trade agreement in escrow with the California Pacific Title Company". Tower View Community, Inc., was not incorporated at that time, or ever, and we are of the opinion that said agreement neither adds to nor detracts from any of the rights of either party. Neither have we discussed the question of constructive notice because it is not materially involved herein. The respondent freely admitted not only constructive notice of the written offer of the Ten Winkels but *actual* notice of it.

It follows from what we have hereinbefore said that the interest in the Hyde street property acquired by appellant was subject to the $175,000 trust deed, and being so subject, appellant's interest in said community apartment house was foreclosed by the sale under the foreclosure of said trust deed.

The motion of respondent to take additional evidence is denied. The judgment of the trial court is hereby affirmed.

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11 Cal.2d 751

Ex parte CRITCHLOW.

Cr. 4164.

Supreme Court of California.

Aug. 9, 1938.

Rehearing Denied Sept. 8, 1938.

1. Witnesses ⟹304(1)

Where legislation grants immunity to witnesses in return for testimony, such testimony ceases to be self-incriminating.

2. Witnesses ⟹304(3)

Where statute grants immunity from prosecution to witnesses in return for testimony, in order for the immunity to be a substitute for the constitutional privilege against self-incrimination, the immunity must, in addition to eradicating the self-incriminating character of the testimony to be adduced, also exonerate the witness from prosecution for the offense thereby disclosed. Const. art. 1, § 13.

3. Witnesses ⟹304(3)

Where a statute grants immunity to witnesses from prosecution in return for testimony, the immunity must be coextensive with and a full substitution for the constitutional privilege against self-incrimination. Const. art. 1, § 13.

4. Witnesses ⟹304(1)

The application of the constitutional privilege against self-incrimination and the statute granting immunity to witnesses from prosecution in return for testimony regarding gaming offense is not limited to an investigation in the witness' own case, but the immunity may also be asserted in any case, by a witness compelled in law to appear and answer before any investigating body. Pen. Code, § 334; Const. art. 1, § 13.

5. Witnesses ⟹304(1)

The immunity from criminal prosecution which is given in return for a witness' testimony proceeds from the statutory provision and is not an implied or inherent incident of the power to investigate.

6. Witnesses ⟹304(1)

The statute compelling witness to testify concerning a gaming offense and immunizing witness from subsequent prosecution for any offense concerning which he testified, grants full protection from self-accusation and protects a witness in giving self-incriminating testimony relating to bribery in an investigation concerning violation of the gaming law, provided the testimony was elicited for the purpose of disclosing the gaming operations, and was relevant for that purpose. Pen.Code, § 334; Const. art. 1, § 13.

7. **Witnesses** ⚷304(1)

Under statute compelling witness to testify concerning a gaming offense and immunizing witness from subsequent prosecution for "any offense concerning which he testified," the quoted phrase must be deemed to include any offense concerning which witness may be compelled to give testimony material to the determination of the investigation at hand. Pen.Code, § 334; Const. art. 1, § 13.

8. **Witnesses** ⚷304(1)

A statute giving a witness immunity against self-incrimination in one class of offenses cannot apply to give immunity in an investigation concerning another and different class.

9. **Witnesses** ⚷307

A witness may not invoke the privilege against self-incrimination for the purpose of shielding some third person from prosecution. Const. art. 1, § 13.

10. **Witnesses** ⚷304(1)

The statutory immunity afforded a witness against prosecution in exchange for compulsory testimony of the witness is for the purpose of eliciting evidence against other offenders and questions asked the witness must have some relation to the investigation in the course of which the immunity is allowed. Pen.Code, § 334; Const. art. 1, § 13.

11. **Witnesses** ⚷304(1)

The statute compelling a person to testify concerning a gaming offense and providing that no prosecution can thereafter be had against the person for any offense concerning which he testified affords protection only when the testimony is given in investigations of gaming offenses and not when for any reason the investigation is of a different class of offense. Pen.Code, § 334.

12. **Witnesses** ⚷304(3)

A witness who had been acquitted on a charge of bribery, and who was questioned by grand jury in regard to gaming charges which were brought against the parties in whose behalf witness had allegedly attempted to deliver bribe money to chief of police, was required to answer questions regarding whether she received and delivered the money, where investigation as to gaming charges was still pending, as against contention that statute providing immunity from self-incrimination to witnesses testifying as to gaming offenses would not afford immunity from bribery prosecution. Pen.Code, § 334; Const. art. 1, § 13.

13. **Witnesses** ⚷306

A witness may not invoke the constitutional privilege against self-incrimination when the answers which she might give would reveal an offense of which she had been acquitted, since the testimony then could no longer be incriminating. Pen.Code, § 334; Const. art. 1, § 13.

14. **Witnesses** ⚷21

Where a witness, who was questioned by grand jury in regard to gaming charges which were brought against parties in whose behalf witness had allegedly attempted to deliver bribe money to chief of police, refused to answer questions put to her on ground that her testimony would be self-incriminating as to bribery charge, and witness had been acquitted on that charge, court properly adjudged witness in contempt of court for refusal to answer. Pen.Code, § 334; Const. art. 1, § 13.

15. **Habeas corpus** ⚷92(3)

In habeas corpus proceeding for release of prisoner who had been adjudged in contempt of court for refusal to answer questions put to her by grand jury, examination of the record and evidence before the committing court was within the proper scope of inquiry by the Supreme Court.

* * *

Proceeding in the matter of the application of Myra Critchlow for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Freitas, Duffy & Keating, of San Rafael, for petitioner.

A. E. Bagshaw, Dist. Atty., of San Francisco, for respondent.

SHENK, Justice.

This proceeding in habeas corpus presents the question of the scope of immunity from prosecution afforded by section 334 of the Penal Code enacted in 1872.

The petitioner, Myra Critchlow, was adjudged guilty of contempt of court by the superior court in Marin county for refusing to answer certain questions propounded to her before the grand jury of that county.

In August, 1937, Tony Quadros, chief of police of the town of Sausalito, reported to the district attorney of Marin county that the petitioner, then employed by the Sausalito News, a newspaper published by Frank B. Anderson, had handed him an unaddressed and sealed plain white envelope in which he found $25 in currency. He also reported that the petitioner told him that the money came from the Golden Hill (or Golden Rule) Business Men's Club, Inc., in Sausalito, whose membership was Chinese, and that he would receive a like sum on the 15th of every month. As the result of investigations, then made by the grand jury the petitioner was indicted on two bribery counts on both of which she was acquitted by a jury in December, 1937. In the meantime the Chinese club was raided, arrests were made on charges of gambling, and the place was closed. Trials on those charges were had and the defendants convicted. They paid fines on October 21, 1937.

On February 24, 1938, the petitioner was subpoenaed to appear before the grand jury. She was informed by the foreman that the grand jury was conducting an investigation into gaming law violations in connection with the Chinese Golden Hill Club, and she was asked certain questions. Upon her refusal to answer on the ground that the answers might tend to incriminate her, the foreman read to her section 334 of the Penal Code, which is as follows: "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified." The petitioner persisted in her refusal to answer certain of the questions put to her, placing her refusal on the ground that they related to an investigation of bribery charges, as to which she contended the section read afforded her no immunity. The questions asked of the petitioner and which she refused to answer were the following:

"Did Mr. Andy Anderson ever discuss with you the operation of the Golden Hill Business Men's Club * * * ?"

"Did Mr. Anderson ever in 1937 give you any money contained in a plain white envelope with instructions to give that to Mr. Tony Quadros, Chief of Police of the City of Sausalito, and to tell him that was coming from the persons operating the Chinese Social Club. * * * ?"

"Did you when you gave Mr. Quadros that envelope (referring to one admittedly given on August 7, 1937) or shortly thereafter or at any time thereafter tell Mr. Quadros that Mr. Anderson had given you that money for him and that it was coming from the Chinese Social Club * * * ?"

"Did you on October 20, 1937, tell Chief of Police Quadros of Sausalito that Andy Anderson wanted him to have this $25.00 you had previously given him and it was from the Chinese Social Club * * * and Andy said it was alright for him to take the money?"

"Did you in that same conversation with Tony Quadros, Chief of Police of Sausalito, on October 20, 1937, approximately in front of the Sausalito News * * * tell Mr. Quadros you had money in the safe for all of the boys and you did not know what to do with it?"

The petitioner attempts to justify her refusal to answer by contending that section 334 of the Penal Code does not offer immunity from prosecution for the offense of bribery to which the questions very plainly relate. It is her claim that the supposed investigation into gaming violations, and the offer of immunity under section 334, was merely a pretense for the purpose of eliciting information from her in connection with the grand jury's investigation into alleged bribery activities; and that the section does not purport to grant immunity from prosecution for any bribery offense disclosed by any self-incriminating testimony which the petitioner, except for the invocation of the constitutional privilege, would be compelled to give.

The constitutional section (art. 1, sec. 13), provides that no person shall be compelled, in any criminal case, to be a witness against himself.

The history of the origin of the privilege and its adoption in this country as an inviolable right by constitutional enactment has often been stated. Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110; Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819; Ex parte Cohen, 104 Cal. 524, 38 P. 364, 26 L.R.A. 423, 43 Am.St.Rep. 127; Duckworth v. District Court, 220 Iowa 1350, 264 N.W. 715; In re Doyle, 257 N.Y. 244, 177 N.E. 489, 87 A.L.R. 418, and note at page 435.

[1-3] It has never been questioned that, where legislation grants immunity to witnesses in return for testimony, such testimony ceases to be self-incriminating. But in order that the immunity from prosecution be a substitute for the constitutional privilege it must, in addition to eradicating the self-incriminating character of the testimony to be adduced, also exonerate the witness from prosecution for the offense thereby disclosed. The leading case to that effect, followed by the weight of authority in this country, holds that the immunity offered must be coextensive with and a full substitution for the constitutional prohibition. Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110, followed in Re Doyle, supra; Ex parte Cohen, supra, and numerous other cases. As said in Re Doyle, supra (177 N.E. page 491), "To force disclosure from unwilling lips, the immunity must be so broad that the risk of prosecution is ended altogether."

[4, 5] It is not questioned that the application of the constitutional provision and the immunity statute is not limited to an investigation in the witness' own case. The immunity may also be asserted in any case by a witness compelled in law to appear and answer before any investigating body. The immunity proceeds from the statutory provision and is not an implied or inherent incident of the power to investigate. In re Doyle, supra; Ex parte Clarke, 103 Cal. 352, 37 P. 230; Ex parte Cohen, supra; In re Tahbel, 46 Cal.App. 755, 758, 759, 189 P. 804.

[6] In accord with the foregoing authorities it is apparent that section 334 of the Penal Code grants full protection from self-accusation by reason of testimony which the petitioner might give concerning the offense of gaming. There has been no general immunity statute in this state since the repeal of section 1324 of the Penal Code by Statutes of 1917, page 291. And there is no statute in this state affording immunity in a bribery investigation. The district attorney concedes that two investigations of the activities of the Chinese club were pending before the grand jury: One an investigation of the violation of the gaming laws, and the other of the bribery activities in connection with the operation of that club. He seeks to uphold the action of the court in committing the petitioner for contempt on the theory that the investigations were related and that an investigation into the bribery activities is an investigation of offenses concerning gaming.

The authorities appear to uphold the view that a witness would be protected by the immunity statute, section 334, in giving self-incriminating testimony relating to bribery in an investigation concerning violation of the gaming law, provided the testimony was elicited for the purpose of disclosing the gaming operations, and it was relevant for that purpose. The immunity statute is very broad, providing as it does for protection from prosecution on account of "any offense concerning which" the witness testified. This is not necessarily to be restricted to any "gaming" offense. Had such restriction been expressly made, it is questionable that the statute would have met the test as a complete offer of immunity laid down by the authorities hereinabove cited; and obviously it is not to be read into the statute when the effect might be to lay open to prosecution a witness who had given testimony relevant and material in an investigation, but which disclosed another offense of a class different from that to which the investigation pertained. The statute involved herein was clearly designed to meet the requirements stated in the authorities. Such a construction of the provisions thereof, contrary to the fears of the petitioner, would not leave them open as a sanctuary for criminals within which they could voluntarily confess any crime with impunity, however unrelated to the general matter embodied in the immunity statute. It must therefore be concluded that the legislature intended that meaning which would effect the manifest object of the statute. Ex parte Cohen, 104 Cal. 524, 38 P. 364, 26 L.R.A. 423, 43 Am.St.Rep. 127. The Cohen Case does not involve the exact situation before us, but the language of the court in that case indicates the correct premises for the foregoing conclusion. The court said at page 531, 38 P. at page 366: "The immunity thus given includes not only the offense with which the defendant then under examination is charged * * * but also any other offense with which the witness may be charged, and to which such testimony may have reference, or which it may tend to establish. 'The offense with reference to which his testimony was given' is broader in its terms, and has a wider scope, than 'the offense with which the defendant is charged'; and the exemption from prosecution or punishment consequent upon his giving testimony in reference thereto, when considered in view of the personal privilege given by the constitution, must receive a liberal construction in its favor. The statute purports to compel him to testify 'in the same manner as any other person,' and as the equivalent for his constitutional protection, gives him a legislative protection of equal scope and effect by exempting him from all liability to punishment for the offense with reference to which he testifies. The exemption is as broad as the compulsion, and the protection is equal to that given by the constitution. The testimony which he may be compelled to give is the same as that which could be required of any other witness, and includes any matter within his knowledge which is relevant to the offense under investigation and material to its determination. If, in giving such testimony, the testimony has reference to another offense committed by himself, he is within the protection of the statute, and, upon any prosecution for such offense, is authorized to plead or prove in bar thereof that under the compulsion of this section he gave testimony with reference to such offense."

[7] Likewise in the statute here under consideration the language "any offense concerning which he testified", must be deemed to include any offense concerning which he may be compelled to give testimony material to the determination of the investigation at hand. United States v. Weinberg, 2 Cir., 65 F.2d 394. This view also has support in the language used in Re Williams, 127 Cal.App. 424, at page 431, 16 P.2d 172, at page 175 even though in that case the question was left open whether testimony concerning certain offenses of bribery in connection with the gaming statute would result in immunity. The court said: "What the statute means is that a witness called to testify to facts concerning or relating to the offense of gaming can safely testify for the reason that he is forever free from the possibility of punishment for any crime in the proof of which such testimony would be material. Such a construction is literally what the statute says, and it preserves the whole meaning and intention thereof. Such construction brings the statute within the rule that it must be coextensive with the Constitution."

[8-10] Certainly a statute giving immunity in one class of offenses cannot apply or be used to give immunity in an investigation concerning another and different class. Foot v. Buchanan, C.C., 113 F. 156; Ex parte Werner, 46 R.I. 1, 124 A. 195. But we cannot accede to the view that the questions asked of the witness here were not so related to an appropriate investigation of gaming violations as to leave the witness unprotected in any answer which she might have given. A witness may not invoke the privilege for the purpose of shielding some third person from prosecution. The compromise afforded by the ancient custom of granting amnesty or immunity is for the purpose of eliciting evidence against other offenders —here offenders against the gaming law. However, the questions asked should have some relation to the investigation in the course of which the immunity is allowed. People v. Newmark, 312 Ill. 625, 144 N.E. 338; People v. Boyle, 312 Ill. 586, 144 N.E. 342. When it does have some relation or connection with the matter under investigation the witness is compelled to testify because the immunity statute affords the protection guaranteed by the Constitution. In this respect the Newmark and Boyle Cases, supra, overruled any intimation in People v. Argo, 237 Ill. 173, 86 N.E. 679, and People v. Goldberg, 287 Ill. 238, 122 N.E. 530, that the fact that gambling and bribery may be related afforded no justification for compelling the witness to answer questions as to the offense of gambling to which the immunity statute was not directed. If the question, the answer to which might reveal an offense of a different class, indicates that it is related to the investigation to which the immunity statute is applicable, then the answer is under the protection of the statute. People v. Rockola, 346 Ill. 27, 178 N.E. 384. In that case it was said (page 387): "While the people may not ask questions of a witness calling for self-incriminating answers which do not show some relation to the bribery charge being tried or investigated, if such questions are so related the order granting him immunity is a complete protection to the witness, and he is not excused from answering the question because his answer may furnish a link in the chain of evidence against him for some other or different offense. The order of immunity protects him. People v. Boyle, supra. * * * Nor does the fact that the questions asked may relate to another offense not being tried or investigated furnish an excuse for refusal to answer if it can be seen that such questions also relate to the charge of bribery on trial or under investigation. People v. Boyle, supra."

[11, 12] It may not be said, therefore, that in a proper case testimony revealing the offense of bribery committed by the witness in connection with gambling activities then under investigation, would be unprotected by the immunity statute. If, however, answers to the questions here asked could no longer have any bearing in proving the case against the persons charged or to be charged with the offense of gaming, because, forsooth, all of the offenders involved had been tried and convicted, then we must say that the prosecuting authorities or the investigating body could not attempt to misuse the statute by engaging upon a fishing expedition to catch perpetrators of other and different penal offenses. The protection is afforded only when the testimony is given in investigations of offenses which are the subject of the statute, viz., gaming; and not when for any reason the investigation is of a different class of offense. Maxie v. State, 133 Miss. 243, 97 So. 560. The district attorney contended before the court which committed the petitioner that the investigation concerning the gaming operations was still pending, and that all violators of the gaming laws involved in the Golden Hill Business Men's Club had not been apprehended. The court found that such investigation was still pending. It could also properly conclude that the questions were relevant to further necessary proof connecting with the gambling operations persons who had not yet been apprehended. It was therefore acting within its jurisdiction in directing the petitioner to answer the questions hereinabove quoted.

[13, 14] Furthermore, the court properly may have been of the opinion that the testimony sought from the petitioner had reference solely to the offenses of which she was acquitted in December, 1937. The questions themselves so indicate. The petitioner may not invoke the constitutional privilege when the answers she might give would reveal an offense of which she had been acquitted, for the reason necessarily that the testimony could not longer incriminate her, and she is not excused from answering. Ex parte Cohen, 104 Cal. 524, 528, 38 P. 364, 26 L.R.A. 423, 43 Am.St. Rep. 127; People v. Boyle, 312 Ill. 586, 144 N.E. 342, 346. From the record here presented we must conclude that the committing court could also have found that the witness had been acquitted of any participation in any bribery offenses which would be revealed by the answers to the questions propounded to her. She therefore could be required to answer those questions, and the court would then be acting within its jurisdiction in adjudging her in contempt for her refusal.

[15] The foregoing examination of the record and evidence before the committing court is within the proper scope of the inquiry which this court may make in this proceeding. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127; In re Lake, 65 Cal.App. 420, 224 P. 126; In re Connolly, 16 Cal.App.2d 709, 61 P.2d 490.

The writ is discharged and the petitioner is remanded.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; HOUSER, J.

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11 Cal.2d 761

WILSON v. DAVIS.

L. A. 16743.

Supreme Court of California.

August 9, 1938.

Rehearing Denied Sept. 8, 1938.

1. Wills 🔑230

A complaint alleging that on designated date defendant agreed to pay plaintiff $10,000 for withdrawing contest of will, and that subsequently defendant executed and delivered written memorandum promising to pay such amount on consideration that plaintiff would "tell the truth" about the will, and that plaintiff withdrew the contest and defendant consented to pay the amount agreed, stated cause of action as against contention that consideration expressed in written memorandum was insufficient.

2. Pleading 🔑237(6)

In action for breach of promise to pay plaintiff $10,000, for withdrawing contest of will permitting amendment of amended complaint to conform to proof was not error.

3. Evidence 🔑419(11)

In action for breach of promise to pay plaintiff $10,000 under alleged agreement whereby plaintiff was to withdraw contest of will in consideration of such payment, wherein amended complaint alleged existence of oral agreement and subsequent written promise of defendant to pay plaintiff designated amount in consideration of plaintiff's "telling the truth" about the will, parol or extrinsic evidence was admissible to show true consideration.

4. **Wills** ⚷230

In action for breach of promise to pay plaintiff $10,000 in consideration of his withdrawal of contest of will, evidence of inventory, appraisement and decree of distribution in estate of testatrix was admissible to show that plaintiff had carried out his part of agreement and had given adequate consideration, and had acted in good faith in the matter.

5. **Wills** ⚷230

In action for breach of contract to pay plaintiff $10,000 for withdrawing contest of will, refusal to permit defendant to introduce report of inheritance tax appraiser to show that part of property in estate was held by testatrix in trust for defendant and that defendant in fact received approximately one-half of amount named in inventory of estate introduced by plaintiff, was not error since evidence was immaterial.

6. **Wills** ⚷230

In action for breach of contract to pay plaintiff $10,000 for withdrawing contest of will, evidence that plaintiff had not withdrawn contest as he had agreed to do and to show rescission of contract was properly rejected where proffered evidence went to acts taken by plaintiff in effort to enforce collection after estate had been distributed to defendant and after she had broken agreement with plaintiff.

7. **Appeal and error** ⚷1058(3)

In action for breach of contract, error, if any, in court's refusal to permit defendant's counsel to ask leading questions and ask particular witness concerning certain conversation, was cured where court later permitted another witness to testify fully as to all such matters.

8. **Wills** ⚷230

Evidence *held* to justify judgment for breach of contract whereby defendant agreed to pay plaintiff $10,000 for withdrawing contest of will on ground that defendant had entered into such agreement and that agreement had not been rescinded.

9. **Wills** ⚷230

In action for breach of contract whereby defendant agreed to pay plaintiff $10,000 for withdrawing contest of will, fact that plaintiff had offered earlier will for probate did not of itself show bad faith on his part which would preclude recovery in absence of showing that such earlier will was in existence at time of death of testatrix, or that plaintiff had knowledge of such fact, since when earlier will came into his possession it was his duty to produce it in absence of definite knowledge that it was not the last will of the testatrix.

10. **Trial** ⚷260(9)

In action for breach of contract whereby defendant agreed to pay plaintiff $10,000 for withdrawing contest of will, instructions were not erroneous as refusing to permit defendant to show that plaintiff's contest was in bad faith, especially where court adequately covered matter of possible bad faith on part of plaintiff in another instruction which was given.

11. **Wills** ⚷230

In action for breach of contract whereby defendant agreed to pay plaintiff $10,000 for withdrawing contest of will, wherein amended complaint alleged that subsequent to oral agreement defendant executed and delivered writing whereby she promised to pay plaintiff $10,000 in consideration of his "telling the truth" about the will, refusal of instruction that if paper was given only in consideration as therein stated that plaintiff tell the truth about the will, there was no consideration for the promise, was properly refused under evidence presenting issue of compromise alleged in amended complaint.

12. **Appeal and error** ⚷712

In action for breach of contract wherein defendant contended on appeal that judgment against her was invalid, on ground that she was incompetent at time of entry of judgment and that no appearance was made by her guardian, the burden of producing a proper record showing that defendant was incompetent as alleged, was on the defendant.

13. **Appeal and error** ⚷712

In action for breach of contract, contention that judgment against defendant was invalid because defendant was incompetent at time of entry thereof and that no appearance was made by her guardian, could not be urged for first time on appeal, in absence of record showing that defendant was incompetent at time of entry of judgment, especially where at opening of trial question was raised as to whether guardian for defendant had been substituted for her and defendant's attorney stipulated that question of her competency should not be raised, and that she should be considered competent for the purpose of the trial.

14. Appeal and error ⚷189(5)

In action for breach of contract, contention that court erred in refusing to permit defendant to associate two additional attorneys to assist her counsel and in refusing to continue the trial until one of such attorneys should be free from other court engagements, was not available on appeal, where record showed that court granted motion as to association of one of attorneys and stated that he would make similar order when the other attorney appeared, and record showed that no request for continuance was made.

15. Appeal and error ⚷964

In action for breach of contract, refusal to permit defendant to call trial judge as witness at hearing of motion to transfer hearing of motion for new trial to some other judge, which was heard before another judge, was not error, where motion was heard on affidavit including one by the trial judge, since matter of making transfer was largely within discretion of judge hearing motion.

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In Bank.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by Robert J. Wilson against Effie F. W. Davis on defendant's alleged promise to pay the plaintiff $10,000. Judgment for plaintiff for that amount, and defendant appeals.

Affirmed.

Prior opinion, 76 P.2d 699.

William Ellis Lady, Jerome H. Kann, and Lois Preston Gilbert, all of Los Angeles, for appellant.

Phil Jacobson and Harold Prudhon, both of Los Angeles, for respondent.

BARNARD, Justice pro tem.

The plaintiff filed for probate a will signed by one Emma H. Wilson, dated May 17, 1933, and naming him as principal beneficiary and as executor. Shortly thereafter the defendant filed for probate another will, dated October 24, 1933, naming her as principal beneficiary and as executrix. The plaintiff filed objections to the probate of that will upon the ground, among others, that it appeared that the date thereon had been altered. An interesting sidelight on this contention may be found in the opinion in People v. Gilbert, Cal.App., 78 P.2d 770. On January 8, 1935, the defendant petitioned for an order to compel the plaintiff to produce still another will supposed to have been signed by Emma H. Wilson under date of August 22, 1933. This will was never produced and there is a conflict in the evidence with respect to what became of it, and as to whether or not it named the plaintiff herein as a beneficiary.

While matters thus stood certain negotiations or transactions took place between the plaintiff and defendant, after which the plaintiff withdrew his petition for the probate of the will of May 17, 1933, and his objections to the probate of the will dated October 24, 1933, and in due course the estate in question was distributed to the defendant.

The plaintiff brought this action on the theory that the defendant, in consideration of his making the withdrawals just mentioned, had agreed to pay him the sum of $10,000, which she had failed to do. After a motion to strike large portions of an amended complaint had been granted that complaint still contained, in the first cause of action, allegations to the effect that on January 18, 1935, the defendant requested the plaintiff to withdraw his contest of the will dated October 24, 1933, and his petition to probate the earlier will; that in consideration of such withdrawals the defendant promised and agreed to pay him $10,000; and that on January 20, 1935, the defendant executed and delivered to him a written agreement wherein she agreed to pay him $10,000 in consideration of said withdrawals, which agreement was as follows:

"Jan. 20, 1935.

"Dear Bob,

"I feel that you and I should settle our affairs between us without Lawyers So I trust you will not say anything to your Lawyers as well as myself.

"I will give you the equivalent of $10,000 upon the consideration that you will tell the truth about my Dear Sister Will of Aug. 22, 1933, as you know this will left everything to me.

"Bob you know I worked and put my money into everything Emma bought and we both agreed that it should go to me if anything happens to her.

"Lots of love to you and Margaret.

"Effie F. W. Davis."

It is further alleged that because January 20, 1935, fell upon a Sunday the plaintiff requested the defendant to ratify said agreement, which she did by executing the following agreement:

"January 21—1935

"The contract I made to Robert J. Wilson & dated Sunday Jan. 20—1935 I agree to ratify the said contract as of January 21—1935

"Witness: C. S. Ludlum

"Effie F. W. Davis."

It is then alleged that the defendant has failed and refused to pay said sum or any part thereof. In a second count, for money had and received, a recovery of the same amount is sought.

The answer contains a general denial and sets up as a special defense that the plaintiff at one time had possession of another will dated August 22, 1933; that he destroyed this will without the consent of Emma H. Wilson; that after filing a contest to the will dated October 24, 1933, he "threatened to expose the conduct and physical condition of the said Emma H. Wilson unless this defendant submitted to certain demands of plaintiff then and there made to the extent of approximately $10,000"; that he further promised that he would refrain from carrying into effect these threats and "would refrain from doing or saying anything detrimental or harmful of and concerning this defendant" if she would give to him the papers mentioned in the amended complaint; and that the defendant would not have given these papers to the plaintiff except for such threats and promises. The answer then alleges that the plaintiff broke these promises by a series of things done by him on and after March 19, 1936, including the filing of this action; that the filing of this and other actions or proceedings by the plaintiff constituted a rescission of any agreement between them; and that the defendant by filing a notice of rescission acquiesced therein.

The action was tried before a jury. At the close of the evidence, with the court's consent, a second amended complaint to conform to the proof was filed which, among other things, restored many of the allegations which had previously been struck from the first cause of action. The jury returned a verdict in favor of the plaintiff for $10,000, judgment was entered accordingly, and the defendant has appealed.

Many points are raised by the appellant, most of which are based upon the theory that this action is founded entirely upon a written contract, being the writing dated January 20, 1935; that this agreement is nudum pactum since the consideration therein stated, to tell the truth, is in law no consideration at all; that evidence of any other consideration was not admissible; and that it necessarily follows that any agreement between the parties was without consideration. It is respondent's position, on the other hand, that the action involves an oral agreement between him and the appellant, which was evidenced by certain writings and memoranda signed by her and that a good consideration was both alleged and proved.

[1-3] The appellant contends that the amended complaint failed to state a cause of action since the agreement on which it is based expresses a consideration which in law is not sufficient, and that the court erred in permitting the filing of an amended complaint to conform to the proof since this had the effect of entirely changing the cause of action. If the complaint merely failed to allege the existence of a valid consideration it might be an interesting question as to how an amendment conforming to proof of such a consideration could be said to entirely change the cause of action. While the amended complaint is far from a model it does appear therefrom that the writing in question was included therein for the purpose of showing a confirmation of the agreement on the part of the appellant, and not for the purpose of alleging the consideration therefor. It is otherwise specifically alleged that an agreement was entered into between the parties two days before the writing was signed, by the terms of which the respondent was to withdraw his petition for the probate of a will and dismiss his contest of another will in consideration of the appellant's agreement to pay him the sum of $10,000. The case was largely, if not entirely, tried upon the issues raised by these allegations and those of the answer to the effect that the appellant's agreement to pay the money had been obtained by a form of duress. In so far as the point now raised is concerned, at least, the allegations of the amended complaint, after the motion to strike was granted, were sufficient to state a cause of action. The amendment later

permitted by the court not only conformed to the proof but was in harmony with the real meaning and effect of the original allegations, which affirmatively set forth a valid consideration, and the real cause of action sought to be alleged and thoroughly understood and combated by the other party was not changed or altered in any material respect. If, as the appellant concedes, there was no valid contractual consideration the usual rule applies and parol or extrinsic evidence was admissible to show the true consideration. County of Los Angeles v. Farnsworth, 4 Cal.App.2d 516, 41 P.2d 577.

[4-8] Some fourteen specifications of error in connection with the admission or rejection of evidence are set forth, with the additional contention that the evidence is not sufficient to sustain the judgment. Several of these contentions are based upon the theory that it was error to permit evidence of any consideration other than the one mentioned in the writing which is set forth in the amended complaint. This point requires no further consideration in view of what has already been said. A number of these objections are directed at the admission into evidence of the inventory, appraisement and decree of distribution in the estate of Emma H. Wilson, it being argued that these were introduced solely for the purpose of prejudicing the jury by showing the amount which the appellant had received from this estate, and, further, that the situation is comparable to an action for damages for personal injuries where "evidence of one's poverty is inadmissible". We are unable to find these exhibits in the record and are not advised as to their contents. However, this evidence was admissible for the purpose of showing that the respondent had carried out his part of the agreement, that he had given an adequate consideration, and possibly for its bearing upon his good faith in the matter. Complaint is made of the refusal of the court to permit the appellant to introduce the report of the inheritance tax appraiser on the ground that this would have shown that a part of the property in the estate was held by the deceased in trust for the appellant, and that she in fact received under the will only about $30,000 instead of the $60,000 named in the inventory. This evidence was immaterial and could not have affected the result. In a series of points the appellant complains of the refusal of the court to admit evidence offered by her, which it is said would have shown that the respondent did not "lay off" as he had agreed to do and would therefore have disclosed the fact that there had been a rescission. The proffered evidence all went to acts taken by the respondent in an effort to enforce collection of his claim, after the estate had been distributed to the appellant and after she had broken her agreement with him, and was properly rejected. Complaint is also made, in several instances, of the court's refusal to permit appellant's counsel to ask certain leading questions and to ask a particular witness concerning certain conversations. If any error here occurred it was cured, since the court later permitted another witness to testify fully as to all of these matters. The most obvious error of the court was in permitting the appellant to go too far afield in her introduction of evidence. The evidence amply sustains the judgment.

[9, 10] Practically all of the instructions given are attacked except those of a general nature. Most of these assignments of error are based upon the contention that the only consideration which could be considered was that expressed in the writing of January 20, 1935, an agreement to tell the truth, and that the other instructions, as to what constitutes a consideration, should not have been given. This requires no further discussion. Several of the other instructions are said to be erroneous because the court "refused to permit defendant to show that plaintiff's contest was in bad faith". In none of these instances is it pointed out where the court refused to permit the appellant to make such a showing. The argument seems to be that bad faith conclusively appears because the respondent knew, because he once had it in his possession, of the existence of a will dated August 22, 1933, which was later than the one he offered for probate. There is evidence that respondent delivered this will to the appellant before the death of Emma H. Wilson and we are pointed to no evidence either that such a will was in existence at the time of her death or that the respondent had knowledge of such a fact. When the earlier will came into his possession it was his duty to produce it in the absence of definite knowledge that it was not her last will and the fact that he offered that will for probate does not, of itself, show bad faith upon his part. Not only is no evidence called to our attention which discloses that the giving of these instructions was erroneous, but the court adequately covered the matter of any possible bad faith upon the part of the re-

spondent in another instruction which was given.

[11] It is next urged that the court erred in refusing to give ten instructions offered by the appellant. Most of these were either obviously improper or not justified by the evidence, and only one need be here considered. That instruction reads as follows:

> "The Court instructs the jury that in this case the defendant has alleged that there was no consideration for the claims of plaintiff. If you find from the evidence that the paper sued upon herein, to-wit, the one bearing the date of January 20, 1935, was given only in consideration as therein stated, that Robert Wilson tell the truth about the will of the sister of Mrs. Davis bearing date of August 22, 1933, then I charge you that there is no consideration for the reason that everyone is always required or at least expected to tell the truth of and concerning matters and things."

We are pointed to no evidence which would have supported a finding that this "paper" was given only in consideration that the respondent tell the truth about the will mentioned therein. The complaint alleged that two days before that writing was given the appellant agreed to pay the money in consideration that the respondent withdraw his petition to probate another will and allow a third will to be probated. The answer denied generally that there was any consideration for the agreement alleged in the complaint and specifically alleged that the writing was given as a result of duress and that a rescission had taken place. The case was largely tried on these issues. There is ample evidence that the respondent withdrew his objections and permitted the appellant to probate the will she had offered. Even if there were evidence to support a finding that the "paper" mentioned in the instruction was given only in consideration that the respondent tell the truth, the other consideration and agreement alleged in the complaint, and the evidence in support thereof, would still remain. In effect, this was a formula instruction purporting to tell the jurors that there was no consideration and they must find for the appellant if they found one particular thing to be true, when there was another issue, supported by ample evidence, which also required consideration. Even if it could be said that the agreement to tell the truth was the only consideration for the paper itself, and that that writing was therefore void, there was still the matter of a compromise which was alleged and proved. If it be assumed that some instruction along this line could properly have been given such an instruction should have been so limited that a finding on that particular matter would not have prevented the jury from considering the other issues upon which the case was tried. Under the circumstances here appearing the question of whether or not a good consideration existed was not conclusively determined by the expression of a consideration which appears in the paper dated January 20, 1935.

[12, 13] The appellant contends that this judgment is invalid for the reason that at the time it was rendered she was, in law, an incompetent person and that no appearance was made by her guardian. It may first be observed that the record herein does not disclose any such situation. However, five days after the respondent's brief was filed a purported "Supplemental Reporter's Transcript on Appeal" was filed in the trial court and later presented for filing in the Appellate Court but the same has never been filed. If this supplemental transcript were to be considered it contains only a set of findings to the effect that this appellant is incapable of managing her property, an order appointing a guardian for her estate, both dated August 27, 1936, and an affidavit of her attorney filed in the trial court eleven days after the respondent's brief was filed herein. The general facts relied on are that while this action was pending and on August 27, 1936, the appellant was adjudged to be an incompetent person, that she filed a petition for restoration to competency, that a jury returned a verdict finding her competent on November 24, 1936, that the verdict was entered pursuant to section 664 of the Code of Civil Procedure within twenty-four hours thereafter, and that a formal judgment was not entered by the court until January 7, 1937, after the entry of the judgment here appealed from. Not only is there no proper record before us but it appears from the offered supplemental transcript that the appellant was found competent by the verdict of a jury on November 24, 1936, and from the record herein that about a month after that she testified at great length in the trial of this case. It further appears from the record that at the opening of the trial some question was raised as to whether a guardian for the appellant had been substituted and her attorney not only expressed a willing-

ness to proceed but in effect stipulated that the question of her competency should not be raised, and that she should be considered competent for the purpose of this trial. While the record is in an unsatisfactory condition, the burden of producing a proper record was upon the appellant, and in view of the absence of such a record and the stipulation which in effect waived the right to produce the proper evidence and properly call the matter to the attention of the court at a time when it could be corrected, it cannot now be urged for the first time that the minute entry of the jury's verdict was not technically a sufficient adjudication of her competency.

[14, 15] It is urged that the court erred in refusing, on the first day of the trial, to permit the appellant to associate two additional attorneys to assist her counsel and in refusing to continue the trial until one of these additional attorneys should be free from other court engagements. The record shows that the court granted the motion as to the association of one of these attorneys and stated that he would make a similar order when the other attorney appeared. It further appears that no request for a continuance was made and the point is without merit. But one other assignment of error will be considered. The appellant moved, on the ground of bias and prejudice, to transfer the hearing of her motion for a new trial to some judge other than the one who had tried the action. At the hearing of that motion, before another judge, the appellant was refused permission to call the trial judge as a witness. The motion was heard on affidavits, including one by the trial judge, but the appellant argues that by a personal examination it might have been shown that said judge was "biased and prejudiced in his rulings" during the trial of the action. Aside from other considerations, the matter of making such a transfer was necessarily largely within the discretion of the judge hearing that motion. Neither abuse of discretion nor prejudice appears from anything which is brought to our attention.

While minor errors appear in the record the case was fairly tried, voluminous evidence was received which amply sustains the judgment, and we are far from convinced that a miscarriage of justice has occurred.

The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; HOUSER, J.

28 Cal.App.2d 87

UNION OIL CO. OF CALIFORNIA v. BASALT ROCK CO., Inc.

Civ. 10806.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1938.

1. Appeal and error 🔑653(1)

An appellate court having jurisdiction of a record may properly authorize temporary withdrawal thereof at any time during the pendency of the appeal for the purpose of correction or amendment in conformity with the direction of the appellate court.

2. Appeal and error 🔑653(1)

An appellate court will disregard technical objections to temporary withdrawal of record for purposes of correction or amendment, and look with favor on the making of such amendments as will enable the court to dispose of the appeal on the merits.

3. Appeal and error 🔑654

On appeal from order granting defendant's motion for change of venue, wherein defendant challenged sufficiency of transcript because of absence of certificate of trial judge, and plaintiff moved for order permitting withdrawal of transcript to obtain certificate, plaintiff's motion for order permitting filing of amended transcript which was exact duplicate of original but which bore certificate in due form of county clerk and trial judge, was granted in absence of claim that transcript omitted any necessary part of record or anything which might tend to prevent full and fair presentation and determination of appeal on the merits. Code Civ.Proc. § 953a.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by the Union Oil Company of California against Basalt Rock Company, Inc. From an order granting the defendant's motion for a change of venue, the plaintiff appeals. On motion for an order permitting filing of an amended transcript.

Motion granted.

Cooney & Kelley, of Los Angeles, for appellant.

Clarence N. Riggins, of Napa, for respondent.

KNIGHT, Justice.

Plaintiff took an appeal pursuant to the provisions of section 953a of the Code of Civil Procedure from an order granting defendant's motion for a change of venue, and in furtherance of the appeal and in conformity with statutory requirements requested the preparation of a transcript, which in due course was filed in this court. Thereupon plaintiff served and filed its opening brief, which was followed by the filing of defendant's brief. Both briefs deal with the merits of the appeal; but by way of preliminary point, defendant in its brief challenged the legal sufficiency of the transcript. In this respect it appears that although the transcript was duly certified by the county clerk it did not have attached thereto the certificate of the trial judge; whereupon plaintiff moved this court for an order authorizing the withdrawal of the transcript for the purpose of having said certificate attached; and shortly after the submission of the motion the county clerk forwarded to the clerk of this court for filing an amended transcript which is an exact duplicate of the one heretofore filed and which bears the certificates in due form of the county clerk and the judge of the trial court. The motion for change of venue was heard and determined on affidavits, and defendant has at no time made any claim that the transcript as prepared omits any part of the record upon which such determination was based, nor anything else which might tend to prevent a full and fair presentation and determination of the appeal on the merits.

[1, 2] It is quite obvious that under the circumstances stated plaintiff's present motion for an order permitting the filing of the amended transcript should be granted. As held in several recent cases, an appellate court having jurisdiction of a record may properly authorize the temporary withdrawal thereof at any time during the pendency of the appeal for the purpose of correction or amendment in conformity with the direction of the appellate court; and to that end that it will disregard technical objections and look with favor upon the making of such amendments as will enable it to dispose of the appeal on the merits. Keck v. Keck, 217 Cal. 280, 18 P.2d 338; McMahon v. Hamilton, 202 Cal. 319, 260 P. 793; Tasker v. Warmer, 202 Cal. 445, 261 P. 474; Dugan v. Forster, 101 Cal.App 144, 281 P. 411.

[3] It is ordered, therefore, that the amended transcript be filed and that it shall for all purposes constitute the record on appeal.

We concur: TYLER, P. J.; CASHIN, J.

AGUDO v. MONTEREY COUNTY.*

Civ. 10522.

District Court of Appeal, First District, Division 1, California.

July 29, 1938.

Hearing Granted by Supreme Court Sept. 26, 1938.

1. Assignments ⚿26

Where the liability imposed by a statute is punitive in character so far as a defendant is concerned, the right of recovery based thereon is not assignable, even though, so far as the plaintiff is concerned, such right be deemed remedial.

2. Assignments ⚿26

The right to recover under statute imposing liability upon county for injuries to property by mobs or riots is in the nature of a statutory penalty and is not assignable. Pol.Code, § 4452.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Luis Agudo against Monterey County of the State of California to recover as assignee of 54 persons the value of wearing apparel and personal belongings alleged to have been destroyed by the actions of a mob. From a judgment for the defendant, plaintiff appeals.

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*For subsequent opinion see 89 P.2d 400.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Anthony Brazil, Dist. Atty., of Salinas, for respondent.

KNIGHT, Justice.

This is an appeal from a judgment entered in defendant's favor pursuant to an order sustaining a demurrer to an amended complaint without leave to amend.

The action was instituted by plaintiff as assignee, the purpose thereof being to obtain a money judgment against Monterey county in the sum of $7,765.45 under the authority of part 4, title 4 of the Political Code, entitled "Liabilities of Counties and Cities for Injuries to Property by Mobs or Riots", which declares in part that "Every county and municipal corporation is responsible for injury to real or personal property situate within its corporate limits, done or caused by mobs or riots". Pol. Code, sec. 4452.

Plaintiff made no claim that any of his property had been injured or destroyed, but in a single count he sued as assignee of fifty-four other persons whose wearing apparel and personal belongings he alleged were destroyed by the actions of a mob. The complaint in this regard sets forth, in separate paragraphs, the name of each person, a list of his property alleged to have been destroyed, and its asserted value. For example, the paragraph relating to the first of such persons reads: "J. F. Sampilo, personal property owned by him and in his possession, consisting of a saxaphone, overcoat, wrist watch, blankets and wearing apparel, of the total value of $265.75." Continuing, the complaint alleged that prior to the commencement of the action each of said persons filed a verified claim for damages against the county, but that the same was rejected by the board of supervisors and thereafter each claimant in writing assigned and delivered "his said aforementioned claim" to plaintiff.

The trial court's ruling sustaining the demurrer without leave to amend is founded on two legal propositions, first, that the liability imposed upon counties and municipalities by said section 4452 is in the nature of a statutory penalty (Underhill v. Manchester, 45 N.H. 214; 13 A.L.R. 754; Champaign County Com'rs v. Church, 62 Ohio St. 318, 57 N.E. 50, 48 L.R.A. 738, 78 Am.St.Rep. 718; County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 35 Am. Rep. 670; Marshall v. City of Buffalo, 50 App.Div. 149, 64 N.Y.S. 411; Feinstein v. City of New York, 157 Misc. 157, 283 N.Y.S. 335); and secondly, that the right to recover a statutory penalty is not assignable (Peterson v. Ball, 211 Cal. 461, 296 P. 291, 74 A.L.R. 187; Western Mortgage, etc., Co. v. Gray, 215 Cal. 191, 8 P.2d 1016, 80 A.L.R. 866).

[1, 2] Appellant concedes the correctness of both of the above propositions, but contends that while the statutory liability so imposed upon counties and municipalities is as to them in the nature of a penalty, the right of recovery arising out of the statute in favor of an injured property owner, being limited to recovery of the actual loss or damage sustained, is a remedial right, as distinguished from a right to recover a penalty, and if so, that such right is assignable; and he asserts that the decisions rendered in Peterson v. Ball, supra, and Western Mortgage, etc., Co. v. Gray, supra, tend by implication to support his theory. We are unable to sustain the theory thus advanced by appellant, nor do we find anything in the decision in either of the cases mentioned lending support thereto. Quite to the contrary, it appears to have been definitely settled by both of those cases that where the liability imposed by the statute is punitive in character so far as a defendant is concerned (in this case the county), the right of recovery based thereon is not assignable, even though so far as the plaintiff is concerned such right be deemed remedial. Those cases were founded on former section 309 of the Civil Code, which imposed a statutory liability on the directors of corporations for the violation of certain corporate restrictions, and provided a dual remedy for recovery against the directors, one remedy being in favor of the corporation and the other in favor of creditors. And in both cases it was held that the liability thus imposed on the directors was "highly punitive" in character, and that therefore the right of recovery afforded by the statute was not assignable, either by the corporation or the creditors.

Nor does the fact that a statute of the kind here involved allows compensatory damages rather than a fixed amount render the liability imposed thereby any the less punitive in character. As said in Champaign County Com'rs v. Church, supra (page 52), "The primary purpose of the legislature was punishment and correction. The expressed object of the law is 'the suppression of mob violence.' * * * It makes no difference whether in the statute it be called penalty, or compensation, or damages. Nor does it alter the case that the amount is fixed—that is, determined—by the statute, as in this case, or that it is to be found by a jury. Nor yet does it matter that it is declared to be 'for the suppression of mob violence,' as in this case, or 'for compensating parties whose property may be destroyed in consequence of mobs or riots,' as in the statute which was upheld in Darlington v. Mayor, etc., 31 N.Y. [164] 187 [88 Am.Dec. 248]; because the imposition of any amount by authority of the state is, in either case, essentially penal and corrective in its nature." In other words, whatever the injured property owner is allowed to recover under the statute from the public treasury is strictly in the nature of a penalty, regardless of the measure of the recovery; and such being the case, the right to sue therefor is not assignable. One of the principal reasons given by some of the courts for the rule precluding the assignment of the right to sue for a penalty is that it is a personal right; that assignability of such claims encourages litigation and strife, and that "public policy forbids the conversion of penalties into commodities or assets." Wilson v. Shrader, 73 W.Va. 105, 79 S.E. 1083, 1086, Ann.Cas.1916D, 886, quoted in Peterson v. Ball, supra.

Appellant has also cited several cases from other jurisdictions which uphold the assignability of certain claims, but those cases are not in point for the reason that as pointed out therein the liabilities sued upon were not punitive in character. As stated in Western Mortgage, etc., Co. v. Gray, supra, in many jurisdictions having statutes similar to our former section 309, it has been held that the assignment of the debt against the corporation carried with it the right to sue the directors on their liability imposed by the statute; but as the court goes on to state, the basis of those decisions is that the liability sued upon is contractual in character. Credit Men's Adjustment Co. v. Vickery, 62 Colo. 214, 161 P. 297, which appellant emphasizes in his opening brief, appears to have been such a case, it being there said, in speaking of the liability imposed by the statute on corporate directors, that "in the strict sense" such liability was not punitive in character. Here, however, admittedly, the liability imposed upon the bodies politic by the provisions of the Political Code is not based on contract, tort, negligence, misfeasance or malfeasance, but is purely punitive in character. It is our conclusion, therefore, that as held by the trial court, the right of recovery based thereon is not assignable.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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28 Cal.App.2d 18

DOYLE et al. v. RICE RANCH OIL CO.

Civ. 11477.

District Court of Appeal, Second District, Division 1, California.

July 29, 1938.

1. Judgment ⇨162(4)

An affidavit filed in support of motion to vacate a default judgment for defendant, merely setting forth that affiant, one of plaintiffs' attorneys, prepared amended complaint when associate counsel's stenographer was ill, and thought that amended complaint had been mailed but subsequently discovered that it had not been mailed because of secretary's illness, did not show "excusable neglect" that would warrant vacating the judgment under statute. Code Civ.Proc. § 473.

[Ed. Note.—For other definitions of "Excusable Neglect," see Words & Phrases.]

2. Judgment ⇨143(3)

Carelessness and negligence are not akin to "excusable neglect" specified by statute as grounds for vacating default judgment. Code Civ.Proc. § 473.

3. Master and servant ⇨68

A letter from employer to secretary of employees' association, reciting that "it is certainly our intention to pay all back wage claims," was a mere declaration of policy and not a contract to pay back wages, and did not give employees a cause of action.

4. Judgment ⚷145(2), 153(2)

Under statute governing opening of defaults, defaulting party must make timely motion within the year, establish that he has a meritorious defense or, if he is a plaintiff, that he has a cause of action, and comply with reasonable terms imposed by the court. Code Civ.Proc. § 473.

5. Judgment ⚷145(2)

The general rule that court should exercise its power liberally to dispose of cases upon their merits without unreasonable delay does not permit the opening of a default for the purpose of filing an amended complaint that states no cause of action. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by W. T. Doyle and others against the Rice Ranch Oil Company. From an order vacating a default judgment for defendant, defendant appeals.

Reversed.

Richard J. O. Culver, and Felix H. McGinnis, both of Los Angeles, for appellant.

C. Douglas Smith, and Fred A. Shaeffer, both of Santa Maria, for respondents.

DORAN, Justice.

This is an appeal from an order vacating a default judgment in favor of defendant and against the plaintiffs.

A demurrer had been sustained to the complaint and to the first amended complaint. Defendant served notice on December 17, 1936, that the demurrer had been sustained with ten days' leave to amend. No amended complaint was filed before January 18, 1937, and on said date judgment was entered in favor of defendant and against plaintiffs. On January 29, 1937, plaintiffs served notice of a motion to vacate and set aside the default under section 473 of the Code of Civil Procedure, accompanied by an affidavit of plaintiffs' attorney as well as a copy of the second amended complaint. On February 13, 1937, the motion was heard and granted.

[1] It is contended by appellant that the affidavit in support of the motion was insufficient, and that the second amended complaint did not state a cause of action. Both contentions are entitled to be sustained. The affidavit in support of the motion merely set forth that affiant, Fred A. Shaeffer, one of plaintiffs' attorneys, prepared the second amended complaint when informed by his associate counsel that he (the associate counsel) was unable to prepare the same by reason of the illness of his stenographer; that he, affiant, believed that the second amended complaint which he had prepared had been mailed but that he learned later that owing to the illness of his secretary said amended complaint had not been mailed; that upon discovery of the oversight on January 19, the second amended complaint was forthwith mailed, and that affiant had no knowledge of the entry of the default until January 28, 1937.

[2] The affidavit reveals neglect, but not excusable neglect. Carelessness and negligence is not akin to excusable neglect. See Ross v. San Diego Glazed C. P. Co., 50 Cal.App. 170, 194 P. 1059; People v. Rains, 23 Cal. 127; Bailey v. Taaffe, 29 Cal. 422; Slater v. Selover, 25 Cal.App. 525, 144 P. 298; Smith v. Tunstead, 56 Cal. 175.

The complaint in the action purported to allege an action for money as follows: "That the defendant is indebted to each of the plaintiffs herein for the respective sums hereinafter alleged, no part of which has been paid to any of the plaintiffs, and said indebtedness * * * arose from and is based upon the promise of said defendant by and through its president, George W. Lichtenberger; that said promise by the said George W. Lichtenberger was authorized and acquiesced in and ratified by the said defendant, Rice Ranch Oil Company, a corporation, and is in words and figures as follows, to wit:

"Geo. W. Lichtenberger, President,
"H. G. Phillips, Secretary,
"Edgar Craig, Plant Superintendent.

"Rice Ranch Oil Company
262 South Los Angeles Street
Los Angeles

"November 15th, 1934.

"Mr. Marvin D. Tognazzini, Secy., Rice Ranch Oil Company Employees Assn.,
"Box 477,
"Santa Maria, California.

"Dear Sir:

"Replying to your letter of the 14th:

"The Rice Ranch Oil Company wishes to assure you and all of their employees that it is certainly our intention to pay all back wage claims as provided for by the Oil Administrator, Mr. Harold L. Ickes, and which also you were assured of by our Superintendent, Mr. Holmes.

"Due to our general reorganization and due to the fact that, as you know, we have been so extremely busy endeavoring to complete our new plant, our auditor has found it impossible to complete the work in connection with the claims for back pay. However, rest assured that same will be forthcoming as soon as it is possible and in this connection we are asking the indulgence of our employees as we feel that they appreciate the vast amount of work we have been endeavoring to complete. However, feel assured that this matter is in the process of execution and as stated above, will be forthcoming at the earliest possible date.

"Yours respectfully,
"Rice Ranch Oil Company,
"By Geo. W. Lichtenberger,
"President."

[3-5] It is at once evident that the foregoing letter, although addressed to the secretary, is intended for the members in general of an association, and is a mere declaration of policy on the part of the company. In no sense can it be regarded, as a matter of law, as a contract, and it therefore gave rise to no cause of action whatsoever. With regard to the right of a party to the opening of a default, the Supreme Court has hitherto declared, "To secure the enjoyment of this right he must, first, make timely motion within the year; second, establish that he has a meritorious defense; and, third, comply with such reasonable terms as the court may impose in granting his motion." Osmont v. All Persons, etc., 165 Cal. 587, 590, 133 P. 480, 482. Obviously the rule applies equally to both parties, that is to say, that a plaintiff under such circumstances must establish that he has a cause of action. See, also, Bailey v. Taaffe, supra; Janson v. Bryant, 52 Cal. App. 505, 506, 199 P. 542; Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990. Notwithstanding the general rule that the power of the court should be liberally exercised with regard to proceedings so as to dispose of cases upon their merits and without unreasonable delay, nevertheless the rule does not appear to go to the extent of permitting the opening of a default for the purpose of filing an amended complaint that states no cause of action.

The order appealed from is reversed.

We concur: YORK, P. J.; WHITE, J.

SKINNER et al. v. COY.*

Civ. 2163.

District Court of Appeal, Fourth District, California.

July 18, 1938.

Hearing Granted by Supreme Court Sept. 15, 1938.

1. **Agriculture 🔑9**

Trees which are growing upon private property and are affected with a virus disease may constitute a "public nuisance" which can be summarily abated by an officer authorized thereto by law. Civ.Code, §§ 3479, 3480, 3494.

[Ed. Note.—For other definitions of "Public or Common Nuisance," see Words & Phrases.]

2. **Agriculture 🔑9**

Where a tree or plant has become to such an extent infected by a disease that the disease cannot be eradicated without the destruction of the plant, and such disease is one which, if not eradicated, threatens other plant life in the neighborhood, the tree or plant harboring the disease is in itself a "pest" and subject to abatement as such by agricultural commissioner under Agricultural Code. St.1933, pp. 82–84, §§ 129–138.

3. **Agriculture 🔑9**

Any form of vegetable life which is the host of any infectious, transmissible or contagious disease liable to be dangerous or detrimental to the agriculture industry of the state is a "pest" which agricultural commissioner, under the Agricultural Code, can require the owner to eradicate, destroy or control, and remains such, unless it is possible to eradicate the disease. St.1933, pp. 74, 82–84, §§ 100(a), 129–138.

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*For subsequent opinion see 90 P.2d 296.

4. **Agriculture** ⚿9

A tree or plant infected with a communicable disease amounting to a pest is a "nuisance" which can be abated by the agricultural commissioner by destroying the pests or, if necessary, the plant, notwithstanding that tree or plant is a neglected or abandoned plant within provision of Agricultural Code providing for destruction of neglected or abandoned plants whereon pests exist. St.1933, pp. 83, 85–87, §§ 135, 136, 141–148; Civ.Code, § 3494.

[Ed. Note.—For other definitions of "Nuisance," see Words & Phrases.]

5. **Health** ⚿13(1)

Public authorities exercising their powers summarily to destroy property deemed likely to spread disease must follow statutory provisions regulating the manner in which such power shall be exercised, and their failure to follow such provisions will render their action unlawful.

6. **Agriculture** ⚿9

Under statute requiring agricultural commissioner to give landowner notice of diseased plants before commissioner should undertake to eradicate the disease, a notice correctly designating premises on which infected peach trees were located and stating the existence of the infection in trees thereon was sufficient without designating every particular tree in which the infection existed. St.1933, p. 82, § 129.

7. **Injunction** ⚿118(1)

The trial court had the right to enter upon trial of action to enjoin destruction of plaintiffs' peach trees, notwithstanding that defendant was the agricultural commissioner and was threatening to destroy trees in good faith under color of his office, where face of complaint did not reveal that defendant was the agricultural commissioner. St.1933, pp. 82–84, §§ 129–138.

8. **Injunction** ⚿85(1)
Prohibition ⚿5(2)

Injunctions issued in violation of statutes forbidding injunctions preventing execution of public statutes by officers of the law for public benefit are erroneous and judgments awarding them are subject to reversal and their enforcement will in some circumstances be made the subject of writs of prohibition. Code Civ.Proc. § 526; Civ. Code, § 3423, subd. 4.

9. **Injunction** ⚿110

Whether agricultural commissioner correctly determined that landowners' peach trees were diseased, and that presence of diseased trees was a menace to the peach industry, could not be inquired into in proceeding to restrain commissioner from destroying such trees, where court was without jurisdiction to grant injunction. Civ. Code, § 3423, subd. 4; Code Civ.Proc. § 526; St.1933, pp. 82–84, §§ 129–138.

10. **Trial** ⚿404(5)

The trial court's findings in excess of court's jurisdiction are not conclusive upon the parties.

11. **Agriculture** ⚿2

The agricultural commissioner is liable officially and personally for wrongful acts done under the color of his office.

12. **Agriculture** ⚿9

Landowners can maintain action against agricultural commissioner for damages for arbitrarily or improperly destroying landowners' peach trees in the attempted performance of the commissioner's official duty. St.1933, pp. 82–84, §§ 129–138.

13. **Injunction** ⚿85(1)

Landowners could not obtain injunction restraining agricultural commissioner from destroying landowners' diseased peach trees pursuant to the authority given commissioner by the Agricultural Code. Code Civ.Proc. § 526; Civ.Code, § 3423, subd. 4; St.1933, pp. 82–84, §§ 129–138.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by S. A. Skinner and another against John P. Coy, Agricultural Commissioner of San Bernardino County, for an injunction restraining the defendant from destroying plaintiffs' peach trees. From a judgment awarding an injunction, the defendant appeals.

Reversed.

Jerome B. Kavanaugh, Dist. Atty., and Albert E. Weller, Chief Deputy Dist. Atty., both of San Bernardino, for appellant.

Wilson & Coughlin, of San Bernardino, for respondents.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., amici curiæ, for appellant.

HAINES, Justice pro tem.

This action was brought by respondents, S. A. Skinner and Gem Rounds Skinner, to obtain an injunction forbidding appellant, John P. Coy, who is the agricultural commissioner of San Bernardino county, from entering upon a peach orchard within that county owned by respondents and removing and destroying peach trees which, according to respondents' claim, were and are producing marketable crops. The complaint alleges that appellant, prior to November 21, 1936, informed respondents of his intention to enter upon their premises for that purpose; that on the date mentioned he did enter thereon for that purpose, and only desisted therefrom temporarily when threatened by respondents with bodily injury, and still threatens to return and uproot and remove peach trees from the premises, whereby respondents' property will be made unproductive and practically valueless. In the answer appellant admits that he threatened to enter and did on November 21, 1936, enter upon respondents' premises, but that such entry was for the purpose of uprooting and removing certain diseased peach trees therefrom; that he only desisted from so doing because of respondents' threats of bodily injury if he persisted; but that the only peach trees that he threatened or attempted to remove were trees infected with the disease known as "peach mosaic". He admits that it is his intention, unless restrained by the court, to return and remove such trees. By way of a separate defense appellant in his answer sets up his status as agricultural commissioner of the county and that he was and is a duly appointed, qualified and acting state plant quarantine officer and an enforcing officer of all laws, rules and regulations related to the prevention of the introduction into or spread within the state of pests, all under the supervision of the director of the department of agriculture of the state of California. He alleges further that on or about October 9, 1936, in his capacity as such agricultural commissioner he received information from the department of agriculture of the state of California of the existence of the fruit disease known as "peach mosaic" in certain of the peach orchards in San Bernardino county; that, pursuant to the authority vested in him by the Agricultural Code of the state, St.1933, p. 60, and accompanied by duly qualified plant pathologists of the department of agriculture of the state of California, he entered upon respondents' premises for the purpose of making an inspection to determine whether or not such "peach mosaic" existed thereon and proceeded with said pathologists personally to examine the peach trees there growing and then and there determined that certain of the said peach trees were affected by such "peach mosaic". He further sets up that said "peach mosaic" is a transmissible and infectious disease; that the Yucaipa valley, wherein respondents' premises are located, is planted to many thousands of peach trees, many of which are healthy and in bearing but many others whereof are affected by said "peach mosaic". He further avers that it has been determined by the departments of agriculture of the United States and of the state of California that said "peach mosaic" is a virus disease existing in the sap of fruit trees; that its presence ultimately destroys the productivity of the trees; that it spreads to other trees in the same orchard and to adjoining orchards; that it will not respond to exterior treatment such as fumigation or sprays; that the scientists of the said departments have reached the conclusion which appellant alleges to be the fact, that the only effective method of control is the extermination of infected trees by uprooting and burning the same. It is further alleged that in pursuance of his duties appellant on the 24th day of October, 1936, caused to be personally served on respondents a notice, a copy of which is attached to the answer, requiring respondents to eradicate, destroy or control the said "peach mosaic" within ten days after service upon them of the notice, all of which they refused and neglected to do, in consequence of which, on or about November 21, 1936, appellant attempted to enter upon their premises to destroy said diseased peach trees pursuant to law, but was forcibly prevented from so doing, and threatened by respondents with bodily injury if he persisted in so doing. Appellant further alleges that unless the diseased peach trees on respondents' premises are eradicated and destroyed said "peach mosaic" will spread to other peach trees in the vicinity of respondents' premises and infect a large number thereof and that the eradication and destruction of respondents' diseased trees is necessary to the preservation of the peach orchards and peach industry of San Bernardino county. An injunction was therefore sought on behalf of appellant restraining respondents from interfering with his enforcement of the Agricultural Code of the state by so destroying and eradicating the disease aforesaid from respondents' premises. A copy of the notice referred to, served upon respondents in attempted compliance with section 129 of the Agricultural Code, St.1933, p. 82, is directed to respondents, describes their premises, sets out that the same were inspected on the 21st and 22d days of October, 1936, and determined to be infected with "peach mosaic" disease and proceeds to notify them that there are thereon peach trees infected with such disease, which the notice states was declared by law to be a public nuisance. The notice then proceeds as follows:

"You are hereby required to eradicate, destroy or control the said peach mosaic disease to the satisfaction of the said Agricultural Commissioner within ten days after the service on you of this notice by removing the infected trees with sufficient roots that no shoots will develop therefrom, and burning the brush."

The notice concludes with information that if respondents neglect or refuse to comply with its requirements appellant will cause the nuisance to be abated and that the expense thereof will become a lien upon respondents' premises.

The evidence shows that in the year 1931 there appeared in Texas the so-called "peach mosaic", which is a virus disease affecting peach trees. This disease has since been identified in Colorado, Utah, New Mexico, Arizona, and in the counties of Riverside and San Bernardino in California. According to testimony given by Dr. Lee M. Hutchins, a plant pathologist of the United States department of agriculture, who states that for some years he has devoted himself chiefly to the study of this disease, as well as by one Gilbert L. Stout and one M. R. Harris, plant pathologists of the California state department of agriculture, and various other pathologists and inspectors attached to the latter department, the symptoms of the disease are, among others, breaking in the flowers, both in shape and color patterns, retarded foliation in the spring with a tendency to crinkling and mosaic-like discoloration and yellow mottling of the leaves, stunting of growth by the shortening of the internodes, the tufting of foliage at the terminals of growing shoots, and bumpiness and general malformation of the fruit, including an abnormally deepened crease on the suture side of the peach, and an abnormally prominent apex. The disease, according to these experts, differs in the details of its behavior with the different varieties of peach trees and most conspicuously affects the freestone peaches such as Elbertas, but is by no means confined to them; and its tendency is to reduce the size, destroy the symmetry and general appearance of the peach and to make the crops unmarketable. No single one of the symptoms referred to is deemed sufficient for identification of the disease, but reliance is placed on the picture presented by the appearance of various symptoms, some of which may be absent in certain varieties of peach trees. Dr. Hutchins' testimony is that the disease, like other virus diseases, both in the vegetable and animal kingdoms is deep-seated in the tissues; that in the case of peach trees it cannot be reached by exterior applications and that there is no known means of eradicating it otherwise than by the uprooting and destruction of the trees affected by it. His testimony is further to the effect that the disease is, as respects any given tree, slow acting and does not kill the tree, but that it is infectious and that the vector of the infection is thus far unknown, so that it is impossible to say at what particular time of the year the infection occurs. It has, however, according to him, been demonstrated that the infection is not transmitted in the seed nor yet carried in the soil. The effect of Mr. Stout's testimony is that, in areas affected, the increase among infected trees has been largely above 100 per cent per annum, proceeding, of course, by geometrical progression, so that if it is uncontrolled the orchard will in the course of a few years become completely diseased. According to appellant's witnesses some 16 peach trees on respondents' property were in 1936 definitely determined to be infected with "peach mosaic" and under appellant's supervision marked as being so infected. After such marking the notice already referred to was given.

Plaintiff and respondent S. A. Skinner, and various other orchardists, testified on behalf of respondents. It was not denied that some of the trees were infected with a malady constituting a virus disease. It was not denied that most, at least, of the 16 trees marked by the inspectors in 1936 had various of the symptoms described by appellant's experts as present in cases of "peach mosaic". Indeed, Skinner, when asked whether he was not unable to state whether or not certain of these trees had the infection of "peach mosaic", frankly said: "As far as I know they do have. It seems to correspond to the description that has been given of 'peach mosaic'". Skinner says that the fruit of only five of the 16 marked trees was unmarketable. He conceded that all or practically all of these 16 trees had, to some extent, mosaic marked leaves, but claimed that several of them had, under intensive conditions of fertilization and general care, shown marked improvement in condition. A number of them, however, were old trees past their prime. After the initial trial of the case the court postponed its disposition during the cropping season of 1937 for the purpose of permitting observation to be had of the behavior of the orchard during that season. There is testimony in the record that during the season of 1937, 25 additional trees showed signs of infection. There is also testimony on the part of appellant's witnesses that the general increase in infection in the Yucaipa district between 1936 and 1937 had been approximately 170 per cent.

The court filed findings of fact and conclusions of law which are attacked in various particulars as self contradictory as well as unsupported by the evidence. It was found to be true that appellant was, at the times mentioned, and is agricultural commissioner of San Bernardino county and as such, in October, 1936, was advised by the state department of agriculture of a report that "peach mosaic" existed in certain peach orchards in San Bernardino county; that in his capacity as such commissioner, and accompanied by duly qualified plant pathologists, he entered upon respondents' property to determine the existence of the disease in the peach trees there growing and personally examined respondents' peach trees with said plant pathologists, and, upon such examination, determined that some of the same were affected by a virus disease which he and said plant pathologists believed to be "peach mosaic". The court further went on to find that "peach mosaic" is a transmissible and infectious disease, that the Yucaipa valley and territory in the immediate vicinity of respondents' real property is planted to many thousands of peach trees, many of which are healthy and bearing, but some of which are infected with a virus disease; that it has been determined by the departments of agriculture of the United States and of the state that "peach mosaic" is a virus disease existing in the sap of fruit trees, of such character as ultimately to destroy their productivity; that it spreads to other trees in the same and adjoining orchards, and that the scientists of said departments have reached the conclusion that it can only be eradicated by uprooting and burning the infected trees. The court went on to find that "pursuant to the duties imposed upon him" appellant personally served on the respondents on October 24, 1936, the notice to which reference has already been made, and that copy of the same was recorded in the office of the county recorder of San Bernardino county and that the respondents have failed and neglected to eradicate the virus disease with which some of their peach trees are infected; that appellant, in his capacity as agricultural commissioner of said county, accompanied by deputy agricultural commissioners of the county, attempted on November 21, 1936, to enter upon respondents' property to eradicate the virus disease there existing, then believed by them to be "peach mosaic", and to destroy the peach trees affected thereby, from which action they were deterred by force and threats of violence on the part of respondents. The court, however, found to be untrue the allegations of paragraph 10 of the second defense contained in the answer, which paragraph is to the effect that: "That unless the diseased peach trees on plaintiffs' premises are eradicated and destroyed, the disease with which said trees are affected, to-wit: Peach Mosaic, will spread to other peach trees in the vicinity of plaintiffs' premises and will infect a large number of peach orchards in the area adjacent to plaintiffs' real property. That the eradication and destruction of said diseased trees is necessary to the preservation of the peach orchards and the peach industry in the County of San Bernardino."

The court concluded as a matter of law that appellant had no right or authority to enter upon said real property for the purpose of destroying any of the peach trees growing thereon; that appellant had not given notice to respondents as required by section 129 of the Agricultural Code; that the 16 peach trees affected with the virus disease claimed by appellant to be "peach mosaic" constituted "neglected plants" within the meaning of section 141 of the Agricultural Code, St.1933, p. 85; that it was necessary that appellant be perpetually enjoined from entering upon respondents' real property and uprooting and removing the 16 trees affected by said virus disease or other trees or plants growing or that might thereafter be planted upon said real property. Judgment awarding such injunction was thereupon entered, from which the present appeal follows:

[1-3] Evidently the theory of the trial court was that it was entitled, in a proceeding in equity, to investigate and determine the question whether the trees involved were or were not affected with "peach mosaic", or merely with some other virus disease not susceptible of dangerous results. Its conclusion apparently was that this particular orchard was not infected with "peach mosaic" but merely with some other relatively innocuous virus disease and its action was a result of that conclusion. It is conceded by respondents that trees growing upon private property affected with a virus disease may constitute a public nuisance. Civ.Code, secs. 3479, 3480. It is also conceded that a public nuisance may be summarily abated by an "officer authorized thereto by law". Civ.Code, sec. 3494. It is, however, claimed that sections 129 to 138, both inclusive, of the Agricultural Code, St. 1933, pp. 82–84, do not authorize appellant to summarily destroy trees conceived by him to be infected by disease. Counsel undertake to draw a distinction between "pests" which the commissioner may require the owner to eradicate, destroy or control, and trees which are the victims of such pests; and this, notwithstanding that section 135 of the same code, St.1933, p. 83, declares that "premises, plants, conveyances or things infected or infested with pests, or premises where pests are found," constitute public nuisances and may be prosecuted as such. It is observed that where the notice to the owner to eradicate, control or destroy the pests is disregarded the commissioner may, under the provisions of section 136 of the Agricultural Code, St.1933, p. 83, proceed to abate the nuisance by eradicating, controlling or destroying the "pests". A tenuous distinction is attempted between his power to eradicate the disease and his power to eradicate the trees which harbor the disease. The distinction is obviously fallacious. It seems entirely clear to us that where a tree or plant has become to such an extent infected by a disease that the disease cannot be eradicated without the destruction of the plant, and such disease is one which, if not eradicated, threatens other plant life in the neighborhood, the tree or plant harboring the disease is in itself a pest and subject to abatement as such. Furthermore, under subdivision (a) of section 100 of the Agricultural Code, St.1933, p. 74, defining a "pest", it may consist not only in any infectious, transmissible or contagious disease of plants, "liable to be dangerous or detrimental to the agricultural industry of the State", but of any form of vegetable life liable to be so dangerous or detrimental, from which it must follow that when any form of vegetable life is the host of any infectious, transmissible or contagious disease liable to be so dangerous or detrimental it also is a "pest" and must remain such, unless it is possible to eradicate from it the disease in such infectious, transmissible or contagious form.

A further claim on the part of respondents is that, if the trees which appellant has sought to destroy can be said to constitute public nuisances at all, the exclusive method of abating them is that provided by sections 141 et seq. of the Agricultural Code, St.1933, p. 85 et seq. The first paragraph of section 141, p. 85, is to the effect that: "Neglected or abandoned plants or crops which, because of the existence therein or thereon of pests, or because of other conditions, constitute a menace to the agriculture of the county, district, or vicinity, or which are host plants of or provide a favorable and likely harbor for pests are public nuisances and it is unlawful to maintain the same, and all remedies which are or may be given for the prevention or abatement of nuisances apply thereto."

Subsequent provisions of this section and of sections 142, 143 and 144, pp. 85, 86, provide machinery in the nature of a special proceeding in the superior court whereby a judicial ascertainment of the necessity of the "removal or destruction of the neglected or abandoned plants or crops" may be had and the owner be required to remove or destroy the same. Section 145, p. 86, provides for their removal or destruction by the commissioner in the event of failure by the owner to comply with the court's order. Further provisions contained in sections 146 and 147, pp. 86, 87, provide for the establishment and foreclosure as against the property affected of a lien for the costs incurred, and section 148, p. 87, makes it contempt to disobey the court's order in the matter.

[4] We think it clear that there is nothing in sections 141 to 148, both inclusive, of the Agricultural Code above outlined, to militate against the lawfulness of appellant's attempted conduct here involved. It is highly questionable whether the court's

conclusion of law that the peach trees on respondents' premises found to be infected with a virus disease "constitute neglected plants within the meaning of section 141 of the Agricultural Code" is right. The evidence tends to show that instead of neglecting them respondents have given them special attention and fertilization. The machinery for judicial investigation and action provided for in sections 141 et seq. is not by their terms made applicable to all plants or crops wherein or whereon pests exist, or which are host plants of, or provide favorable and likely harbor for pests, but only to such plants or crops wherein and whereon pests exist or which are such host plants or provide a favorable and likely harbor for pests as are also neglected or abandoned. What we have in the instant case are trees that are being given a high degree of care but are nevertheless infected. Even if it be conceded, however, that these trees can be properly described as "neglected" or "abandoned" plants within the meaning of said section 141 it does not follow that the method of procuring their removal provided by said sections 141 to 148, both inclusive, is the exclusive method permitted. On the contrary, by the express terms of section 141 "all remedies which are or may be given for the prevention or abatement of nuisances apply thereto"; and under section 3494 of the Civil Code "a public nuisance may be abated by any public body or officer authorized thereto by law". We think that a tree or other plant infected with a communicable disease or diseases amounting to a pest or pests, even if it be conceded to fall within the definition of a "neglected" or "abandoned" plant, is not only a nuisance but a nuisance of the description specified in section 135 of the Agricultural Code and subject thereunder to abatement by the commissioner under section 136 of that code "by eradicating, controlling, or destroying said pests" and that when the only practical method of eradicating, controlling or destroying the pests is to destroy the plant, the power to destroy the pests necessarily includes the power to destroy the plant.

Respecting provisions for the summary abatement of agricultural nuisances it is in 1 Ruling Case Law 790 said: "The efficiency of regulations of this type necessarily depends upon their prompt and summary execution, and it is therefore unavoidable that a certain amount of discretion must devolve upon the administrative officers entrusted with their enforcement, as before they act they must necessarily decide whether a thing possesses the qualities constituting it a nuisance under the statute or not. While in a strict sense this discretion is judicial in its nature, it does not constitute a delegation of 'judicial powers' within the meaning of the usual constitutional inhibition against the delegation of judicial powers to an administrative officer. Consequently, statutes providing for the summary destruction of vegetation infected with contagious pests, without any preliminary judicial inquiry and without compensating the owner for the resulting loss, are perfectly constitutional so long as they themselves define what constitutes a nuisance, and there is a right to a subsequent judicial review of the action of the administrative officer. As property thus destroyed is confiscated under the police power of the state, the owner thereof is not entitled to be compensated as a matter of right."

Various aspects of such regulations have frequently been before the courts both of this and of other jurisdictions. Statutes frequently provide for the summary abatement of agricultural nuisances by executive officers and the establishment and foreclosure of liens upon the property affected to defray the cost involved. Often such statutes define in a general way what shall constitute a nuisance but leave it in the first instance to the determination of the enforcing officer to decide in a particular case whether such a nuisance has come to exist. A familiar example is the legislation providing for the control of ground squirrels. Of this it is said in Contra Costa County v. Cowell Portland Cement Company, 126 Cal.App. 267, 271 et seq., 14 P.2d 606, 608:

"The police power is universally considered 'to justify the destruction or abatement * * * of whatever may be regarded as a public nuisance. * * *' Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 500, 38 L.Ed. 385. '* * * Every property owner * * * is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this * * * duty which pertains to the police power of the state so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby he is without remedy. It is a regulation and not a taking, an exercise of police power and not of eminent domain.' 1 Lewis on Eminent Domain (3d Ed.) § 6."

The court then proceeds to quote the portion of the paragraph from Ruling Case law above set out.

The Supreme Court in the case of Los Angeles County v. Spencer, 126 Cal. 670, 59 P. 202, 77 Am.St.Rep. 217, had before it a statute providing for a county horticultural commission, authorizing it to abate insect pests in citrus orchards and providing for liens against the property involved for the expense. The action was to foreclose such a lien and the statute was attacked as unconstitutional. The court said:

"It is urged that the act in question is unconstitutional and invalid because it confers judicial powers upon the horticultural commissioners, contrary to article 3 of the state constitution; but we do not think that this contention can be maintained. This provision of the constitution must be understood as construed by judicial decisions, and with reference to the subject of police power. The act itself defines the nuisances to which it relates, and declares that 'all places, orchards, nurseries,' etc., infected with 'scale insects, or codlin moth, or other pests injurious to fruit, plants,' etc., are public nuisances. In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion, which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of officers under many other laws and ordinances which have been held valid. Ordinances prohibiting the erection of wooden buildings within fire limits, except upon the order of fire commissioners; giving viticultural commissioners power to prohibit the importation of diseased vines; prohibiting the carrying on of a public laundry without a certificate of the health officer and of the board of fire wardens; prohibiting retail liquor business without permission of the board of police commissioners; giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any rubbish should be deposited; forbidding orations, harangues, etc., in a park without consent of the park commissioners, or upon other grounds except by permission of the city government committee; beating drums, etc., without permission of the president of the village; prohibiting manufacturers and others from ringing bells, etc., except at such times as the board of aldermen may designate; authorizing harbor masters to station vessels and to assign each its place; forbidding the keeping of swine without a permit from the board of health; and giving to boards of health, quarantine officers, and milk inspectors discretion as to the exercise of police powers,—all such laws and ordinances have been judicially held to be valid, although they confer the same power upon designated public officers as is given by the act here in question to the commissioners. Ex parte Ah Fook, 49 Cal. 402; In re Flaherty, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529, and cases there cited; Ex parte Fiske, 72 Cal. 125, 13 P. 310; Bittenhaus v. Johnston, 92 Wis. 588, 66 N.W. 805, 32 L.R.A. 380; Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N.E. 929 [59 Am.Rep. 113]; Newton v. Joyce, 166 Mass. 83, 44 N.E. 116 [55 Am.St.Rep. 385]. The efficiency of many police regulations depends upon their prompt and summary execution; and therefore, from necessity, certain discretion must be given to the officers who are to make the regulations effective. In Ex parte Ah Fook, supra, this court said: 'It is obvious that, to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws, it must be prompt and summary, and we are not aware that any reasonable provisions of the statute clothing such officers or boards with enlarged powers, often exercised by them, have ever been held unconstitutional.' * * *

"It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is therefore a proper exercise of the police power which the legislature has, under section 1 of article 19 of the constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state."

The particular statute involved in County of Los Angeles v. Spencer, contained no authority to destroy the affected trees, as the destruction of the particular pests there provided against did not necessitate such destruction. The same principles have, however, been often applied where the more or less summary destruction of property is involved, notably in legislation now also embodied in the Agricultural Code for the eradication of bovine tuberculosis. Such legislation is regularly upheld. Coelho v. Truckell, 9 Cal.App.2d 47, 48 P.2d 697; Stanislaus County Dairymen's Protective Association v. County of Stanislaus, 8 Cal. 2d 378, 65 P.2d 1305; Loftis et al. v. Superior Court, Cal.App., 77 P.2d 491. It is to be observed that this legislation provides for the destruction of animals "reacting positively to a tuberculin test conducted by a representative of the Federal or State Department of Agriculture, or adjudged tuberculous upon physical examination by said representative" (Agricultural Code, secs. 236, 237, St.1933, pp. 100, 101), without any provision for any hearing for the owner as to whether or not such animals are in fact diseased. There are, indeed, certain provisions for compensation when the slaughtering of diseased stock is done by state officials and the animals are found within control areas established by the state, but it is held that when, outside of such state control areas, counties have, under the authorization of the statute, established "voluntary control areas" and enacted control ordinances providing for no compensation for animals destroyed, reactors may nevertheless, under the supervision of county inspectors thereunto authorized by ordinance, be slaughtered without payment of compensation. Stanislaus County Dairymen's Protective Association v. County of Stanislaus, supra.

In Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488, the Supreme Court sustained the constitutionality of the California Apiary Inspection Act (Stats.1927, p. 1724, as amended, now part of the Agricultural Code). It was there said, page 660, 24 P. 2d page 489: "The act does no violence to the Fourteenth Amendment to the Federal Constitution, for it is elementary that 'where the exercise of the police power is applicable, the provisions of the constitution declaring that property shall not be taken without due process of law is inapplicable.' Ex parte Elam, 6 Cal.App. 233, 237, 91 P. 811."

Under this statute, as under those provisions of the Agricultural Code involved in the instant case, notice is first given to the owner of the infected condition of his property and he is given a limited time in which to abate the nuisance, and in the event of his failure to do so, its abatement by the officer giving the notice is provided for.

Cases from other jurisdictions illustrative of the right of properly constituted public authorities summarily to destroy property deemed likely to spread disease are: Miller v. Schoene, Va., 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568; Carstens v. De Sellem, 82 Wash. 643, 144 P. 934; State v. Main, 69 Conn. 123, 37 A. 80, 36 L.R.A. 623, 61 Am.St.Rep. 30; Shafford v. Brown, 49 Wash. 307, 95 P. 270; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Louisiana State Board of Agriculture and Immigration v. Tanzmann, 140 La. 756, 73 So. 854, L.R.A.1917C, 894, Ann.Cas.1917E, 217; Kelleher v. French, D.C.Va., 22 F. 2d 341; Wallace v. Dohner, 89 Ind.App. 416, 165 N.E. 552; Miller v. Horton, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St.Rep. 850; Pearson v. Zehr, 138 Ill. 48, 29 N.E. 854, 32 Am.St.Rep. 113; Lemon v. Rumsey, 108 W.Va. 242, 150 S.E. 725; Upton v. Felton, D.C., 4 F.Supp. 585.

[5, 6] It cannot, of course, be doubted that in the exercise of such powers public officers are bound to follow such statutory provisions as may exist regulating the manner in which they shall be exercised and that a failure to do so will render the action taken unlawful. County of San Benito v. Wapple, 188 Cal. 423, 205 P. 673. Respondents in the instant case claim that appellant failed to follow the procedure prerequisite under section 129 of the Agricultural Code, St.1933, p. 82, to any right on his part to proceed to eradicate the disease on their premises, in that the notice that he caused to be served failed to identify the particular 16 trees which he asserts to have been infected. The court's conclusion of law evidently adopted this view, because, despite the finding that the notice made an exhibit of the complaint was served, the court has concluded that the notice required by section 129 was not given. The notice, however, informs respondents that their premises, which are there properly described, have been "found and determined to be infected with peach mosaic disease" and that there are there "peach trees infected with peach mosaic disease", and proceeds to declare such infected trees a public nuisance and to require respondents within ten days to eradicate, destroy or control the said "peach mosaic" disease by "removing the infected trees with sufficient roots that no shoots will develop therefrom, and burning the brush". The evidence shows that certain WPA workers, after an instruction from the experts of a week or thereabouts, with respect to the symptoms of the disease to be looked for, went through respondents' orchard and charted fifteen trees, to which a sixteenth was later

added, as having the symptoms of the mosaic. These charts were furnished to appellant and the department pathologists followed up the WPA men and verified the presence of the symptoms and, according to their opinion, the existence in these trees of the "peach mosaic", and thereupon proceeded to mark the trees with white paint. Respondents now claim that they were not advised by the notice and do not even know from the evidence that the trees so marked are those found by appellant to be infected. Respondent, S. A. Skinner, not only knew that appellant was having a search made to locate infected trees but he testified at length to his observation of the marked trees with the particular view of testing the diagnosis, and says himself that these trees showed the symptoms described in the evidence as indicative of the disease. As respects the notice, it is, under section 129 of the Agricultural Code, to be given to the "record owner or person in charge or possession of said premises, plants, conveyances or things, that the same are infected or infested with said pest", etc. We think that under the statute a correct description of the premises as infected, with a specification of the existence of the infection in trees thereon, is, in general, enough, without an attempt in the notice to designate every particular tree or plant in which the infection exists. It might be that in a property of very extensive area more particularity would be reasonably necessary. The statute, however, must be given a reasonable construction and in the circumstances here shown the notice given was in our opinion sufficient.

[7] Looking at the case as a whole we are constrained to the view that the trial court misconceived its powers. Doubtless it had the right to enter upon the trial because it did not upon the face of the complaint appear what was the occasion for appellant's activities. So soon, however, as it did appear in the evidence that appellant was the duly constituted agricultural commissioner of the county and was acting, as the court in effect finds, in good faith under color of his office in the effort to eliminate a disease deemed by himself and the state department of agriculture to be dangerous to the peach industry, and that he had given to the respondents the notice referred to, and, upon their disregard of its requirements for the ten days allowed them for acting upon it, that he was making an effort in an ordinary and reasonable manner to eradicate the disease pursuant to the authority given by section 136 of the Agricultural Code, the court's jurisdiction to further entertain respondents' application for an injunction against his proposed action was terminated. If the courts are to undertake to issue injunctions against the activities of sanitary and quarantine officers conducted in good faith within the limits of their authority as such, effective control of virulent infectious diseases, either in the plant or animal kingdom, will come to an end. By the specific provisions of section 526 of the Code of Civil Procedure and subdivision 4 of section 3423 of the Civil Code of this state courts are forbidden by injunction to prevent the execution of a public statute by officers of the law for the public benefit. In Loftis v. Superior Court, 77 P.2d 491, 495, this court quoted at length from the decision of the Supreme Court in Reclamation District v. Superior Court, 171 Cal. 672, 681, 683, 154 P. 845, wherein the law upon the subject was elaborately reviewed, and it was, among other things, said that subdivision 4 of section 3423 of the Civil Code is but "the enunciation of an old and generally recognized rule of equity jurisdiction". It is unnecessary for us to again repeat this discussion at large.

[8] Not only are injunctions so issued in violation of such statutory provisions erroneous and judgments awarding them subject to reversal, but their enforcement will, in some circumstances, be made the subject of writs of prohibition. Moore v. Superior Court, 6 Cal.2d 421, 57 P.2d 1314. Loftis v. Superior Court, supra.

[9-11] From what has been said it necessarily follows that the present case was not a proper proceeding for investigating the correctness or incorrectness of the conclusion reached by appellant about the existence of "peach mosaic" in respondents' orchard or whether or not it is a menace to the peach industry in the neighborhood or county or state. The court's findings on the subject, having been in excess of its jurisdiction, cannot conclude the parties. We do not, of course, say that respondents are precluded from obtaining in a proper proceeding a judicial determination on that subject. As was said in Graham v. Kingwell, supra, page 661, 24 P.2d page 489, quoting from County of Los Angeles v. Spencer, supra: "The acts of the commissioner are not clothed with that sanctity and protection which accompanies the judicial

acts of courts and judges, and the commissioner would be liable officially and personally for wrongful acts done under the color of his office."

[12, 13] So, too, in Contra Costa County v. Cowell Portland Cement Company, supra, pages 271, 272, 14 P.2d page 608, the court, as already noticed, quoted with approval the passage which we have quoted from, 1 Ruling Case Law 790, wherein it was in substance stated that the authority to destroy vegetation infected with contagious pests without previous judicial inquiry was proper, provided "there is a right to a subsequent judicial review of the action of the administrative officer". Should appellant, in the attempted performance of his official duty turn out to have acted arbitrarily or improperly, respondents are not precluded from maintaining an action for damages, but the remedy they here sought was not available to them.

The judgment is reversed.

We concur: BARNARD, P. J; MARKS, J.

28 Cal.App.2d 106

In re MALLON'S ESTATE.

MALLON v. MARY KNOLL MISSIONARY SOC. et al.

Civ. 2081.

District Court of Appeal, Fourth District, California.

Aug. 10, 1938.

Hearing Denied by Supreme Court Oct. 7, 1938.

1. Wills 🔑182

A prior will is revoked by a subsequent will if the provisions of the latter are wholly inconsistent with the terms of the former. Probate Code, § 72.

2. Wills 🔑182

If a testator intends to and does in a later will make a complete disposition of his property in a different manner than that provided in an earlier will, the second will constitutes a complete revocation of the first. Probate Code, § 72.

3. Wills 🔑440, 441

The intention of the testator is to be ascertained from the words of his will, and the circumstances under which it was made may be considered only if there is an uncertainty in the language. Probate Code, § 105.

4. Wills 🔑182

Where instrument was of itself sufficient to constitute a holographic will, and purported to dispose of testator's entire estate without referring to a prior holographic will which purported to make an entirely different disposition of testator's property, last executed instrument constituted a revocation of the prior holographic will. Probate Code, §§ 72, 105.

5. Wills 🔑706

Where precise construction of a holographic will was not adequately presented either in the trial court or on appeal, District Court of Appeal would not construe will.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding in the matter of the estate of Joseph C. Mallon, also known as J. C. Mallon, deceased, by the Mary Knoll Missionary Society and Bank of America National Trust & Savings Association, administrator with the will annexed, against Mary A. Mallon. From an order construing the will and directing the disposition of the property, Mary A. Mallon appeals.

Reversed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

Marcus L. Roberts, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order construing a will and directing the disposition of the property of the estate.

The deceased left a holographic will reading as follows:

"835 B Ave.,
"Coronado, California
"June 8th, 1934

"Being of sound and disposing mind, I hereby make, execute and sign, all in my own handwriting, my last will and testament. I give and bequeath to my sister, Mary A. Mallon, residing at this date at

835 B Ave., Coronado, California, all my real and personal property in trust, during her life and I select the Bank of America, Corporation of California, to act as her trustee. To this corporation I give right and authority to sell my real estate, to provide thereby for her sounder and safer income. Mrs. Mary L. Barrett, 835 B Ave., Coronado, California, will be cared and provided for by my sister, during her (my sister's life). At the death of Mary A. Mallon, my sister, I give and bequeath to Mary L. Barrett, if living, one fourth of the estate. To Mrs. Margaret Mallon Leahy, 33 Water Street, Stonington, Connecticut, I give and bequeath one fourth of the estate. I give and bequeath to Joseph C. Mallon, 2900 M Street, N. W., Washington, D. C., one fourth of the estate.

"To St. Mary's Seminary President and Faculty, Roland Park Ave., Baltimore, Md., I give and bequeath one-eighth of the estate. To The Sisters of Bon Secours, Yuma St., Washington, D. C., I give and bequeath the remaining eighth of the estate.

"I hereby appoint my sister, Mary A. Mallon, 835 B Ave., Coronado, Calif., executrix of my will, to act without bonds.

"Witness my hand and seal this 8th day of June, 1934.

"(s) Joseph C. Mallon."

He left another instrument entirely in his own handwriting, which reads:

"835 B Ave.,
"Coronado, Calif.
"July 1, 1936

"The following is a statement of all the personal and real property that I own. (Here follows a list of personal and real property.)

"I, Joseph C. Mallon, on this date, July 1st, 1936, hereby will and bequeath all of above property to my sister, Mary A. Mallon, who will care for Mary L. Barrett until death shall separate them. To the survivor shall be given one half of the amount of money realized from the sale of all real property. One fourth of that amount shall be given to my niece, Mrs. James Leahy, 35 Water St., Stonington, Connecticut, and one-fourth to the Mary Knoll Missionary Society, whose headquarters are in New York State.

"Signed by myself,
"Joseph C. Mallon."

Both instruments were admitted to probate and the Bank of America National Trust and Savings Association was appointed administrator with the will annexed. In due course the administrator filed a petition asking the court to construe the will and determine to whom the property of the estate should be distributed. After a hearing the court held that the two instruments are to be construed together as one will and to be so interpreted as to "give to every expression therein some effect". It was then ordered that the entire estate be distributed to the bank as trustee; that the trustee should sell all of the real estate and invest the proceeds; that the net income from the trust estate should be paid to "Mary A. Mallon, out of which the said Mary A. Mallon will care and provide for Mrs. Mary L. Barrett"; that in the event Mary L. Barrett shall predecease Mary A. Mallon the trustee shall pay to Mary A. Mallon a sum equal to one half of the proceeds of the sale of all of the real property; and that upon the death of Mary A. Mallon the trust is to terminate and the trust estate is to be distributed, in certain proportions, to the devisees named in both instruments.

From this order Mary A. Mallon has taken this appeal. It is her contention that the instrument dated July 1, 1936, is the last will of the deceased and that it had the effect of revoking the earlier will. The respondent contends that under settled rules for the interpretation of wills we are to look to the general scheme or plan which the testator must have had in mind, that we must look to the whole of each instrument and give effect to every word contained therein, and that "in determining inconsistencies from the four corners of each will" it clearly appears that the 1936 instrument continued the trust arrangement set up in the 1934 will and simply modified a part of that trust provision by making a different final distribution of the money realized from the sale of real property.

While the intent and purpose of a document is usually to be determined from a consideration of the entire instrument and while effect is to be given to each part thereof if possible, no effect can be given to any portion of the earlier of these instruments unless it remains as a part of the last will of the deceased. The question presented is whether or not the 1936 instrument had the effect of revoking the earlier will.

[1-3] A prior will is revoked by a subsequent will if the provisions of the latter are wholly inconsistent with the terms of

the former. Sec. 72, Probate Code. Aside from any other inconsistency, if a testator intends to and does, in a later will, make a complete disposition of his property in a different manner than that provided in an earlier will, the second will constitutes a complete revocation of the first. Estate of Siemers, 202 Cal. 424, 261 P. 298. The intention of the testator is to be ascertained from the words of his will, and the circumstances under which it was made may be considered only if there is an uncertainty in the language. Probate Code, sec. 105; Estate of Mitchell, 160 Cal. 618, 117 P. 774.

[4] The instrument dated July 1, 1936, is sufficient in itself to constitute a will and purports to dispose of all of the property owned by the testator. No reference is made to the provision of the previous will, which left all of his property in trust during the lifetime of his sister. Both wills were written by the decedent and the fact that the earlier will left the entire estate in trust while the later one contains no express trust provisions indicates not only a knowledge of the purpose of such trust but an intention to make a different disposition of his estate. Estate of Mitchell, supra. There is no uncertainty in the language used in this respect, and no reference is made to the trust provisions of the former will. If any trust arises from the provisions following the words of gift to the sister, it is a different trust than that set up in the first will, with a different trustee and different terms, and with a considerable change in beneficiaries. Any possible trust, under the later will, would arise by operation of law and not by express provision of the testator.

Whatever its legal effect and whatever estate was thereby given to the sister, the later will purports to give all of the property, which was by the former will placed in trust with the bank, to the sister, followed by provisions which may or may not limit or change her estate or title as to a part of the property. Not only does the second will dispose of the entire estate, which the first will did not do if Mrs. Barrett predeceased the sister, but the complete change from the trust provisions of the earlier will makes the terms of the second will entirely inconsistent with those of the prior will. Under these facts it must be held that the will of July 1, 1936, amounted to and was a complete revocation of the will of June 8, 1934.

[5] The appellant asks us to direct the entry of a decree construing the second will as devising and bequeathing the entire estate to her absolutely. Not only is the question of the precise construction that should be given to this will not now before us, but for obvious reasons that matter has not been adequately presented either in the trial court or on this appeal. Nothing said herein is to be taken as the expression of an opinion on that subject.

For the reasons given the order appealed from is reversed.

I concur: MARKS, J.

* * *

27 Cal.App.2d 755

HOWARD v. CHOW et ux.

Civ. 11809.

District Court of Appeal, Second District, Division 2, California.

July 26, 1938.

1. Exchange of property 🔑3(1)

Where defendants executed an instrument whereby they offered to exchange certain realty, and plaintiff did not accept unqualifiedly the exact terms of defendants' offer but added a new condition that the acceptance was subject to ability to deliver clear title to the parties later designated in escrow, there was no "acceptance" of defendants' offer. Civ.Code, § 1585.

[Ed. Note.—For other definitions of "Acceptance," see Words & Phrases.]

2. Contracts 🔑23

An acceptance, to result in the formation of a binding contract, must meet exactly and precisely the terms proposed in the offer, and, if something different is made a condition of the alleged acceptance, no contract arises, unless the original offerer accepts the counter offer. Civ.Code, § 1585.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by H. A. Howard against Edwin O. Chow and Elaine Alice Chow, his wife, to recover a sum allegedly due as a broker's commission. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

Henry Haves, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover a sum alleged to be due as a broker's commission plaintiff appeals.

The essential facts are:

March 15, 1937, defendants executed an instrument whereby they offered to exchange certain real property with the Mortgage Guarantee Company. This agreement contained a provision for the payment of a commission to plaintiff which read as follows:

"And it is further agreed with said H. A. Howard, that when he has secured an acceptance of the proposition to exchange the above described property on the above terms, we will then pay the sum of five hundred and no 00/100 Dollars as commission for services rendered."

March 18, 1937, plaintiff delivered to defendants a letter executed on behalf of the Mortgage Guarantee Company reading thus:

"March 18, 1937

"Mr. H. A. Howard, Broker
"3208 South Central Avenue,
"Los Angeles, California.

"Dear Sir:

"This will act as confirmation of my telephone conversation with you as of this date, signifying the acceptance of the offer for the property located at 4701 Central Avenue, Los Angeles, consideration for same being $5500.00 cash, a first trust deed of $17,000 on the above property, payable $200.00 or more per month, including interest at 6% for ten years, and clear title to a property located at 3115 W. 76th Street and a property located at 1106-10 S. Central, both of Los Angeles. For this, this company agrees to furnish title free and clear subject only to the above mentioned first trust deed and all taxes, insurance, interest and rentals prorated as of the close of escrow.

"This acceptance is subject to the ability of this Company to deliver clear title to the parties later designated in escrow.

"Cordially, J. D. Wallace."

On March 19, 1937, defendants sent plaintiff the following telegram:

"H. A. Howard Co.
"3208 So. Central Ave.
"Los Angeles, Cal.

"We hereby withdraw our offer to the Mortgage Guarantee Co.

"Edwin and Elaine Chow."

This is the sole question for determination:

Does the foregoing correspondence constitute an acceptance of defendants' offer to exchange properties with the Mortgage Guarantee Company?

[1, 2] This question must be answered in the negative. It is the established law that an acceptance to result in the formation of a binding contract must meet exactly and precisely the terms proposed in the offer; and if something different is made a condition of the alleged acceptance no contract arises, unless the original offeror accepts the counter offer. Sec. 1585, Civ. Code; Cooper v. Stansbury, 28 Cal.App. 444, 447, 152 P. 948.

Applying the foregoing rule of law to the instant case, it is clear that the letter from the Mortgage Guarantee Company dated March 18, 1937, did not accept unqualifiedly the exact terms of defendants' offer but added a new condition, to-wit: "This acceptance is subject to the ability of this company to deliver clear title to the parties later designated in escrow."

Therefore, since defendants never accepted the counter offer of the Mortgage Guarantee Company, but in lieu thereof withdrew the offer previously made by them, plaintiff failed to secure an acceptance of defendants' proposition to exchange properties and thus was not entitled to receive a commission.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

FARNEY v. STOCKTON PORT DIST. et al.*

Civ. 6108.

District Court of Appeal, Third District, California.

Aug. 8, 1938.

Rehearing Denied Sept. 6, 1938.

Hearing Granted by Supreme Court Oct. 7, 1939.

Appeal and error ⚷766

Where petitioner in a mandamus proceeding made no request for leave to amend his petition after demurrer thereto had been sustained and on appeal failed to comply with rule requiring one, who relies on the sufficiency of a pleading to show alleged error of the trial court in sustaining a demurrer thereto, to print in his opening brief such portions of the pleading as may be necessary to an understanding of the issues to be determined, the judgment would be affirmed. Rules of Supreme Court and District Courts of Appeal, rule 8, § 3.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Mandamus proceeding by Edgar D. Farney, petitioner, against the Stockton Port District, and Paul E. Weston and others, members of the Board of Port Commissioners of the Stockton Port District, to require the respondents to restore the petitioner's license as a pilot of that district. From a judgment of dismissal of the action, the petitioner appeals, and the respondents move to dismiss the appeal.

Judgment affirmed.

Gumpert & Mazzera, of Stockton, for appellant.

Louttit, Marceau & Louttit, of Stockton, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The respondents moved to dismiss the appeal in this proceeding, or to affirm the judgment which was rendered pursuant to an order sustaining its demurrer to a petition for a writ of mandamus without leave to amend the pleading. The motion was presented under the provisions of rule V, section 3, and rule VIII, section 3, of the Rules for the Supreme Court and the District Courts of Appeal of California, for failure on the part of the appellant to print in his opening brief the allegations of his petition upon which he relies for a reversal of the judgment, and because the question to be determined on appeal has been waived and is so unsubstantial as to require no further argument.

The plaintiff filed in the superior court of San Joaquin county a petition for a writ of mandamus to require the Board of Port Commissioners of Stockton Port District to restore his license as a pilot of that district which, it is alleged, was wrongfully revoked by the board without cause and without notice. A general demurrer to the petition was filed on the ground that it fails to state facts sufficient to constitute a cause of action warranting the issuance of a peremptory writ of mandamus. The demurrer was argued by respective counsel, submitted for determination and sustained without leave to amend the pleading. No request for permission to amend the pleading was made by the appellant. A judgment of dismissal of the action was subsequently rendered and entered. From that judgment the petitioner has appealed.

The appellant failed to print in his opening brief any portion of the petition for a writ of mandamus upon the sufficiency of the allegations of which he relies for a reversal of the judgment in this case. Under the provisions of rule VIII, section 3, supra, where an appellant relies on the sufficiency of a pleading to show the alleged error of a trial court in sustaining a demurrer thereto, he is required to print in his opening brief such portions of the pleading "as may be necessary to an understanding" of the issues to be determined on appeal. In the present case the appellant has failed to quote or print in his brief such portions of his petition for a writ of mandamus as he considers adequate to constitute a sufficient cause of action entitling him to the peremptory writ sought. No attempt was made to print any portion of the petition in question. There is therefore a total failure to comply with the provisions of the rule above cited.

Moreover, the appellant waived his right to complain of an abuse of discretion on the part of the trial judge in sustaining the demurrer to his petition for a writ of mandamus without leave to amend the pleading, by failing to request the court to permit an amendment thereto. See v. Joughin, 18 Cal.App.2d 414, 420, 64 P.2d 149, Buckley v. Howe, 86 Cal. 596, 605, 25 P. 132. In the See Case, supra, it is said (page 151): "It is the established rule of law in this jurisdiction that a plaintiff waives a charge of abuse of discretion on the part of the trial judge in sustaining a demurrer to a complaint without leave to amend the pleading, where he fails to ask leave to file such an amendment."

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*For subsequent opinion see 86 P.2d 832.

For the foregoing reasons the judgment is affirmed.

I concur: PULLEN, P. J.

27 Cal.App.2d 750

SMITH et al. v. AGGOLA et al.

Civ. 11841.

District Court of Appeal, Second District, Division 2, California.

July 26, 1938.

Rehearing Denied Aug. 15, 1938.

Hearing Denied by Supreme Court Sept. 21, 1938.

1. Appeal and error ⇨930(1)

On appeal by plaintiffs from judgment on verdict in favor of defendants, the District Court of Appeal had duty to view the evidence in the light most favorable to the defendants.

2. Automobiles ⇨171(13)

The mere fact that truck driver observed movement of automobile at all times did not charge him with notice that driver of automobile would turn directly across the truck driver's path and expose herself to danger at a time and distance which would make a collision unavoidable.

3. Automobiles ⇨245(91)

Where the question of whether or not the last clear chance doctrine would apply to collision at intersection between truck and automobile depended on which version of the evidence the jury believed and whether the jury believed that the truck driver did all that he could reasonably have been expected to do to avoid the collision after discovery of the peril of those in the automobile, the question of the applicability of the doctrine was for jury's determination.

4. Evidence ⇨358

In action for injuries sustained in collision between truck and automobile at intersection, the admission of a small drawing of the intersection, made by an engineer, was not error, where the accuracy of the drawing was not denied.

5. Automobiles ⇨246(38)

In action for injuries sustained by motorist in collision with truck, stock instruction on the last clear chance doctrine was not erroneous for failing to include statement that doctrine was applicable, not only where it is physically impossible for plaintiff to escape, but also where he is totally unaware of his danger and for that reason unable to escape.

6. Appeal and error ⇨882(12)

Where language, which plaintiffs contended should have been included in instruction, was not incorporated in the instruction requested by the plaintiffs, the plaintiffs could not complain.

7. Appeal and error ⇨757(4)

Where plaintiffs wholly failed to comply with court rule providing that, where instructions given to a jury are attacked as erroneous, all other instructions given bearing on that subject should be printed in full in the appellants' brief, the District Court of Appeal would not discuss the allegedly erroneous instructions separately. Rules of Supreme and District Courts of Appeal, rule 8, § 3.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Eleanor H. Smith and others against John C. Aggola and others for injuries sustained in an automobile collision. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

Daniel A. Knapp, of Los Angeles, for appellants.

Kenneth J. Murphy, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

[1] This case arises out of another automobile collision and is an appeal by the plaintiffs from a judgment in favor of the defendants founded upon the verdict of a jury. It is our duty on appeal to view the evidence in the light most favorable to the defendants (respondents). The plaintiffs, just prior to the collision, were busily engaged in looking backwards toward a man at a parked car but did not turn in

front of defendant's truck until the defendant's truck was so close that in the exercise of ordinary care the defendant could not help but collide with the plaintiffs' car.

[2] The mere fact that the defendant truck driver observed the movement of the coupe at all times did not charge him with notice that the driver of the coupe would turn directly across his path and expose herself to danger at a time and distance which would make a collision unavoidable. Curtis v. Pacific Electric Ry. Co., 15 Cal.App.2d 580, 59 P.2d 890; Rasmussen v. Fresno Traction Co., 15 Cal. App.2d 356, 59 P.2d 617; Korchak v. Pacific Electric Ry. Co., 9 Cal.App.2d 89, 48 P.2d 752; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36. If the jury accepted the testimony of defendant Aggola and the witness Bray, which it apparently did, that the truck was on its own proper side of the highway, traveling at a speed of eighteen or twenty miles an hour, and entered the intersection and was almost to the extended center line of Manuel avenue before the coupe crossed from the west half of Cota avenue, then there is not any ground for a finding of negligence on the part of the truck driver. Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86; Keyes v. Hawley, 100 Cal.App. 53, 279 P. 674.

Furthermore, the court instructed the jury that the negligence of Eleanor Smith could not be imputed to Marcella Smith, who was a passenger of her older sister Eleanor, and that if the defendant Aggola and plaintiff Eleanor H. Smith were negligent and their negligence proximately caused the accident, the verdict should be in favor of the defendants and against the plaintiff Eleanor Smith, but in favor of Marcella Smith for any injury she may have sustained arising from the accident. In the face of this instruction the jury returned a verdict against Marcella Smith, and there can be no doubt that the jury determined that the defendant Aggola was without negligence in the operation of the truck and that the negligence of Eleanor H. Smith was the sole proximate cause of the collision.

[3] The first and primary contention of the plaintiffs is that they are entitled to a judgment under the doctrine of the "last clear chance", and they present in their brief a jury argument on that point, which is obviously impossible if this court is to accept the evidence in the light most favorable to the defendants. The question of whether or not the doctrine of last clear chance would apply depended upon which version of the evidence the jury believed and whether the jury believed that the defendant did all that he could reasonably have been expected to do to avoid the collision after discovery of the peril of the plaintiffs. This question was for the jury's determination. Wantz v. Ammons, 7 Cal.App.2d 643, 646, 46 P.2d 210; Lawrence v. Goodwill, 44 Cal.App. 440, 450, 186 P. 781.

[4] The plaintiffs next contend that there was prejudicial error in the admission of the evidence of Engineer Bramble, including exhibit "F", which is a small drawing of the intersection made by the same engineer, who surveyed and drew the large map, defendants' exhibit "A", and he inserted the skid marks on exhibit "F" which he found four days after the collision. The map corroborated the testimony of Captain Stroh diagramming the tire marks of the coupe on the large map, who testified the skid marks were on the pavement immediately after the collision. Appellants do not deny the accuracy of the map or that the tire marks indicated on it are the identical marks made by the coupe at the time of the collision. There was no prejudicial error in admitting this evidence.

[5, 6] The plaintiffs next contend that the court erred in its instruction on the last clear chance doctrine in that it did not include the explanatory statement appearing in Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915. The language of the opinion in that case discussing the doctrine of last clear chance is (page 917): "The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; *and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape* * * *." And the plaintiffs contend that the italicized portion of the above should have been included in the court's instruction. The court gave a stock instruction on the last clear chance doctrine. The italicized portion of the foregoing statement adds nothing to

the second element of the last clear chance, and while it could not be objectionable in an instruction in a proper case, it is only an explanatory statement specifying one of the conditions under which the plaintiff may be unable to escape. The language was not incorporated in the instruction requested by the plaintiffs, so the plaintiffs cannot rightfully complain in this regard. Creamer v. Cerrato, 1 Cal.App.2d 441, at page 445, 36 P.2d 1094.

[7] The plaintiffs further contend that several instructions were erroneous, but the plaintiffs have wholly failed to comply with section 3 of rule VIII, rules of the Supreme and District Courts of Appeal, which provides that where instructions given to a jury are attacked as erroneous, all other instructions given bearing upon that subject must be printed in full in the appellants' brief, and for that reason we will not discuss them separately. It is sufficient to say that we have examined them carefully and there is no reversible error in any of the instructions.

Finally, the plaintiffs contend that the verdict as to Marcella M. Smith was against the law. We have already answered this contention in our statement of the case.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

KING v. SCHUMACHER et al.*

Civ. 10651.

District Court of Appeal, First District, Division 1, California.

July 25, 1938.

Rehearing Granted Aug. 24, 1938.

1. Courts 🔑97(5)
Master and servant 🔑86

Rights and obligations of persons within provisions of Federal Employers' Liability Act depend upon act and applicable principles as interpreted by federal courts. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and servant 🔑204(1)

A railroad employee engaged in interstate transportation assumes risk of dangers normally incident to occupation.

3. Master and servant 🔑204(1)

As respects principle that injured railroad employee engaged in interstate transportation assumes risk of danger incident to occupation, employee is not under duty to exercise care to discover extraordinary dangers from negligence of those for whose conduct employer is responsible, but employee may assume employer or his agents have exercised proper care for employee's safety, unless want of care and danger arising from it are so obvious that ordinarily careful person under circumstances would observe and appreciate them. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and servant 🔑265(13)

Burden of proof on issue of assumption of risk is upon employer in action under Federal Employers' Liability Act. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Master and servant 🔑288(1)

Unless evidence regarding an employee's assumption of risk is such that ordinary minds would not differ as to proper conclusion, questions of assumption of risk are for jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Master and servant 🔑136

As respects duty of agent of railroad engaged in interstate transportation to use reasonable care for safety of another employee, where circumstances are such as to convey to mind of ordinarily prudent person in agent's position that employee is in perilous position, knowledge of danger to employee will be imputed to agent. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

7. Master and servant 🔑286(32)

In action for injuries to foot by fireman on ditching machine mounted on flatcar of railroad company engaged in interstate transportation, sustained when fireman was about to enter cab of machine through door usually used by firemen, but where there were no steps, and engineer seeing fireman's position, but not knowing fireman had placed his foot on track of machine to enter door, moved machine in such manner that it crushed fireman's foot, evidence regarding negligence of engineer was for the jury.

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*For subsequent opinion see 89 P.2d 466.

Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

8. Master and servant ⚿285(7)

In employee's action for injuries to foot crushed when run over by ditching machine mounted on flatcar of railroad engaged in interstate transportation, allegedly due to negligence of machine engineer, and to fact that one axle which helped to control machine was broken, where movement of machine was stopped immediately by engineer upon his discovery of accident, evidence did not justify submitting issue of negligent maintenance of machine. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

9. Appeal and error ⚿1062(1)

In employee's action for injuries to foot crushed when run over by ditching machine mounted on flatcar of railroad engaged in interstate transportation, allegedly due to negligence of machine engineer and to fact that one axle which helped to control machine was broken, where evidence did not support conclusion that injury was caused or aggravated by the defective axle, or that injury might have been avoided had defect not existed, submission of issue of negligent maintenance of machinery with issue of machine engineer's negligence was prejudicial error, where it was not possible to determine from record upon which of the two issues jury found defendants guilty of negligence, notwithstanding statutory provision that submission of questions of facts separately is matter within discretion of trial court, and notwithstanding in California there is no presumption of prejudice from error. Code Civ.Proc. § 735; Const. art. 6, § 4½; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Raymond King against Thomas Schumacher and another, trustees of the Western Pacific Railroad Company, for personal injuries. From a judgment for plaintiff, defendants appeal.

Reversed.

Edwin V. McKenzie, of San Francisco, for appellants.

Clifton Hildebrand, of Oakland, Goodman & Brownstone, of San Francisco, and Louis Goodman, of Los Angeles, for respondent.

PER CURIAM.

An action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., against the trustees of The Western Pacific Railroad Company to recover damages for personal injuries alleged to have been sustained by the negligent acts of the defendants. A jury returned a verdict for plaintiff and the defendants have appealed from the judgment entered thereon.

The complaint alleged that plaintiff was employed by defendants on a ditcher engaged in repairing the main interstate line of the railroad near Poe, California; that while thus engaged the ditcher was so negligently operated and maintained that plaintiff's foot was run over and injured. The answer denied negligence and alleged as defenses, assumption of risk and that the injury complained of was due solely to plaintiff's negligence. The case was tried on two theories, namely, the negligence of the engineer in charge of the ditcher in moving forward while plaintiff was in a position of danger, and its negligent maintenance in that by reason of a broken axle on the drive shaft it was out of control at the time of the injury. Defendants contend that the evidence was insufficient to sustain the judgment on either theory, and that the trial court erred in denying their motions for directed verdicts, and by its refusal of their request for separate verdicts on the two issues.

The ditcher consisted of a steam shovel mounted on a flat car. The apparatus was set on wheels which moved back and forth on rails laid upon and fastened to the platform of the car. It had what is known as a four wheel drive, the moving power being transmitted to all four wheels. One lever controlled its movement upon the rails mentioned, and by this means it was moved backward and forward by the engineer. There were no brakes controlling its movements, this being accomplished by reversing the lever or moving it forward. At the time of the accident the axle transmitting power to one set of wheels was broken. This occurred about two weeks before the accident, and both the engineer and the plaintiff knew the fact. The ditcher crew consisted of the engineer and the fireman. On the day of the accident plaintiff was acting as fireman, his duties being to keep steam in the boiler, to sand the rails on the flat car, and otherwise assist in operating the machine, the engineer being his superior. According to plaintiff he was directed by the engineer just prior to the accident to sand the rails on the flat car, the sand being obtained from a nearby locomotive. When the sanding operation was completed he mounted the flat car in order to enter the cab of the ditcher, which he attempted to do through a side door. It was testified that it was usual for the fireman to enter the cab through this door. He had been told by the engineer that the ditcher would not be moved while anyone was standing on the flat car. There were no steps to aid ingress through the door mentioned and a chain was placed across the same. It was his intention to grasp the chain and raise himself. In order to do so he placed his left foot on one of the rails on the flat car. As he did this, the apparatus was moved back slightly and then forward about two feet, one of the wheels passing over his foot and pinning it to the rail. The engineer at the time saw the position of the plaintiff except that from the cab he could not see that his foot was upon the rail. According to the engineer he saw from plaintiff's facial expression that an accident had occurred and he had at once reversed the lever, thus releasing the plaintiff. A part of the foot was crushed and it was subsequently amputated. The ditcher was inspected by the jury and the trial court, and its operation explained, but the evidence was conflicting as to the exact position of the parts immediately preceding and at the time of the injury. The plaintiff testified that when he mounted the flat car the boom was in a position lengthwise with the car and the apparatus was not moving. The engineer directed him to enter the cab but he was unable to do this by reason of the position of the boom. To enable him to enter it was necessary to wait until the boom was swung at an angle with respect to the car, and the apparatus was so constructed that the cab would revolve at the same time. The evidence fairly supports the conclusion that it was unnecessary in order to move the boom that the apparatus should be moved forward on the rails, and that the engineer was aware of the possibility of injuring the plaintiff if such a movement should be made. There was also testimony that the engineer had directed the plaintiff to enter the cab by another door, called the fireman's door, but according to the latter the door which he attempted to use was the usual means of ingress.

[1-7] It is well settled that by the Federal Employers' Liability Act congress took possession of the field of employers' liability in interstate transportation by rail, and that the rights and obligations of persons within its provisions depend upon the act and applicable legal principles as interpreted by the federal courts (St. Louis I. M. & S. R. Co. v. McWhirter, 229 U.S. 265, 33 S.Ct. 858, 57 L.Ed. 1179; Chicago M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 46 S.Ct. 564, 70 L.Ed. 1041), and an employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages. Gila Valley G. & N. R. Co. v. Hall, 232 U.S. 94, 34 S.Ct. 229, 58 L.Ed. 521. However, it is not his duty to exercise care to discover extraordinary dangers that may arise from the negligence of those for whose conduct the employer is responsible, but he may assume that the employer or his agents have exercised proper care for his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. Chesapeake & O. R. Co. v. De Atley, 241 U.S. 310, 36 S.Ct. 564, 60 L.Ed. 1016. This has been held to be the rule when the injury arises from a single act of negligence by the employer or his agent, creating a sudden danger to the servant of which the latter is without warning and could not reasonably have foreseen. Chicago R. I. & P. R. Co. v. Ward, 252 U.S. 18, 21, 40 S.Ct. 275, 276, 64 L.Ed. 430; Reed v. Director General, 258 U.S. 92, 42 S.Ct. 191, 66 L.Ed. 480; Swank v. Pennsylvania R. Co., 94 N.J.L. 546, 111 A. 44; Pennsylvania R. Co. v. Swank, 254 U.S. 638, 41 S.Ct. 12, 65 L.Ed. 451; Illinois Central R. Co. v. Norris, 7 Cir., 245 F. 926. The burden of proof on the issue of assumption of risk is upon the employer (Kanawha & M. R. Co. v. Kerse, 239 U.S. 576, 36 S.Ct. 174, 60 L. Ed. 448) and unless the evidence is such that ordinary minds would not differ as to the proper conclusion such questions are for the jury. Chesapeake & O. R. Co. v. De Atley, supra. We are unable to agree with the defendants that, as was the case in Atlantic Coast Line Railroad Co. v. Davis, 279 U.S. 34, 49 S.Ct. 210, 73 L.Ed. 601, but one conclusion on both issues might reasonably be drawn from the evidence. As stated, the engineer was aware of plaintiff's position with the one exception, that the latter's foot was upon the rail, and it was his duty to use reasonable diligence in analyzing the situation. We are satisfied that the circumstances were such as to convey

to the mind of an ordinarily prudent person that plaintiff was in a position where the movement of the apparatus as described above would imperil his safety, and such movement might reasonably be expected to cause injury. Where this is the case knowledge of the danger will be imputed. The evidence on this issue as well as that of assumed risk was we think, sufficient to justify their submission to the jury.

[8, 9] There remains, however, the question whether in view of the evidence the submission to the jury of the issue of negligent maintenance was, as claimed by the defendants, prejudicially erroneous. The evidence shows that the axle transmitting power to one set of wheels was broken and it is a fair inference from the testimony that due to this condition the movement forward and backward on the rails would not be as readily subject to control as would otherwise have been the case. However, the record clearly shows that notwithstanding this the movement forward was stopped immediately upon the discovery by the engineer of the fact of the accident, and nothing therein supports the conclusion that the injury was caused or aggravated by the defect, or might have been avoided had it not existed. Under this state of fact we are convinced that there was no justification for the submission of this issue to the jury as was done by the instructions of the trial court. As we have said, the court was requested by the defendants to direct that the evidence was insufficient to support a verdict against them on this issue, and also to instruct the jury to return special verdicts upon the two issues, both requests being denied. Although as provided by statute, Code of Civil Procedure, section 625, the submission of questions of fact separately is a matter within the discretion of the trial court, nevertheless we are satisfied that defendants' request, that the jury be charged that the evidence was insufficient to warrant a finding against them on the issue mentioned, should have been granted. That such a refusal would constitute prejudicial error under the federal practice appears well settled (Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 27 S.Ct. 412, 51 L.Ed. 708; Chicago, St. Paul M. & O. R. Co. v. Kroloff, 8 Cir., 217 F. 525), the reasons being, as stated in the case last cited, a presumption of prejudice from error, and that the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict. Although the presumption no longer obtains in our own jurisdiction (Constitution, California, Art. 6, sec. 4½), nevertheless as in Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481, it is not possible to determine from the record upon which of the two issues the jury found the defendants guilty of negligence. As the court there said (page 486): "Some of them may have found against the defendant on the one and erroneous theory, and the remaining jurors may have reached the same conclusion on the other theory." We think, as was the court's opinion in the Barrett Case, that the error was prejudicial to a degree which reasonably supports the conclusion that the result was a miscarriage of justice.

The judgment is reversed.

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27 Cal.App.2d 745

In re BEATY'S ESTATE.

BEATY et al. v. LEWIS.

Civ. 11485.

District Court of Appeal, Second District, Division 1, California.

July 26, 1938.

1. Appeal and error 🔑907(3)

Where appeal was to be determined on the judgment roll alone, the District Court of Appeal was required to assume that the evidence supported the findings.

2. Wills 🔑130

A holographic instrument in which testatrix directed her brother, in event of her death, to keep her home and live there and stating that there was money in a lock box to pay the taxes and assessments, was sufficient to constitute a "testamentary disposition."

[Ed. Note.—For other definitions of "Testamentary Disposition," see Words & Phrases.]

3. Descent and distribution 🔑71(4)

The children and heirs at law of deceased by his first wife, in order to succeed under statute to that portion of the estate of his second wife, which was formerly deceased's separate property, had burden of establishing such a right. Probate Code, § 229.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of Ida M. Beaty, deceased, wherein William H. Lewis filed his petition for construction of the will and the determination of heirship to the estate, and wherein Elmer E. Beaty and others contested the petition. From an adverse judgment, the contestants appeal.

Judgment affirmed.

Harry William Elliott, Harrison M. Dunham, and Edward P. Fogg, all of Los Angeles, for appellants.

Fred M. Riedman, of Long Beach, for respondent.

DORAN, Justice.

Decedent, Ida M. Beaty, died on February 23, 1936, leaving an holographic instrument as follows:

"481—E. 42nd St.
"Los Angeles Cal.
"Nov 11th 1934.

"Dear Brother—

"I was sick all night. My stomach (Indigestion) If I should pass out send for Stella and family to come out and keep house for you.

"Keep the Home and all of you live here do not give away my things that I have had so long.

"There is money in the lock box to pay the taxes and assessment.

"Lay me beside my dear Husband. be good and dont worry about me Just carry on as I have done.

"Your Loving Sister
"Ida."

(Envelope)
"Mr. William H. Lewis."

Said Ida M. Beaty was the second wife of one William Beaty who died on April 3, 1929; there were no children of this marriage.

The above instrument was admitted to probate as decedent's last will and testament, and letters testamentary were issued to William H. Lewis, the brother of decedent, who qualified as executor. On January 19, 1937, said executor filed his petition for construction of the will and determination of heirship to the estate. Appellants herein, the children and heirs at law of William Beaty by his first wife, contested the petition of the executor on the grounds that the holographic instrument did not purport to dispose of any portion of decedent's estate save and excepting the mention of a home; that with reference to such home said instrument was indefinite, ambiguous and uncertain, and was not legally sufficient to pass title; that said Ida M. Beaty died intestate; that all of the estate was the separate property of William Beaty, deceased; and that pursuant to section 229 of the Probate Code, appellants, as the children and heirs at law of William Beaty, deceased, were entitled to succeed to that portion of the estate which was formerly the separate property of said William Beaty.

The trial court found and concluded as a matter of law, in substance, that Ida M. Beaty died on or about February 23, 1936, leaving the above holographic instrument which was properly admitted to probate as her last will and testament, and that neither of the answering parties, appellants herein, were entitled to succeed to any part of the estate, but that the will devised to William H. Lewis the home place where the testatrix was residing at the time of her death.

[1] Inasmuch as the appeal is to be determined on the judgment roll alone, it must be assumed that the evidence supports the findings, and an examination of the findings shows that such findings amply support the judgment.

[2] The authorities relied upon by appellants, in support of the contention that the above instrument admitted to probate is insufficient to constitute a testamentary disposition, are of little, if any, assistance. Manifestly no two of such instruments are alike, and although the authorities are useful as a guide they are by no means conclusive. The trial court's conclusion that the instrument in question herein amounted to a testamentary disposition, and expressed the will of the testatrix, is abundantly supported by the judgment roll and the law.

[3] Appellants' claim to succeed to any portion of the estate by reason of the provisions of section 229 of the Probate Code is without merit. Under such circumstances the burden was on appellants to establish such a right, and it must be assumed from the record on the appeal, the judgment roll alone, that the court's find-

ings against appellants in this regard are supported by the evidence. The agreement which was in evidence at the hearing, between appellants and the deceased with regard to the property now claimed by appellants, is sufficient to support the trial court's conclusion in favor of respondent.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

28 Cal.App.2d 50

PEOPLE v. LORRAINE.

Cr. 1635.

District Court of Appeal, Third District, California.

Aug. 5, 1938.

1. Abortion 🔑11

In prosecution for abortion, corroboration of prosecutrix' testimony by evidence of two doctors who later treated her and of her sister who visited defendant *held* sufficient to sustain conviction. Pen.Code, §§ 274, 1108.

2. Abortion 🔑11

All material details of the illegal transaction constituting the crime of abortion need not be corroborated and corroboration of prosecutrix which satisfactorily tends to prove the offense and to connect the defendant with the crime is sufficient. Pen.Code, §§ 274, 1108.

3. Criminal law 🔑386

In prosecution for abortion, testimony by prosecutrix' sister that she met defendant and recognized his voice as the voice of the person to whom she had spoken over the telephone shortly after the operation *held* to authorize admission of telephonic communications.

4. Criminal law 🔑386

Admission of a telephonic communication in evidence requires proof of the identity of the person with whom communication is held.

5. Criminal law 🔑386

As respects admissibility in evidence of a telephonic communication, the identity of person with whom communication is held may be established by proof of recognition of his voice or by other circumstances satisfactorily indicating his identity.

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

L. P. Lorraine was convicted of the crime of abortion, and he appeals.

Affirmed.

Robert W. Huston and Horace F. Frye, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted of the crime of abortion under the provisions of section 274 of the Penal Code. From the judgment which was accordingly rendered and from the order denying a new trial he has appealed.

It is contended the verdict and judgment are not supported by the evidence for the reason that the testimony of the prosecutrix, upon whom the crime was committed, is not sufficiently corroborated to meet the requirements of section 1108 of the Penal Code. It is also asserted the court erred in receiving evidence of communications with the defendant over the telephone without adequate proof of a recognition of his voice or of his identity.

There is no merit in either of the preceding contentions. The prosecutrix testified to a convincing story of her condition and her first visit to the defendant at his home in Sacramento on January 7, 1938. They discussed her condition and he agreed to perform the illegal operation of abortion prohibited by section 274 of the Penal Code for a consideration of $75. At his request she returned the following day. She described exactly how he then performed the operation, and she identified the instrument which he used for that purpose. She also related the advice which he instructed her to follow thereafter. She paid his fee of $75 and returned to her apartment. The following day she became violently ill as a result of the illegal operation. The defendant was repeatedly called on the telephone from her apartment, but flatly declined to visit her. He refused to attempt to aid her in any manner. On the 9th of January she was taken to the hospital.

It is true that section 1108 of the Penal Code declares that:

"Upon a trial for procuring or attempting to procure an abortion, * * * the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

[1, 2] In the present case the requirements of the preceding section were adequately complied with. There was an abundance of corroborating evidence of the prosecutrix' straightforward story by four other witnesses. Two reputable physicians of Sacramento, with many years of experience in the practice of their profession, attended the prosecutrix at the hospital on January 10th. Both of them testified that she had lately suffered a miscarriage procured by artificial means with the use of an instrument. The sister of the prosecutrix, in company with a mutual lady friend, visited the defendant at his home on March 3d, and talked with him about his participation in the illegal operation in question. They testified that, in effect, he admitted to them that he performed the operation. They stated that "He said he knew that the work he was doing was illegal." They called his attention to numerous communications which the sister of the prosecutrix had with him over the telephone the night after the operation was performed, in which she told him of the serious illness of her sister. They asked him why he did not respond to the request to visit her. He replied "that he never came to call on his patients, and as soon as they left the door of his home that he was through with them". The sister of the prosecutrix then testified that:

"I asked him if he wouldn't consider giving her back the $75.00 that she paid him to perform the operation and he said that he never did that; he never gave back the money because he would be giving back money to everybody, and he said he never saw his patients outside of his home because he was afraid—he said that he never knew when he was going to be framed, * * * because once before he had been caught and he said he had to be very careful."

This furnishes sufficient corroboration of the testimony of the prosecutrix to comply with the statutory requirement. It is not necessary that all the material details of the illegal transaction constituting the crime of abortion shall be corroborated. (1 C. J. 332, sec. 112.) It is only necessary to supply corroboration which satisfactorily tends to prove the offense and to connect the defendant with the crime with which he is charged. In 1 California Jurisprudence, page 114, section 12, it is said in regard to the amount of corroboration required to prove the crime of abortion:

"It may be stated generally that it is sufficient if, considered by itself, it tends in some way to connect defendant with the crime charged."

To the same effect is the case of People v. Thompson, 16 Cal.App. 748, 117 P. 1033.

[3-5] The court did not err in receiving evidence of communications with the defendant over the telephone on the evening following the commission of the illegal operation. The sister of the prosecutrix, who testified to her communications with the defendant over the telephone, said that she afterward visited his home and talked with him, and that she positively recognized his voice as the voice of the person with whom she previously talked over the telephone. This testimony was given in that regard:

"Q. Had you ever talked to him over the telephone prior to the time you went to his home on the third of March? A. Yes, I talked to him several times.

"Q. Did you recognize this man and his voice as the one to whom you had talked? A. Yes. * * * I called him eight or ten times and he refused [to visit my sister]. * * *

"Q. And was it this man to whom you talked? A. Yes, it was. * * *

"Q. When was it that you recognized the man whom you had talked to at the home was the same man you talked to over the phone? A. I knew immediately when he spoke to me at the door."

The identity of the defendant as the person with whom the witness had carried on the conversations over the telephone, to which she testified, appears to have been clearly established. For the purpose of admitting in evidence a communication over the telephone, it is necessary to first require proof of the identity of the individual with whom it is held. The identity of the person may be established by proof of recognition of his voice, or by other circumstances which satisfactorily indicate the identity of the individual. Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 306, 125 P. 242; Eastman

v. Means, 75 Cal.App. 537, 242 P. 1089; Mayr v. Goldschmidt, 63 Cal.App. 381, 386, 218 P. 621; People v. Herman, 49 Cal.App. 592, 595, 193 P. 868; 71 A.L.R. 5, note.

In 1 Ruling Case Law, page 477, section 13, it is said with respect to the preliminary proof which is required to render testimony of a communication over a telephone competent:

"Communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face. But the identity of the party against whom the conversation is sought to be admitted must be established by some testimony, either direct or circumstantial; to hold parties responsible for answers made by unidentified persons opens the door for fraud and imposition. Slight circumstances will suffice for this purpose, however."

The judgment and the order are affirmed.

I concur: PULLEN, P. J.

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27 Cal.App.2d 668

DEL GIORGIO et al. v. POWERS et al.

Civ. 2074.

District Court of Appeal, Fourth District, California.

July 21, 1938.

1. Appeal and error 🔑931(4), 1011(1)

Trial court, which made no specific finding as to authenticity of certain documents, would be deemed to have resolved the conflict on the subject in respondent's favor, and trial court's finding was conclusive on the District Court of Appeal.

2. Evidence 🔑450(5)

An instrument providing that the undersigned "agree to take in" named individuals as their partners, and that they are "taking them in on 50-50 basis on all mineral and nonmetallic mineral or anything of value found on said property," being unambiguous, was required to speak for itself, and conversations of the parties were incompetent for purpose of construing the instrument. Civ.Code, § 1639.

3. Mines and minerals 🔑97

Where the owners of mining claims executed an instrument agreeing to take in named individuals as their partners on a 50-50 basis on all mineral and nonmetallic mineral or anything of value found on the property, a "mining partnership" within meaning of the provisions of the statute affecting "mining partnerships" was contemplated, rather than an ordinary partnership. Civ.Code, § 2515.

[Ed. Note.—For other definitions of "Mining Partnership," see Words & Phrases.]

4. Mines and minerals 🔑34

The statute relating to conveyances of gold mining claims, and statute extending it to mining claims generally, have been superseded by the enactment of statute dealing with the requisites for transfer of certain estates. Civ.Code, § 1091; St.1863, p. 98; St.1860, p. 175.

5. Mines and minerals 🔑34

A mining claim is "realty," and may therefore be conveyed as in the case of other realty. Civ.Code, § 1091.

[Ed. Note.—For other definitions of "Realty," see Words & Phrases.]

6. Mines and minerals 🔑99(2)
Trusts 🔑25(1)

An instrument, providing that the owners of mining claim agreed to take in named individuals as their partners on 50-50 basis on all mineral and nonmetallic mineral or anything of value found on the property, was not a "conveyance" but a "declaration of trust," and valid under statute providing that a trust must be in writing and subscribed by the trustee or by his agent thereto authorized by writing. Civ.Code, § 852, subd. 1.

[Ed. Note.—For other definitions of "Conveyance" and "Declaration of Trust," see Words & Phrases.]

7. Trusts 🔑21(1)

Inartificiality of form will not prevent an instrument from being construed as a "declaration of trust."

8. Trusts 🔑21(1)

The words "trust" or "trustee" are not essential to a declaration of trust.

9. Mines and minerals 🔑99(2)

An instrument, providing that the undersigned "agree to take in" named individuals as their partners and that they "are taking them in on 50-50 basis on all mineral and nonmetallic mineral or anything of value found on said property," invested the named individuals with the equitable but not the legal title to a half interest in whatever rights the undersigned possessed.

10. Mines and minerals 🔑34

Where purchaser of mining claim had actual notice of sufficient facts relating to the connection of those who were in equity co-owners of the mining claim and who were mining partners of purchaser's vendors, to put a prudent man on inquiry as to precisely what were the rights of the equitable owners and mining partners, so that if he had pursued the inquiry he would have learned the terms of an instrument creating the mining partnership and equitable ownership, he was chargeable with notice of execution and contents of instrument. Civ. Code, § 19.

11. Mines and minerals 🔑24

To constitute an "abandonment" of mining claim, there must be a concurrence of act and intent, namely, the act of leaving the premises or property vacant, so that it may be appropriated by the newcomer, and the intention of not returning.

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

12. Abandonment 🔑6

Whether there has been an abandonment is a fact question for jury or court sitting as jury.

13. Abandonment 🔑5

The yielding up possession and nonuser are evidence of abandonment, and, under many circumstances, sufficient to warrant the deduction of the ultimate fact of abandonment, but it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon.

14. Mines and minerals 🔑38(21)

Cessation of work on a mining claim and absence therefrom is a circumstance, especially if prolonged, affording some evidence of abandonment.

15. Mines and minerals 🔑24

Neither cessation of work on mining claim nor absence therefrom, though prolonged, necessarily constitutes "abandonment," since there can be no "abandonment" without an intention to abandon.

16. Abandonment 🔑5

Though mere disuse, without an intention to abandon, is no "abandonment," a jury or court sitting as a jury may properly consider both disuse and the time of its continuance in deciding what the intention was.

17. Abandonment 🔑2

Relinquishment of a property with intent never to assert any further claim to it requires no lapse of time thereafter to amount to an "abandonment."

18. Abandonment 🔑3

Other things being equal, disuse for a long period is more persuasive of intent of abandonment than disuse for a shorter time.

19. Mines and minerals 🔑38(21)

Evidence that owner of interest in mining claims failed to give personal attention to property for above five years sustained finding that owner attempted to abandon his interest, notwithstanding that he claimed that he was relying on another to do what was necessary.

20. Abandonment 🔑7

An abandonment results in returning that which is abandoned to the public domain, since there is no such thing as an abandonment in favor of another individual.

21. Abandonment 🔑2

Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing.

22. Abandonment 🔑2

An abandonment must be made without any desire that any other person shall acquire the thing abandoned, since if it is made for a consideration it is a "sale" or "barter," and if made without consideration, but with an intention that some other person shall become the possessor, it is a "gift."

[Ed. Note.—For other definitions of "Barter," "Gift," and "Sale," see Words and Phrases.]

23. Mines and minerals 🔑24

In determining whether there had been an abandonment by owner of interest in mining claim, alleged statements of owner to another that "you may do as you like," and "I do not want anything more to do with it; as far as I am concerned you can have my whole interest in the mine," evined no necessary intent to make any gift to the other, so that there would be no intent to abandon, but could quite as readily be construed as a mere expression of intention to relinquish the interest and of indifference as to whether the other did anything with the interest or not.

24. Mines and minerals 🔑24

In determining whether one of the plaintiffs in suit to quiet title to unpatented mining claim had abandoned his interest in the claim, statement which defendant, who owned an interest in the claim, had previously made to deputy labor commissioners that she and one of the plaintiffs and another were engaged in a partnership in the mining property, was of no controlling importance.

25. Mines and minerals 🔑38(21)

In suit to quiet title to unpatented mining claim, wherein defendant set up defense that plaintiffs had abandoned their interest in the claim, evidence sustained finding of an "abandonment" of the claim by plaintiffs.

26. Mines and minerals 🔑38(2)

Plaintiffs were not entitled to prevail in suit to quiet title to mining claim, where evidence sustained finding that they had abandoned their interest in the claim, since one seeking to quiet title against another must prevail, if at all, on the strength of his own title.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Martin Del Giorgio and V. J. Russo against Mary L. Powers and others to quiet title to an unpatented mining claim. From a judgment in favor of the defendants, the plaintiffs appeal.

Affirmed.

Sloane & Steiner, of San Diego, for appellants.

M. W. Conkling, of San Diego, and Harry W. Horton, of El Centro, for respondent Mary L. Powers.

HAINES, Justice pro tem.

This is an action brought by plaintiffs and appellants, Martin Del Giorgio and V. J. Russo, against defendant and respondent Mary L. Powers, as well as a corporation known as Crystal Quartz, Inc., and various fictitiously named defendants, to quiet title to an unpatented mining claim in San Diego county known as the "Patten" mining claim and also known as the "Old Doctor Northrup" mining claim, as more particularly described in a location notice recorded in the recorder's office of said county by one F. G. Patten on November 13, 1925. Neither Crystal Quartz, Inc., nor the fictitiously named defendants have been served or appeared in the action. The court found that the plaintiffs are not the owners of the property involved but abandoned the same in March, 1931, or thereabouts, and by its judgment denied them all relief. From this judgment the present appeal is taken.

No evidence was introduced with respect to the actual location or marking upon the ground by Patten of the boundaries of the claim, the only showing with respect to his location of it being the recorded location notice which was produced. Patten, on November 15, 1927, deeded the property to appellant Russo and one Stull. There is in evidence a typewritten document purporting to have been signed on January 6, 1928, between appellant Russo and said Stull, on the one hand, and one Hardesty and respondent Mary L. Powers, signing herself, M. L. Powers, on the other, in words and figures following:

"San Diego, Calif., Jan. 6th, 1928.

"We the Undersigned agree to take in Mr. Hardesty and Mrs. Powers as Our Partner on our Cilica Mines, The Old Doctor Northrup claim.

"We are taking them in on Fifty-Fifty basis on all mineral and non metalic mineral or any thing of value found on said Property.

"(Signed)

"Ralph A. Stull
"V. J. Russo
"Frances F. Hardesty
"M. L. Powers."

Mrs. Powers' testimony is that, while all four were together interested, Russo, Stull and Hardesty personally worked on either the mining claim or the roadway to it, while she furnished them with provisions; also that during that spring (1928) Hardesty and she spent in connection with the work more than $800 for food, equipment and dynamite. She testified also that she and Hardesty took quartz from the mine to Los Angeles and elsewhere and tried to work up a demand for it.

On May 24, 1928, Russo and Stull, with their wives, executed a deed purporting to convey the entire property to appellant Del Giorgio. This deed makes no mention of Hardesty or Mrs. Powers or of any interest on the part of either in the property. Two days later Del Giorgio reconveyed what purported to be a half interest in the claim to Russo. The writing of January 6, 1928, above set out, was not recorded and there was, therefore, no record to supply constructive notice of its existence. Del Giorgio, however, testified to having talked in Russo's company with Hardesty and Mrs. Powers at the home of the latter three or four days before his purchase, at which time he says that Hardesty asserted his interest in "the quartz of the mining property". Hardesty was discussing the marketability of the ore and his effort to sell it. Del Giorgio claims not to have seen the actual contract (that is, the writing of January 6, 1928) nor to have known anything about its contents "except what Mr. Russo said about they had some kind of a contract about the ore". He says that Russo told him with respect to Hardesty and Mrs. Powers that "they ain't got no interest in the property; the only contract they had was one for the mining part—the only contract". Del Giorgio adds that "he didn't say what it had on it". Russo also testified to a conversation with Hardesty and Mrs. Powers which he placed "a little after May, 1928" at which Del Giorgio was present and in which Russo claims to have said that he and Stull were selling the mine to Del Giorgio, on which occasion he claims that neither Hardesty nor Mrs. Powers mentioned having any interest in the property. If this testimony is intended to relate to the same conversation referred to by Del Giorgio the latter's conception of its time is different from Russo's, for Russo says that Del Giorgio had "already bought the mine". Mrs. Powers, on the other hand, testified to a conversation with Del Giorgio, the exact date of which she did not place. She says that Russo brought Del Giorgio to her house and the two stayed over night, Hardesty being present; that Russo told them that he wanted to sell his interest to Del Giorgio. She says that she did not know that the actual transfer had taken place "until Mr. Ussher and I went over the books; I think Mr. Russo's book". On December 27, 1928, Hardesty deeded any interest that he may have acquired in the claim to Mrs. Powers and thereafter died.

Mrs. Powers says that in the year 1931 she spent $108 in doing assessment work on the property. No affidavit of the performance of work for the year ending on June 30 of that calendar year seems to have been filed, Mrs. Powers apparently claiming that she relied on one Ussher's promise, made under circumstances presently to be referred to, to do it for her. She relates a conversation between herself and Del Giorgio in March or April, 1931, at which time she says that he came to her house, as follows:

> "I asked him whether he was going to do any more assessment work on it, and he said, 'Well, I have never taken a dollar out of the mine. I am not going to spend any money on it.' I says, 'What are you going to do about it? You will have to do the assessment work.' And he said no, he wasn't going to do any more assessment work or have anything to do with it again. He says, 'You may do as you like. I don't want anything more to do with it, as far as I am concerned; you can have my whole interest in the mine.'"

The semicolon in the middle of the last sentence is obviously that of the court reporter and need not be regarded in construing what was said.

For several fiscal years subsequent to the one which ended with June 30, 1931, Mrs. Powers posted on the property and caused to be recorded, notices of her intention to hold the claim under the federal moratorium legislation. According to her testimony she, in 1935, posted on the center monument on the property, the corners of which were already marked by other monuments, and also recorded, a relocation notice, a copy of which is in the record, containing, among other statements and recitals, one to the effect that: "This location is made on account of an abandonment by co-owner Del Giorgio for failure to file notice of intention to hold during the fiscal years ending July 1, 1932, 1933 and 1934." As against Mrs. Powers' account of the matter, Del Giorgio in his testimony denied that he ever told her that he was abandoning his interest in the claim or that he was leaving it to her. On the contrary, he testified that in 1931 he was short of money but caused the Ussher above mentioned to relocate the claim *for him*, and that, in that year and thereafter, he left the matter of performing the assessment work wholly to Ussher.

Ussher's relation to the situation has been, according to the evidence, somewhat peculiar. Mrs. Powers testified that originally she had some negotiations with him about handling a ranch which she owned; that she had at her home some specimens of feldspar which led to their discussing this mine; that Ussher got her to take him to see it and also brought other people to see her in connection with it, including one Gus Holmes. She took Ussher to see the mine several different times. He helped her rebuild the monuments on it. She testified that she employed Ussher on a fifty-fifty basis to work the mine for her, but it appearing that the arrangement was in writing and the writing not having been produced, her testimony to that effect was stricken out. However, on being recalled she was allowed to testify that Ussher took out quartz for her in the summer of 1931. Notwithstanding such arrangements as he may have had with Mrs. Powers, Ussher undertook on July 1, 1931, to relocate the mine, posting a location notice in the names of Gus S. Holmes and himself, and he and Holmes afterward signed and swore to notices, under the federal moratorium statutes of intention, in their own behalves, to hold this claim for each of the respective fiscal years ending with June 30, 1933, and June 30, 1934 (referred to in their affidavit as July 1 of each of said years). There is nothing said either in the Ussher-Holmes location notice, nor in these affidavits of intention to hold, about any connection on the part of either Mrs. Powers or of Del Giorgio or of any one, other than Holmes and Ussher, with the property. The evidence further shows that in the fall of 1934 the present respondent, Mary L. Powers, brought an action numbered 79,266 in the superior court of San Diego county against Holmes, Ussher, one Frank Alonzo and Crystal Quartz, Inc. (to which corporation Holmes and Ussher had meanwhile undertaken to deed the property) to quiet her title to the same as against them; that the present appellant, Del Giorgio, was brought in as a party to the action by court order and impleaded by a cross-complaint filed by Crystal Quartz, Inc., to quiet title against him, to which cross-complaint Del Giorgio filed an answer claiming to be the owner of the property. The said action 79,266 was dismissed as to Holmes, but tried as to the other parties affected by it upon the issues joined and resulted in a judgment on June 26, 1935, in favor of Mrs. Powers as against Ussher, Alonzo and Crystal Quartz, Inc., quieting her title to the property as against them, decreeing that the latter take nothing by its cross-complaint against Del Giorgio, but adjudicating nothing as between Mrs. Powers and Del Giorgio, as between whom, indeed, there were no pleadings on file. It appears that Del Giorgio filed an appeal from this judgment to this court and Crystal Quartz, Inc., filed an appeal to the Supreme Court. We have no record of any further proceedings on Del Giorgio's said appeal to this court, nor does the record in the instant case show what disposition, if any, has been made of the appeal of Crystal Quartz, Inc., to the Supreme Court.

Mrs. Powers testified that during the trial in the superior court of said case 79,266 Del Giorgio stated to her: "I don't know why they called me, because I haven't anything to do with this since I gave it all to you." A Mrs. Bliss, who was with Mrs. Powers at the time, corroborates her account of this conversation, but Del Giorgio denies ever seeing Mrs. Bliss and denies that he said anything of the sort.

For the purpose of impeaching Mrs. Powers' testimony John R. Lester and Stanley M. Gue, deputy labor commissioners were called on appellant's part. It appears from their testimony that two laborers who had worked on the mine in June, 1931, filed claims against Mrs. Powers for failing to pay them for their work; that she appeared in August and at that time stated that she, Ussher and Del Giorgio were engaged "in some kind of a partnership in this mining property" and agreed to pay the claims within 30 days, but that, having failed to do so, she came into their office again and signed an order, a copy of which was produced, directed to Del Giorgio and Ussher, asking them to pay Gue $70.47, the aggregate of these claims and "deduct from any settlement with me later". This order is dated September 22, 1931, and recites that: "The undersigned" (Mary L. Powers) "and Charles E. Ussher and Martin Del Giorgio are interested as joint venturers" in the claim. Gue says that Mrs. Powers told him that she, Del Giorgio and Ussher had hired these workmen; that Ussher was going to advance the money to complete the assessment work and she was unable at the time to pay the claims but that Ussher and Del Giorgio were both able to pay. Gue says that he put into this order substantially what she told him was the situation. Mrs. Powers claims that she told Lester that Del Giorgio had been interested in the mine but "had turned his interest over to me"; that Lester's reply was that "he ought to come in here; if he wants to hold his interest he will have to come and pay this". Her reply, she says was: "Well then, it is up to you; make him do so." She claims that she later signed the order directed to Del Giorgio and Ussher in fear of arrest if she did not do so. She also claims that both Del Giorgio and Ussher owed her money at the time. As a matter of fact, neither Del Giorgio nor Ussher paid the labor claims but Mrs. Powers eventually paid them herself.

The evidence does not disclose any claim that appellant Russo ever stated to respondent or any one else that he had abandoned his interest in the mine, though there is nothing to show any activity on his part in connection with it subsequent to 1930, in which year he claims to have participated in the assessment work. Thereafter, according to his statement he "left it in charge of Mr. Del Giorgio. I left him in charge to make arrangements somehow." As we have seen, Del Giorgio claims to have left the matter to Ussher, who, as we have seen, whatever his obligations may have been, appears to have in fact acted in the interest neither of Mrs. Powers, Russo nor Del Giorgio, but in the interest of himself and Holmes.

[1] The evidence sharply conflicts in respect to the writing of January 6, 1928, between Stull, Russo, Hardesty and Mrs. Powers as to its authenticity in its present form, Stull and Russo claiming that, though they signed something, it was not the document as it is now presented. We shall not discuss the merits of this conflict. The trial court made no specific finding on the subject, but if the authenticity of the writing in its present form be deemed material to respondent's case then the court must be taken to have resolved the conflict on that subject in respondent's favor and its finding is conclusive upon us. Estate of Jepson, 178 Cal. 257, 172 P. 1107; Castor v. Bernstein, 2 Cal.App. 703, 84 P. 244; People v. Driggs, 14 Cal.App. 507, 112 P. 577.

Appellants contend that even if this writing of January 6, 1928, is in its present form genuine, it amounts to no conveyance from Stull and Russo to Hardesty and Mrs. Powers of any interest in the mining claim but is, at the most, a mere arrangement for handling the product; that they, appellants, are still, subject to the paramount title of the government, the sole owners of the property and have never abandoned it; that even if respondent can make good her claim to have become their partner she can have gained no exclusive right to the property since she has taken no action under the provisions of section 1426*o* of the Civil Code or of 30 U.S.Code Ann., sec. 28, to divest them of their interests. Respondent, on the other hand, claims that the said writing of January 6, 1928, amounted to a conveyance to Hardesty and herself of a half interest in the mining claim; that Del Giorgio and Russo have abandoned or forfeited their interests; that after such abandonment and her acquisition of Hardesty's rights she relocated the claim and is in consequence of these occurrences now, subject, of course, to the government title, its sole owner. Stull and appellant Russo on the one hand and respondent on the other have testified to the conversations that preceded the execution of this document (or, according to the two former, the execution of the document that they did sign) and the accounts given by Stull and Russo are, in brief, that Hardesty claimed to have special opportunities for marketing the product of the mine and that respondent was associated with him and that what was intended by the writing was a mere arrangement for handling the product on the basis of allowing Hardesty and Mrs. Powers to sell such product for the mutual benefit of the four and to participate to the extent of a half interest in the profits from such sales, whereas Mrs. Powers says that the plan was "that we should work the mine together and sell the quartz and divide the spoil of it, or whatever you call it, which we did".

[2-9] We do not think it competent to resort to these conversations for the purpose of construing the writing involved. There is, in our opinion, nothing ambiguous about its terms and that being so it must speak for itself. Civ.Code, sec. 1639. We cannot agree with appellant that it is executory. True, its first sentence is to the effect that "We the Undersigned agree to take in Mr. Hardesty and Mrs. Powers as our partners in our silica mine, the Old Doctor Northrup Claim." So far, the language is possibly not in itself conclusive as to whether the agreement is to become effectual instanter or at some future time, but the finite verb in the next sentence is in the present tense, "we *are* taking them in", etc. This, in our view, makes it entirely clear that the arrangement was to be immediately effective. The next inquiry, however, is what effect it was meant to

have. That one effect was the present creation of a partnership between Russo, Stull, Hardesty and Mrs. Powers is obvious, and since, as we view it, the writing involves a partnership, not merely confined to the marketing of the ore but in the whole enterprise, it is manifestly not an ordinary partnership that is contemplated but a mining partnership within the meaning of the provisions of the Civil Code affecting mining partnerships, one of which is that "the mining-ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property". Civ.Code, sec. 2515. On the other hand, we agree with appellants to the extent of not believing the language used apt to convey to Hardesty and Mrs. Powers actual legal title to the half interest which they as partners were to have in the mining claim. We do not think its failure to amount to such a conveyance results, as suggested by counsel for appellants, from any want of acknowledgment, or, if such there was, from any failure of immediate delivery of possession, as required by the former legislation of this state (Stats.1860, p. 175, relating to conveyances of gold mining claims, extended by Stats.1863, p. 98, to mining claims generally), for, in our opinion, this legislation was superseded by the enactment of section 1091 of the Civil Code. See 17 Cal.Jur. 405. A mining claim is real estate (Harris v. Kellogg, 117 Cal. 484, 488, 49 P. 708; Contreras v. Merck, 131 Cal. 211, 214, 63 P. 336), and may therefore be conveyed as in the case of other real estate. This writing, however, neither contains the word "grant" nor any language which purports to be a transfer of legal title. In our view, so far as the title to the mine is concerned, it amounts not to a conveyance but to a declaration of trust, in consequence of which Russo and Stull (assuming them to have been the holders of the legal title subject to the government's paramount right) agreed henceforth to treat the same as the property of the partnership. As such it would appear to be entirely valid under the provisions of section 852, subdivision 1, of the Civil Code. Inartificiality of form will not prevent an instrument from being construed as a declaration of trust. Luco v. De Toro, 91 Cal. 405, 417, 18 P. 866, 27 P. 1082; Taber v. Bailey, 22 Cal.App. 617, 620, 135 P. 975. Neither is it necessary that the words "trust" or "trustee" be used. Taber v. Bailey, supra, page 620, 135 P. 975. In our view, then, the effect of the writing was to immediately invest Hardesty and Mrs. Powers with the equitable but not the legal title to a half interest in whatever rights Stull and Russo theretofore had gotten from Patten in the claim.

Taking it, then, as established that beginning with January 6, 1928, Russo, Stull, Hardesty and Mrs. Powers were mining partners and in equity coowners of whatever rights Patten may originally have had in the property, we proceed to discuss the legal effect of its subsequent history, as already recited. As we have noted, Mrs. Powers' evidence is that for a time all four participated in doing work for the benefit of the enterprise. In the following May, however, as we saw, Russo and Stull, with their wives, deeded the property to Del Giorgio and Del Giorgio redeeded a half interest to Russo.

[10] While we do not know precisely what was the trial court's view of this phase of the matter, the evidence is, in our opinion, sufficient to have justified it in believing that Del Giorgio had, at and before the time of his purchase, actual notice of sufficient facts relating to the connection of Hardesty and Mrs. Powers with the mine to put a prudent man upon inquiry as to precisely what their rights were, and that had he pursued such inquiry he would have learned the terms of the writing of January 6, 1928. In these circumstances he is charged with notice of its execution and contents. Civ.Code, sec. 19. It follows that the transaction between Russo, Stull and Del Giorgio in no way affected the rights of Hardesty and Mrs. Powers, but, assuming the original location by Patten to have been valid, left the equitable title to the mining claim vested in a mining partnership which had now come to consist of Russo, Del Giorgio, Hardesty and Mrs. Powers, wherein each had an equal one-fourth interest. Hardesty's subsequent deed to Mrs. Powers resulted in enlarging her interest to a one-half. No essential change in the situation seems to have occurred from that time on until 1931, in March of which year the trial court finds that Russo and Del Giorgio abandoned their interests in the claim.

[11-13] We have then to consider what evidence there is in the record to support the trial court's finding of abandonment by Russo and Del Giorgio. As to Russo such evidence, if evidence it be, must consist purely in his failure after 1930 (in which

year proof of labor was filed in behalf of Del Giorgio and himself) until the present action was commenced in 1935, to do anything with the property or toward keeping up the assessment work upon it, other than to leave these matters, as he claims to have done, wholly to Del Giorgio. "To constitute such abandonment, there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Judson v. Malloy, 40 Cal. 299; Bell v. Bed Rock, etc., Co., 36 Cal. 214; Moon v. Rollins, 36 Cal. 333, [95 Am.Dec. 181]; St. John v. Kidd, 26 Cal. 263; Richardson v. McNulty, 24 Cal. 339; Willson v. Cleaveland, 30 Cal. 192. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone without an intention to abandon, be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Yielding up possession and nonuser is evidence of abandonment, and, under many circumstances, sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon." Utt v. Frey, 106 Cal. 392, 397, 398, 39 P. 807, 809.

[14, 15] Cessation of work on a mining claim and absence therefrom is a circumstance, especially if prolonged, affording some evidence of abandonment. Depuy v. Williams, 26 Cal. 309, 313; Bell v. Bed Rock, etc., Co., 36 Cal. 214, 217; Seymour v. Wood, 53 Cal. 303; see, also, to the same effect as to a miner's ditch, Integral Quicksilver Mining Co. v. Altoona Quicksilver Mining Co., 9 Cir., 75 F. 379; and as to possessory title to public land generally, Gluckauf v. Reed, 22 Cal. 468. Neither such cessation, however, nor such absence, though prolonged, necessarily constitutes such abandonment, for there can be no abandonment without an intention to abandon. Thus it was said in Moon v. Rollins, 36 Cal. 333, 338, 95 Am. Dec. 181, that:

> "It is a question of *intention*, and has been so held over and over again, and *not* a question of *time*, except so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim, or non-claim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention."

[16-19] Although mere disuse without an intention to abandon is no abandonment, these authorities nevertheless recognize that a jury or a court sitting as a jury may properly consider both the disuse and the time of its continuance in deciding what the intention was. It is true, indeed, that relinquishment of a property with intent never to assert any further claim to it requires no lapse of time thereafter to amount to an abandonment. Waring v. Crow, 11 Cal. 366; Trevaskis v. Peard, 111 Cal. 599, 44 P. 246. Manifestly, however, other things being equal, disuse for a long period is more pursuasive of intent than disuse for a shorter time. In the instant case we cannot say that Russo's failure for above five years to give any personal attention to the property was no substantial evidence of his intention to abandon it, even though he now claims that he was relying on Del Giorgio to do what was necessary, which claim the trial court was not, of course, required to believe. In fine, we cannot say that the finding was made without evidence and we are, therefore, not at liberty to disturb it.

[20-22] As respects abandonment by Del Giorgio the evidence admittedly conflicts. There is no claim that between March 1931 and the time that this action was begun in 1935 he was at the mine or did any development work on or about it. In these circumstances the trial court, as was its right, evidently believed Mrs. Powers' account of what he had said to her in March, 1931, with such corroboration as is furnished by her further testimony and that of Mrs. Bliss about his subsequent admission while attending the trial in case 79,266. In considering the effect of this we do not, of course, overlook the legal principle already noted in our quotation from Utt v. Frey, supra, that an abandonment must result in returning that which is abandoned to the public domain and that there is no such thing as an abandonment in favor of another individual. As was said in Stephens v. Mansfield, 11 Cal. 363, 366:

> "Abandonment must be made by the owner, without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made

without any desire that any other person shall acquire the same; for if it were made for a consideration it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift."

This principle was elaborated in Richardson v. McNulty, 24 Cal. 339, 344, 346, supra, where, after referring to Stephens v. Mansfield, supra, the court said:

"It is true, as contended by counsel for the appellants, that so far as the case of a gift is concerned, this decision goes outside of the facts; but, upon principle, there is no difference between the act of selling and the act of giving so far as their effect as evidence upon a question of abandonment is concerned. If the gift be complete—that is to say, if the thing given be delivered, and accepted by the donee, a transfer is the result, which transfer as much precludes the idea of abandonment as a transfer resulting from a sale. No question of abandonment can arise where a transfer has been had by the act of two parties. To an abandonment of the character involved in this and all similar cases, there can be but one party. The mining ground in controversy, before it was occupied by the plaintiff, so far as the right to mine the same by parties without title is concerned (and this is true of all the public mineral land of the State), was publici juris, and open to the appropriation of any one desiring it. By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it, or give it to another, or transfer it in any other mode authorized by law (thereby preserving the continuity of possession), or he may abandon it. In doing the latter he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more publici juris, and then, and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists, although vested in another, and the continuity of possession remains unbroken. But the occupant cannot continue his right in another by the mere act of volition; nor is his right kept alive by a mere desire that it may become vested in a particular person. Such a volition or desire does not amount to a gift, for there can be no gift without an acceptance. If the wish or desire is expressed to the person in whose behalf it is entertained, and thereupon he occupies the land, a gift is the result, and the transfer is made complete—and not otherwise. The mere wishes and desires of the occupant are only effectual to preserve the right in himself, and not to transmit it to another; and the case of Stephens v. Mansfield, so far as it can be fairly construed to go beyond the views here expressed, is not law.

"From what has been said, it follows that the charge in question, so far as it instructs the jury that there can be no abandonment where the transaction amounts to a gift, is correct, but that it is erroneous so far as it instructs them that leaving the claim, with a desire that a particular person may acquire it, might be construed to be a gift. The error is in the definition of a gift, rather than in that of an abandonment."

To the same effect see St. John v. Kidd, 26 Cal. 263, 272, supra; Morenhaut v. Wilson, 52 Cal. 263, 268; DeWolfskill v. Smith, 5 Cal.App. 175, 180, 89 P. 1001, and Dresser v. Allen, 25 Cal.App. 124, 142 P. 911.

[23] It might, perhaps, in view of these authorities be claimed that the language testified to as having been used by Del Giorgio could not amount to an expression of intention to abandon the claim but what he is really said to have done is to have made a gift of it to Mrs. Powers. Particularly is he quoted by Mrs. Powers and Mrs. Bliss as admitting, at the time case 79,266 was tried that he "gave" or had "turned it over" to the former. This construction of his language would not be particularly helpful to appellants' claim that Del Giorgio all the time intended to retain his interest in the mine; but, even if insisted on, it would not be by any means the necessary construction of what he is quoted as having originally said. If Mrs. Powers' testimony as to

what he actually did say in March 1931, already quoted by us, is adverted to, it will be seen that this is not the necessary result of it. To say "you may do as you like", and "I do not want anything more to do with it; as far as I am concerned you can have my whole interest in the mine" evinces no necessary intent to make any gift to her, but can quite as readily be construed as a mere expression of Del Giorgio's intention to relinquish the property and of his indifference as to whether Mrs. Powers did anything with it or not. There is nothing in this attitude inconsistent with abandonment so far as Del Giorgio was concerned, nor would his failure to use nice distinctions of terms at a later time when talking to Mrs. Powers and Mrs. Bliss about what had happened require that the court place a different construction on his earlier language.

[24, 25] If, on the other hand, we turn to Del Giorgio's account, it is true that he has testified that he arranged with Ussher to relocate the claim for him and if the trial court believed that he did in fact arrange for such relocation in the interest of Russo and himself, such conduct, whatever other legal effect it might or might not have, might at least have some tendency to show that he had not entertained in the preceding March the purpose of abandoning the property, although it would not be conclusive of what his intention at such previous time was. The trial court, however, was under no obligation to believe that Del Giorgio had any such arrangement with Ussher, or to accept his present account of what his intentions were. Myers v. Spooner, 55 Cal. 257, 260. Certainly there was nothing in Ussher's subsequent conduct as disclosed in case 79,266 that would have any tendency to corroborate Del Giorgio's account of this purported arrangement. We do not regard what Mrs. Powers stated to the deputy labor commissioners as of any controlling importance. The trial court probably thought it was a mere expedient on her part to escape the pressure placed upon her to pay the labor claims for the assessment work done in 1931. We cannot say that the circumstance that under such pressure she may have told them an untruth or signed statements that they prepared required the trial court to reject as unbelievable her testimony given before it at the trial of the instant case. How far the court was justified in accepting her account of what Del Giorgio had said to her about his abandonment of the claim was for it to decide. Neither would what she said to the deputy labor commissioners about being a joint venturer with Russo and Del Giorgio in itself shed any light on what the latter's intention was back in March of 1931, either about retaining his interest in the mine or abandoning it, but the utmost effect of what she said to the deputy commissioners or signed at their office would be to cast a certain amount of doubt on the correctness of the testimony given by her in the instant case on the stand about what Del Giorgio had said to her, and if the trial court still chose to believe her account of Del Giorgio's conversation with her it was within its rights in so doing. We think then, the trial court's finding of an abandonment of the mining claim by Del Giorgio, as well as by Russo, binding upon us.

[26] Treating ourselves, then, as thus bound by the trial court's finding that appellants abandoned this mining claim during or about March 1931, we must hold that it follows, as a matter of law, that when, in September of 1935, they commenced the present action they had no longer any interest in the property, and that the trial court must be sustained in so finding. This necessarily disposes of the case, since one who seeks to quiet title against another must recover, if at all, on the strength of his own title (Williams v. City of San Pedro et al., 153 Cal. 44, 45, 49, 94 P. 234; Sears v. Willard, 165 Cal. 12, 14, 130 P. 869), and having once, as far as they were concerned, abandoned the mine, appellants could not resuscitate any former rights that they may have had in it for the purpose of prosecuting this action.

We have seen that the abandonment of a mining claim may not be made in favor of another locator, but that if effective at all it is to make the interest abandoned publici juris. What the legal effect may be of such abandonment by those who hold the legal title to a mining claim in trust as to an undivided interest with one or more persons who are not parties to the abandonment, and whether or not such cestuy or cestuys retain their original rights, or may, by relocation such as Mrs. Powers has here attempted, reserve, resuscitate, renew or enlarge them to a complete ownership of the claim, are questions which we must leave to be decided when they arise. See, however, Strang v. Ryan, 46 Cal. 33. The trial court's judgment did not undertake to determine what respondent's present rights may be. It merely determined that appellants have none.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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27 Cal.App.2d 739

BERTOZZI v. SWISHER.

Civ. 10475.

District Court of Appeal, First District,

Division 1, California.

July 26, 1938.

1. Exemptions 🔑148

A debtor who claims the benefit of the exemption laws must bring himself within the spirit thereof, and the burden is upon the debtor to show that he is entitled to the exemption. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

2. Exemptions 🔑122

Allegations of defendant's affidavit to dissolve attachment of defendant's race horse, that the horse is defendant's sole means of support, that defendant is a laborer who habitually earns his living from money earned by racing the horse and that by the attachment defendant is precluded from training the horse and thereby deprived of earning a livelihood, were insufficient to establish an exemption under statute exempting two horses by the use of which a laborer habitually earns his living, since the horses so exempted are intended in good faith to be used as instruments of husbandry or labor and must be work horses. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

3. Exemptions 🔑1

The fundamental reason for the enactment of exemption laws is to protect a person from being reduced by financial misfortune to poverty. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

4. Exemptions 🔑122

Where defendant sought to dissolve attachment of his race horse, fact that he uncontradictedly alleged in his affidavit that he was a "laborer" who habitually earned his living by the use of the horse, in the language of the exemption statute, did not entitle defendant to exemption, since the allegation in the statutory language alleged a conclusion of law. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

5. Exemptions 🔑148

One who contends for an exemption must establish his right by evidence and facts.

6. Exemptions 🔑122

An affidavit which merely follows the language of the exemption statute states nothing more than a conclusion of law and proves nothing as regards affiant's right to exemption. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

7. Exemptions 🔑44

Under exemption statute providing for exemption of two horses, by the use of which a "cartman * * * or other laborer" habitually earns his living, every person who habitually earns his living by the use of a horse is not entitled to the exemption, but statute applies only to persons engaged in the designated or similar occupations, and the phrase "or other laborer" does not include the owner of a race horse. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

[Ed. Note.—For other definitions of "Other Laborer," see Words & Phrases.]

8. Statutes 🔑220

Where the exemption law had been twice completely re-enacted without the Legislature having made any attempt to make a material change in the wording of a portion thereof, the Legislature's omission to make such alteration amounted to a confirmation of the judicial construction theretofore placed upon the portion. Code Civ.Proc. § 690.7, as added by St.1935, p. 1968.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by A. Bertozzi against John Swisher to collect an alleged indebtedness, wherein plaintiff attached a race horse belonging to defendant. From an order dissolving the attachment, plaintiff appeals.

Reversed.

John E. Manders, of Redwood City, for appellant.

F. E. Hoffmann, of San Mateo, for respondent.

KNIGHT, Justice.

A race horse belonging to defendant was attached by plaintiff in an action to collect an alleged indebtedness of $1,841.20; and on defendant's motion the trial court dissolved the attachment upon the ground that under the provisions of section 690.7 of the Code of Civil Procedure, as added by St.1935, p. 1968, said horse was exempt from attachment. From the order so made plaintiff appeals.

The provisions of section 690.7 here involved provide for the following exemptions: "Two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living * * *." The sole evidence upon which the motion was heard and determined consisted of defendant's affidavit. It was therein averred that the writ was levied "upon a certain five-year old horse named 'Fritter Circle'; that said 'Fritter Circle' is a race horse and is the sole means of support of defendant * * *; that said defendant * * * is a laborer who habitually earns his living from the proceeds, purses and monies earned by racing said horse; that while said horse is held by virtue of said writ of attachment * * * said defendant is precluded from training said horse and keeping said horse in condition for racing purposes; that as a result thereof said defendant is deprived of earning a livelihood."

[1, 2] Under well-settled rules a debtor claiming the benefit of the exemption laws must bring himself within the spirit thereof; that is to say, the burden is upon him to show he is entitled to the exemption (Murphy v. Harris, 77 Cal. 194, 19 P. 377; People v. Thompson, 5 Cal.App.2d 655, 43 P.2d 600); and it is our conclusion that the facts averred in defendant's affidavit are legally insufficient to establish a case of exemption within the letter or the spirit of the statute.

[3] As said in many of the earlier decisions, some of which are hereinafter cited, the fundamental reason for the enactment of exemption laws is to protect a person, whatever his occupation might be, from being reduced by financial misfortune to abject poverty; therefore, to accomplish that end and in order to encourage industry and thrift, laws of that type have been framed which place beyond the reach of creditors not only the debtor's home but also various kinds of personal property reasonably necessary for him to have in order to earn a living for himself and his family; and from the beginning, among the exemptions thus granted are to be found certain domestic animals, including a limited number of horses. However, as pointed out by those earlier cases, horses so exempt are intended in good faith to be used as instruments of husbandry or labor (Burgess v. Everett, 9 Ohio St. 425; Hickok v. Thayer, 49 Vt. 372; Tishomingo Savings Institution v. Young, 87 Miss. 473, 40 So. 9, 3 L.R.A., N.S., 693, 112 Am.St.Rep. 454, 6 Ann.Cas. 776); in other words, they must be work horses (2 Freeman on Executions, 3d ed., sec. 229); and no case has been cited by defendant from any jurisdiction wherein it has been held that horses used solely for racing purposes are exempt; nor has he called to our attention any authority declaring even by implication that exemption laws should be so construed or extended.

Quite to the contrary, it would appear that whenever by way of analogy or argument the subject has been mentioned by the courts, it has been stated that it was never contemplated that race horses should come within the purview of such laws. See Tishomingo Savings Institution v. Young, supra, and cases cited therein; also notes thereto in 6 Ann.Cas. 779, and 3 L.R.A.,N.S., 693. Hence in Ruling Case Law (vol. 11, p. 520) the rule is stated as follows: "A statute exempting a horse by the use of which the debtor earns his living, or which is necessary to enable him to carry on his business or occupation, does not include a horse bought for speculative purposes, or one used solely for racing or for breeding purposes * * *"; and apparently such was the view taken by the Supreme Court of this state in the early case of Robert v. Adams, 38 Cal. 383, 99

Am.Dec. 413, in discussing the question then before it.

[4-6] Defendant contends, however, that because of the uncontradicted averment in his affidavit that he is a "laborer" who habitually earns his living by the use of said horse, he is entitled to the exemption under the literal wording of the statute, regardless of the fact that the horse is used by him exclusively for racing purposes. We are unable to sustain such contention. The prevailing rule is that "one who contends for an exemption must establish his right by evidence, by facts," and that an affidavit which merely follows the language of the statute states nothing more than a conclusion of law and proves nothing. Petrich v. Francis, 83 Cal.App. 72, 256 P. 444. Here no evidentiary facts are set forth in defendant's affidavit in support of the conclusion that he is a "laborer". True, he avers that while the horse is under attachment he is precluded from training and keeping him in condition for racing purposes, but nowhere does he aver that he personally performs any part of the work necessary to be done in training the animal. Consequently, for aught the affidavit shows, all such work is done by others; and as said in Brusie v. Griffith, 34 Cal. 302, 91 Am.Dec. 695, the words "other laborer" as used in the statute mean one who labors by and with the aid of the animal claimed as exempt.

[7] However, irrespective of any technical construction of the averments of said affidavit, it is quite obvious that under the authorities already cited and for the reasons hereinafter given, the Legislature never intended that the term "or other laborer" as used in said statute should be so broadened as to include the owner of a race horse, even though he personally performed the work of training the animal.

In this respect it is to be noted from said code section that every person who habitually earns his living by the use of a horse is not entitled to claim the animal as exempt; that the benefits of said section are bestowed only upon those engaged in the class of occupations enumerated therein, namely, "cartman, drayman, truckman, huckster, peddler, hackman, teamster". Therefore, under fixed rules of statutory construction, the term "or other laborer" immediately following the designation of such occupations, must be confined to persons performing the same class of labor as those designated. 25 Cor.Jur., p. 41. In other words, as held by the Supreme Court of the state of Nevada in construing an exemption statute copied practically verbatim from ours (page 534), "The legislature evidently intended that the construction to be given to these words [other laborer] should be confined to other laborers ejusdem generis with those named;" and continuing, the court went on to say: "Language, however general in its form, when used in connection with a particular subject-matter, must be presumed to be used in subordination to that matter, and should be construed and limited accordingly." And in that case the court denied the benefits of the statute to a livery stable keeper who personally performed the labor of driving his own team in carrying persons about town for a consideration, upon the ground that his occupation as livery stable keeper did not come within the general classification of those enumerated by the statute. Edgecomb v. His Creditors, 19 Nev. 149, 7 P. 533. Far stronger reasons exist for holding that exemption statutes were never intended to include the owner of horses used exclusively for professional racing, because, as suggested in Robert v. Adams, supra, if a contrary construction were to prevail, any person in failing circumstances might invest his whole estate in two valuable race horses, each worth ten or twenty thousand dollars, or more, and then by claiming them as exempt from execution defraud his creditors under the color of law to a large amount, and thus pervert the benevolent design of the statute. To the same general effect may be cited also the language used in the case of Mundell v. Hammond, 40 Vt. 641, which, like Robert v. Adams, supra, is quoted approvingly in Tishomingo Savings Institution v. Young, supra, wherein the court went on to say that the intent was not to give an absolute or unqualified right to keep two horses for every purpose and thereby allow under cover of exemption hundreds and thousands of dollars to be invested in fast or sporting horses.

[8] Finally, it may be stated that although the exemption law of this state, which originally was made part of the old Practice Act, has twice been completely reenacted, first, at the time of the adoption of the codes when it was embodied in section 690 of the Code of Civil Procedure, and again, in 1935, when the several subdivisions thereof were segregated and reenacted into separate code sections, on

neither of those subsequent occasions did the Legislature attempt to make any material change in the wording of that portion now constituting section 690.7. Therefore, its omission to make any material alteration therein may safely be taken as a confirmation by the Legislature of the judicial construction theretofore placed on said provisions by the early decisions, and as proof that it had no intention of widening the scope thereof so as to extend the benefits of the exemptions therein enumerated to every person, regardless of his occupational pursuit, who claimed that he was earning his living by the use of the property therein exempted.

The order is reversed.

We concur: TYLER, P. J.; CASHIN, J.

28 Cal.App.2d 31

PEOPLE v. FITCH.

Cr. 1632.

District Court of Appeal, Third District, California.

July 30, 1938.

Rehearing Denied Aug. 13, 1938.

Hearing Denied by Supreme Court Aug. 29, 1938.

1. Homicide 🔑244(1)

Evidence *held* to sustain conviction of murder in the second degree, on ground that the homicide was not perpetrated by the accused in the belief that he was in imminent danger of great bodily harm or the loss of his life.

2. Homicide 🔑332(2)

Every reasonable inference which might be drawn from the evidence should be resolved in support of verdict finding the accused guilty of murder in the second degree.

3. Homicide 🔑151(3)

Where the deliberate killing of deceased by accused was conclusively established, the accused had the burden of proving justification or excuse for the homicide. Pen.Code, § 1105.

4. Criminal law 🔑741(1), 742(1)

The jury is the sole judge of the credibility of witnesses and of the weight and sufficiency of the evidence.

5. Homicide 🔑188(7)

In murder prosecution wherein the accused raised the issue of self-defense and contended that the deceased was a large, powerful man with a violent temper and that the deceased was cruel and dangerous and had frequently threatened the accused, evidence of good reputation of the deceased for peace and quietness was admissible.

6. Homicide 🔑188(7)

Evidence of general good character of a decedent for peace and quietness is admissible in a homicide case when the accused relies on a plea of self-defense and attempts to justify the homicide on the ground that the accused knew the decedent to be a violent and dangerous man who had threatened accused's life and that the homicide was committed because of the accused's fear and belief that he was about to receive great bodily harm.

7. Homicide 🔑338(3)

In murder prosecution wherein self-defense was relied on as a defense, the sustaining of an objection to question relating to deceased's alleged cruel treatment of his cattle was not prejudicial where the accused had already testified relating to the deceased's treatment of his cattle.

8. Witnesses 🔑277(3)

In murder prosecution wherein the accused volunteered a statement in his examination in chief relating to alleged threat of the district attorney to select a jury which would hang the accused if he did not plead guilty, the permitting of cross-examination relating to the alleged threat was proper.

9. Homicide 🔑300(3)

In murder prosecution wherein defense was self-defense, an instruction that the mere cursing of accused and shaking of fists of the deceased at the accused at a distance of eight or nine feet from the accused was not sufficient upon which to justify the homicide and that the homicide was not warranted under the circumstances unless the deceased actually reached toward his hip pocket or did some overt act which accused believed placed accused in immediate danger of great bodily harm or death was proper, where the court properly defined the doctrine of self-defense.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Byron Lee Fitch was convicted of murder in the second degree, and he appeals.

Affirmed.

Hardin Barry, of Susanville, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The appellant shot and killed Earl C. Smith at Tule Lake in Modoc county, July 21, 1937. He was convicted of murder of the second degree.

It is contended the verdict and judgment are not supported by the evidence; that the court erred in receiving testimony of the good reputation of the deceased for peacefulness, and in giving to the jury certain instructions.

Earl C. Smith and the defendant's sister, Grace, were husband and wife. They owned seventy-three acres of farm land near Alturas upon which they had resided for five years. They had one son, who was thirteen years of age at the time of the homicide. Mr. Smith was a large man, six feet, two inches tall, and he weighed 200 pounds. The defendant was six feet tall, but he had been sick and he weighed only 117 pounds. The defendant resided in Pasadena. From year to year he had been accustomed to go north and live in the home of his sister, Grace, during farming seasons, helping to produce potatoes and onions in partnership with his brother-in-law. Domestic trouble arose between Mr. and Mrs. Smith. She procured a divorce from him in August, 1936. The defendant was a witness in her behalf at the divorce proceeding. The farm was divided between the spouses. Mrs. Smith was awarded the thirty-five acre tract containing the dwelling house and barn. Earl Smith built a cabin on his portion of the ranch about a quarter of a mile from his wife's house. He sometimes ate and slept in the house of his wife after the interlocutory decree was granted. In a voluntary statement made by the defendant and transcribed immediately after the shooting occurred, he said that Mr. Smith had not personally threatened him, although he thought that he did blame him for his domestic troubles. The defendant said in that regard:

"Well, we put in the crop [in 1936]. He and his wife had trouble, and he could not take the blame on his own shoulders, so he had to blame me.

"Q. Why would he blame you? A. Well, he thought I was the cause of their family trouble.

"Q. What would he actually say [to you] about this matter? A. He would not say anything to me about it, he would not say that I was the cause of the trouble, but he commenced to treat me that way, that I was not welcome, and I thought at that he blamed me for the trouble.

"Q. But he never at any time ever said anything directly to you about this trouble? A. No.

"Q. You are sure? A. Yes, sure."

In January, 1937, the defendant returned to his home in Pasadena. Thereafter John Fitch, the brother of the defendant, and his wife, came from Montana and lived in the home of their sister, Mrs. Smith, until after the homicide occurred. Their mother, Mrs. Clementine Fitch, a widow, who was seventy years of age, also came to live with her daughter.

The defendant returned to his sister's home at Tule Lake in July, 1937, a few days before the homicide occurred. The defendant, Mrs. Smith, and her son, the defendant's brother John and his wife, and their mother were then all living together in the Smith home. His brother John kept an automatic revolver in the bureau drawer in his room. The defendant slept upstairs in the east bedroom. He was then engaged in digging a potato pit in the field on his sister's premises, adjacent to the roadway, some distance from the house. After returning to Modoc county in July, 1937, the defendant did not see Earl Smith prior to the time of the shooting, for he was employed in the trucking business, hauling produce from Sacramento to Tule Lake. The defendant testified at the trial that after he returned from Pasadena he was told by his brother John that Earl Smith had threatened to kill him if he came back to the ranch. Having discovered his brother's revolver in the bureau drawer, the defendant secretly took it and carried it to the field with him for two days prior to the homicide. On the morning of the affray the defendant was told that Smith had returned to his cabin. About eight o'clock that morning the defendant again secretly took his brother's revolver from the bureau drawer, and concealing it inside the top of his right boot, he drove to the field to continue his work on the pit. Prior to the time of the shooting a neighbor lady called at the Smith home for some eggs. Mrs. Fitch, the mother of the defendant, rode with that lady across the field to the place where the defendant was working. At that point she left the machine and crossed a ditch to the locality of the potato cellar, and was present when the shooting occurred. Mrs. Smith and her brother John related circumstances of the affray which they claimed to have observed from a considerable distance. Otherwise, Mrs. Clementine Fitch and the defendant were the only eye-witnesses to the homicide.

The defendant testified that he secretly took his brother's revolver, as he had previously done, and tucked it into his boot top to defend himself against an anticipated attack by Earl Smith, who had threatened to kill him if he returned to the ranch. He said: "I knew I was going to be working alone, and I wanted to take the gun with me for protection." He drove his team of horses over to the potato cellar some time after eight o'clock the morning of July 21st, and began to work on the pit. His mother arrived soon thereafter. In a short time Earl Smith drove along the road in his truck and stopped adjacent to the pit. The defendant said that Smith got out of his truck and walked over to a point eight or ten feet from him and said:

"I warned you about coming back up here, you skinny ungrateful s-of-a-b. He kept abusing me, and I told him to go away, that I was not bothering him. Then he said I owed him four hundred eighty dollars and would give me four days to pay it. I said I did not owe him anything, but if I did, I would pay him. I told him to go and get in his truck and leave me alone. * * * He started away and walked off four or five steps and then turned around rapidly and called be a g— d— lying thief and s-of-a-b, and started back toward me. As he started back, he put his right hand to his hip pocket as if to pull out a gun and I pulled my gun and stopped him."

Continuing his description of the affray, the defendant testified:

"Q. What did Smith do when you fired the first shot? A. He put his left hand here. [Illustrating.]

"Q. Did you keep on shooting? A. Yes sir, I fired after that.

"Q. How far away from you was he? A. About eight or nine feet, something like that. * * *

"Q. Then what did he do? A. He turned his [left] shoulder around toward me. * * *

"Q. Did you keep on shooting? A. Yes sir.

"Q. What did Mr. Smith do next if anything? A. He turned around facing the north. * * *

"Q. Which side was towards you? A. His right side.

"Q. Were you still shooting? A. Yes, sir. * * *

"Q. Were you afraid of Earl Smith? A. Yes sir.

"Q. For what reason? A. Because he was a man with a violent temper.

"Q. * * * Were there any other reasons that you were afraid of him? A. Because he had threatened me."

The defendant emptied his revolver, firing six bullets into the body of Mr. Smith, who then fell to the ground and lay in the roadway, where he died. The defendant reloaded his revolver, and taking his mother he went back to the house, leaving the body of the deceased where it had fallen. He finally drove to town and surrendered to the officers, telling them he had killed Smith. Mr. Smith was not armed with a weapon.

The mother corroborated her son in his story of the shooting, except that she testified that as Smith approached he said, "'I will kill you' or 'I am going to get you,' * * * And put his hand back to his hip pocket." Both Mrs. Smith and the defendant's brother John testified they saw Smith approach the defendant, and that they observed him with his arm raised in a threatening position. Neither of them claimed to have actually seen the shots fired. Both of them testified to numerous previous threats on the part of Earl Smith to kill the defendant if he returned to the farm.

The defendant testified to no actual threats which the deceased made to him personally until the trial of the case, except that he said upon one occasion in 1936, when the defendant was nailing some boards on a chicken house in which their crop of onions had been stored, Smith objected to his work and defendant testified in that regard:

"He abused me and called me an ungrateful, skinny, s-of-a-b, and put his hands up * * * like he was going to put them around my neck, and said, 'I will break every bone in your skinny body.'"

On that occasion Mrs. Smith interfered, and Smith went away. During the trial of the case, for the first time, the defendant told of several occasions upon which he claimed Smith had threatened his life. For instance, he told of overhearing Smith the previous summer when he came home late, muttering to himself as he went upstairs in his own home threatening "to choke me and break every bone in my body. * * * I was afraid to go to sleep, I was afraid I would be killed in my sleep." The defendant testified that he then told the officers Roy Dycert and Mr. Kowolowski of those threats. These statements, however, were not corroborated at the trial. Kowolowski was not called as a witness. Mr. Dycert was interrogated as follows:

"Q. I will ask you to state if he came to see you and what he told you? A. Yes sir, he did. He came to me, and I believe the statement was, they seemed to be having trouble or difficulty, and if things were not cleared up between him and Smith, he was going to have to kill Smith.

"Q. He said he would have to kill Earl Smith? A. That is right.

"Q. Is that about all he said to you? A. There was a little more conversation. It was to the effect that Mr. Smith had been abusing the defendant, was why he was going to have to kill him."

Doctor John McKenny testified that he found three bullets which had entered the back of Mr. Smith near the left shoulder; that there was one bullet which entered the right thigh; one entered the right side of the chest beneath the tenth rib and followed an upward course penetrating the right lung and passing through "the top two chambers of the heart"; that the last-mentioned bullet caused his death. Another bullet plowed into the chest from the left side and came out "through the fleshy part of the [right] forearm below the elbow".

The attorney-general earnestly argues from the location of the six bullet wounds and from the medical expert testimony that the defendant first shot Mr. Smith three times in the back as he was walking away from him, and that he afterwards fired the remaining shots which took effect in the right thigh and in the chest as the deceased turned around or as he lay upon the ground after he had fallen as a result of the shots in his back. The evidence is susceptible of that construction. After a careful reading of the record, we are not satisfied he was first shot in the back. If we were perfectly satisfied of that fact there would be no difficulty in sustaining the verdict on the theory of a wanton and cowardly murder perpetrated without semblance of justification. We are of the opinion the problem is not so simple.

[1] It does, however, appear there is sufficient evidence to support the verdict and judgment of conviction.

If it be true that the deceased threatened to kill the defendant if he returned to the farm and that the defendant knew of that threat and armed himself for fear of bodily harm at his hands, and that the deceased approached him in anger, threatening and cursing him, and that he actually reached toward his hip pocket where a man usually carries a revolver, the defendant would have been justified in shooting his assailant and should have been acquitted on the doctrine of self-defense.

[2-4] Every reasonable inference which may be drawn from the evidence should be resolved in support of the verdict. The defendant was ably defended before a just and able judge, with a fair jury, in a community where all the interested parties have resided for years and are well known. The deliberate killing of the deceased by the defendant having been conclusively established, the burden of proving justification or excuse therefor rested on the defendant in the absence of evidence tending to show that it merely amounted to manslaughter or that it was justifiable or excusable. Sec. 1105, Pen.Code; 13 Cal.Jur. 733, sec. 102; People v. Jones, 160 Cal. 358, 370, 117 P. 176. The jurors were the sole judges of the credibility of the witnesses and of the weight and sufficiency of the evidence. They were not bound to accept the defendant's assertion that he acted in self-defense, believing that he was about to receive great bodily harm at the hands of the deceased, provided the circumstances of the case are reasonably susceptible of the theory of his guilt. Evidently the jurors did not believe the defendant acted in fear of imminent danger of his life or of great bodily harm. Their

verdict is irreconcilable with the theory of self-defense.

What are the circumstances justifying the jurors in rejecting the evidence of necessary self-defense on the part of the defendant? The following facts may be suggested in reply to that question: Immediately after the shooting occurred the defendant made a voluntary statement in which he failed to charge the deceased with having previously made threats against his life. He merely related the domestic trouble which existed between Mr. and Mrs. Smith, and said "he would not say anything to me about it, he would not say that I was the cause of the trouble, but he commenced to treat me that way". Then in reply to the direct question, "But he never at any time ever said anything directly to you about this trouble?" the defendant said "No." Then came the inquiry, "You are sure?" to which he replied, "Yes, sure." Those answers are inconsistent with the repeated statements made by the defendant at the trial to the effect that the deceased had personally threatened his life. Moreover, the defendant at the trial, for the first time, related an incident in which he claimed the deceased had threatened to "break every bone in my body", and he said "I told those things to [the officer] Mr. Dycert". Mr. Dycert was called as a witness and asked if the defendant had related those facts to him. In effect Dycert contradicted him, for he said the defendant merely told him "they seemed to be having trouble" and that "if things were not cleared up" he, the defendant, "was going to have to kill Smith". This indicated no fear of Smith, but rather a deliberate threat to kill him. The story of the threats on the part of the deceased, as related by the relatives of the defendant, are so uniform in language as to raise the presumption they were invented for the purpose of the defense.

The jury was warranted in concluding that if the defendant was really afraid of bodily harm at the hands of the deceased, he might easily have avoided a conflict by remaining at his home in Pasadena instead of returning to antagonize his brother-in-law. The fact that the defendant secretly armed himself with his brother's revolver and hid it in his boot leg is consistent with the previous threat which he made to Dycert that he would have to "kill Smith". It is reasonable to inquire why the defendant carefully avoided letting even the members of his own household know that he was arming himself with a loaded revolver.

The circumstances of the affray, as related by the defendant, seem quite unusual. The deceased had no weapon on his person. He was not armed with a revolver. The defendant said he had never known of his carrying a weapon. The deceased was a large, powerful man. If, in fact, he reached toward his hip pocket, it was a bluff, which he did not need to resort to. Why should a man who was so apparently superior to his antagonist in vigor and strength, pretend to reach for a revolver if he had purposely come to administer corporal punishment? Would a sensible man deliberately plan to openly and violently attack another in the very presence of his mother, whom he might expect to become a witness against him? Did the deceased actually threaten the defendant? Did this unarmed victim actually reach toward his pocket? These are questions the jury evidently resolved against the defendant.

The story of the actual shooting seems improbable. The defendant said that the deceased stopped his truck as he drove along the roadway and coming over to within eight or ten feet of where he and his mother stood, he said, "I warned you about coming back up here, you skinny, ungrateful s-of-a-b." Then he immediately added that "I owed him four hundred eighty dollars, and would give me four days to pay it." The defendant replied that "I did not owe him anything and I told him I would let the law settle it." The defendant said the deceased then turned around and started back toward his truck, but without further provocation he suddenly wheeled about and returned again, angrily cursing the defendant and calling him "a g— d— lying thief and a s-of-a-b". When he reached a point eight or ten feet away, the defendant says that he reached toward his hip pocket. The sudden change of purpose on the part of the deceased, as related by the defendant, seems strange. The attorney-general argues that the evidence conclusively shows that the defendant then deliberately shot the deceased three times in his back, as he was going toward his truck. Assuming, however, that the deceased did suddenly change his plan and that without apparent reason he did return to assail the defendant, was it reasonable or necessary that the defendant should have shot this unarmed man six times, three of which bullets took effect in his back? The defendant says that at his first shot the deceased raised his hand and placed it over his chest where he assumed the bullet hit him. If that be true, was the defendant warranted in firing five other bullets into his body? The defendant does not pretend that the deceased made any movement to procure a weapon or to assail him, after the first shot was fired. From the attitude and conduct of the deceased after that first fatal shot, it must have been apparent that he was so seriously disabled that he was then harmless. The defendant merely says that he continued to fire the other five shots because the deceased failed to fall to the ground. The conduct of the defendant was hardly that of a frightened man who shoots and kills an unarmed person in what he deems to be necessary self-defense.

The entire defense is founded on the asserted belief that the deceased was a violent and a dangerous man who had repeatedly threatened to kill the defendant if he returned to Tule Lake. The evidence of such pretended threats is related by the relatives of the defendant, except for one circumstance told by another close friend. If the decedent was a man of violent temper and of dangerous character, his neighbors should have been aware of that fact, for he had lived in that community for several years, and was well known. Yet nine witnesses testified that his general reputation for peaceableness was good. No character witness was sworn to rebut that fact. Moreover, the defendant himself testified he had never known of the deceased carrying a weapon.

We are of the opinion these and other circumstances disclosed by the record warranted the jury in rejecting the defense of killing the deceased in the belief that the accused was in imminent danger of great bodily harm or of the loss of his life. The verdict and judgment are adequately supported by the evidence.

[5] The court did not err in receiving evidence of the good reputation of the deceased for peace and quietness in rebuttal of the evidence first adduced by the defendant upon his plea of self-defense to the effect that the deceased was a large, powerful man with a violent temper; that he was cruel and dangerous and had frequently threatened to kill the defendant. The defendant first placed in issue the character of the deceased for peaceableness by contending that he was by nature a violent, brutal and dangerous man, and that he shot and killed him with knowledge and in fear of his dangerous character and previous threats, actually believing he was about to receive from him great bodily harm or that he might be killed. The defendant testified in that regard:

> "He was a man with a violent temper. * * * He had threatened me. * * * He was a big man, and strong, and I have been sick, and much smaller than he. * * I knew he was going to carry out his threats. * * * He threatened to get me if ever I came back. * * * He threatened to kill me, I carried a gun to keep him from doing it."

[6] Nine witnesses testified to the good reputation of the decedent for peace and quietness. No character witness was called by the defense to rebut that evidence. The authorities appear to be uniform in support of the rule admitting evidence of the general good character of the decedent for peace and quietness in a homicide case when the defendant relies on a plea of self-defense and attempts to justify the killing of his adversary on the ground that he knew him to be a violent and dangerous man who had threatened his life, and contending that he killed him from fear and in the belief that he was about to receive great bodily harm. People v. Howard, 112 Cal. 135, 140, 44 P. 464; 13 Cal.Jur. 693, sec. 77; 30 C.J. 172, sec. 395; 13 R.C.L. 916, sec. 219; Wharton on Homicide (3rd ed. sec. 270; De Woody v. State, 21 Ariz. 613, 193 P. 299; 25 C.L.R. 459. In 30 Corpus Juris, page 173, section 395, it is said:

> "Where defendant attempts to show that deceased was a violent and dangerous man, the state may properly offer proof of his peaceable and law-abiding character. * * If accused undertakes to justify the homicide on the ground of threats made by deceased it is held that the state may prove that the general character of deceased was that of an inoffensive man, and one not reasonably to be expected to execute the threats."

In 13 California Jurisprudence, page 693, section 77, it is said:

> "While the general rule is that the reputation of deceased cannot be given in evidence, an exception arises where the plea of self defense is interposed, and the evidence leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful

whether the defendant was justified in believing himself in imminent danger at the hands of deceased. * * *

"The prosecution may introduce evidence in rebuttal to sustain the good character of the deceased for peace and quietness, after it has been attacked by the defendant."

In the De Woody Case, supra, the court clearly explains the exception to the general rule with respect to the exclusion of testimony of the general reputation of the deceased for peaceableness, as follows (page 300):

"When the defense in a prosecution for homicide puts the character of the deceased as a quarrelsome, turbulent, or violent and dangerous man in issue, the state may support it by proofs that the deceased was a peaceable, quiet, and law-abiding man. Wharton on Homicide (3d Ed.) par. 269. Furthermore, the attack on the character of the deceased need not be direct as to his general reputation to render admissible evidence of his good character on the part of the state. It is immaterial in what manner the attack is made, whether by evidence of general reputation or by any other species of evidence. If the issue is raised by the defense at all, the state may meet it by evidence of general reputation as to good character. Wharton on Homicide (3d Ed.) par. 270; People v. Gallagher, 174 N.Y. 505, 66 N.E. 1113, affirming 75 App.Div. 39, 78 N.Y.S. 5. No general rule can be laid down for the determination of what will be held to constitute an attack by the defendant on the character of the deceased so as to 'open the door' for rebuttal on behalf of the state, but each case must be decided according to its own circumstances or facts. 13 R.C.L. par. 219, p. 917; Kelly v. People, 229 Ill. 81, 82 N.E. 198, 12 L.R.A.,N.S., 1169, 11 Ann.Cas. 226."

In the present case a direct attack was made upon the character of the deceased by the defendant. Under the circumstances of this case it was therefore proper to receive evidence of the general reputation of the deceased in that community for peace and quietness to aid the jury in determining who was the aggressor in the affray and to ascertain whether the defendant was warranted in shooting the deceased in the belief that he was in imminent danger of receiving great bodily harm at his hands.

[7] The defendant was not prejudiced by the sustaining of an objection to a question, "Q. Did you have any personal knowledge * * * of his beating his cows until they gave bloody milk and bawled for mercy?" That question was remote and cumulative. The defendant had already testified that, "I knew what he would do to me if he got hold of me. This man was mean and he was brutal. He had whipped his wife and blacked her eyes, and put her in bed, and has beat his cows until they gave bloody milk and bawled for mercy, and I knew it was best for a man like that not to get hold of me. * * * I knew what he would do to me from what I had seen him do."

[8] The court did not err in permitting the district attorney to cross-examine the defendant upon an alleged statement in which he asserted, on his examination in chief, with reference to the voluntary statement of the defendant made by him immediately after the shooting occurred. In accounting for the original statement which the defendant made he testified as follows:

"Well, after I talked to him [Mr. Wylie, the District Attorney], he insisted that I should plead guilty and be sentenced without a jury trial, and when I would not do that, he got pretty hot and told me he could pick a jury that would hang me."

On cross-examination, without objection from the defense, the following colloquy occurred:

"Q. Isn't this what I told you, that you had shot Mr. Smith in the back, and to save the county money and the expense of a trial, it would be best for you to plead guilty, and if you did not plead guilty, I would do my best to hang you? A. You said you had hung one and would hang another. * * * You said 'I have hung one and can hang another, and you can get twelve lawyers if you want them'."

There was no motion to strike out the preceding language. The district attorney then said:

"Q. I want to get that statement. You say I told you in my office, in the presence of those parties, that you had better plead guilty, and if you did not, I could pick a jury of twelve citizens of this county that would hang you."

To this question the defendant objected on the ground that it was incompetent and irrelevant. No objection was made that it was not proper cross-examination. The objection was overruled, and the defendant replied, "That is what he said".

The voluntary statement to which the defendant referred was introduced in evidence without objection. It was not contended that it was procured by intimidations or threats. The defendant volunteered the statement that the district attorney threatened to select a jury which would hang him if he did not plead guilty. The truthfulness of that statement was a material and proper subject of cross-examination. The evidence was already in the record. The reply to the last question was merely cumulative. It was not error to overrule the objection.

The court did not err in giving to the jury the following instruction:

"You are instructed, members of the jury, that the deceased, Earl C. Smith, had the right to go onto the land where defendant was working excavating for the potato cellar to attempt to collect money which the deceased believed was owing to him from the defendant, and if you find from the evidence in this case beyond a reasonable doubt that the deceased, Earl C. Smith, did do this, yet even if you further find from the evidence that the deceased did curse defendant and shake his hands or fists at defendant and abuse him by words, yet unless you believe from the evidence that the deceased reached for a gun or a weapon or attempted in some manner to do defendant great bodily harm or death which defendant had reason to believe therefrom would cause defendant great bodily harm or death, I instruct you that the defendant was not justified in invoking the right of self-defense. The law of self-defense being a law of necessity, the law requires that before it can be invoked the defendant, acting and thinking as a reasonable man under such circumstances would act and think, must have honestly believed that he was in immediate danger of great bodily harm or death at the hands of deceased before he would have the right to take the life of the deceased."

[9] The preceding instruction is not misleading. In effect it clearly charges the jury that the deceased had a right to go upon the land where the defendant was digging a potato pit to attempt to collect money which he believed the defendant owed him, and that if the jury believed from the evidence beyond a reasonable doubt that that was the purpose of the deceased, even though they also believed the deceased then cursed and abused the defendant and shook his fists at him, the defendant would not be justified in shooting and killing him, unless they also believed from the evidence "that the deceased reached for a gun or a weapon or attempted in some manner to do defendant great bodily harm or death which defendant had reason to believe therefrom would cause defendant great bodily harm or death".

In other words, the jury was merely told that the mere cursing of the defendant and the shaking of the fists of the deceased at a distance of eight or nine feet was not sufficient upon which to justify the shooting, and that, on the contrary, the defendant was not warranted in killing him under the circumstances of this case unless the deceased actually reached toward his hip pocket, or did some overt act which the defendant then believed placed him in immediate danger of great bodily harm or death. The court then correctly defined the doctrine of self-defense. There is no statement in the challenged instruction from which the jury could infer that the defendant was required to prove the overt acts of the deceased beyond a reasonable doubt. The jury was immediately thereafter instructed that:

"The defendant had a right, at the time of firing the fatal shots, to consider fully all acts of violence that he had seen the deceased commit, all threats that he had heard the deceased make, together with the disposition of the deceased as the defendant knew it, in order that the defendant might know or believe what the deceased meant or intended at the time the fatal shots were fired."

Then the jury was clearly and specifically instructed that "a person may lawfully take the life of another when the circumstances are sufficient to excite the fears of a reasonable man. * * * It is not necessary that the danger be actual, but * * * it is enough if it be apparent." The jury was further instructed that if the defendant believed that he was in immediate danger of great bodily harm, he had a right to act upon the appearances as they presented themselves and would be justified in killing his adversary, if the attack was sudden and the danger seemed imminent, even though the deceased was not in fact armed with a weapon, and that the defendant could so act, under such circumstances without first retreating or attempting to do so. The jury was fully and fairly instructed on every essential element of the charge of murder, and regarding the doctrine of self-defense.

We are of the opinion the record contains no prejudicial or reversible error.

The judgment is affirmed.

I concur: PULLEN, P. J.

27 Cal.App.2d 748

FRYE et al. v. PACIFIC FREIGHT LINES et al.

Civ. 11459.

District Court of Appeal, Second District, Division 1, California.

July 26, 1938.

Rehearing Denied Aug. 16, 1938.

Hearing Denied by Supreme Court Sept. 21, 1938.

1. New trial ⚿117(2)

Where a cause was submitted for decision on December 11, notice of intention to move for a new trial was served and filed on December 23, findings of fact and judgment were signed December 31, and notice of entry of judgment was served and filed January 8, an order purporting to grant a new trial was void for lack of jurisdiction, since notice of intention to move for new trial was not effective.

2. New trial ⚿117(2)

Proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose.

3. New trial ⚿117(2)

All issues must be determined and judgment entered before the trial court may entertain a motion for new trial.

4. New trial ⚿117(2)

Where a new trial was improperly granted because notice of intention to make motion was prematurely filed, defendants did not waive defect by failing to object, since litigants are entitled to a strict interpretation of the statute governing new trials.

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Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Flossie J. Frye and husband against the Pacific Freight Lines and another for damages for personal injuries. From an order granting a new trial after judgment for defendants, defendants appeal.

Reversed.

Chase, Barnes & Chase, Laurence A. Peters, and Thomas R. Suttner, all of Los Angeles, for appellants.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by defendants from an order granting plaintiffs a new trial. The action which was for damages for personal injuries was tried by the court without a jury. The decision of the court in favor of defendants was announced from the bench at the conclusion of the trial on December 11, 1936. On December 19, 1936, findings of fact and conclusions of law prepared by defendants was served on plaintiffs. Four days thereafter plaintiffs served and filed their notice of intention to move for a new trial, although the findings of fact and conclusions of law had not been signed at that time, and in fact were not signed until December 31, 1936. The motion for a new trial was granted upon the sole ground of newly discovered evidence. Defendants participated in the argument upon the motion for a new trial, at which time it was urged by defendants that the motion should be denied but that the case should be reopened for further evidence, under section 662 of the Code of Civil Procedure. Defendants' suggestion in this regard was rejected.

[1-3] Appellants contend that because no effective notice of intention to move for a new trial was ever given, that the trial court never acquired jurisdiction to pass upon the motion and that therefore the order which purported to grant a new trial was void. Inasmuch as the question is decisive of the appeal herein, it is important to note the following dates: Cause submitted for decision—December 11, 1936; Notice of intention to move for a new trial served and filed—December 23, 1936; Signing of findings of fact and judgment—December 31, 1936; Notice of entry of judgment served and filed—January 8, 1937.

It appears to be definitely settled, as the Supreme Court has repeatedly declared, "* * * that proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose." Root v. Daugherty, 201 Cal. 12, 14, 255 P. 181. And, as recently pointed out by the District Court of Appeal in a case somewhat analogous: "Appellant contends that the proceedings for a new trial were taken prematurely and that the trial court was without jurisdiction to entertain the motion for new trial prior to determination of all of the issues and the entry of judgment. In our opinion this contention must be sustained. Respondent has cited no authority which supports the action of the trial court here, and we know of none. On the contrary, the authorities clearly indicate that all of the issues must be determined and judgment must be entered before the trial court may entertain such motion. [Citing cases.]" Cloud v. State Terminal Co., Ltd., 22 Cal.App.2d 568, 570, 71 P.2d 600.

[4] It is argued by respondents that although the notice was premature, appellants waived the defect by a failure to object. The argument is without merit. With regard to the subject herein under consideration, the Supreme Court has declared: "In our opinion, litigants are entitled to a strict and certain interpretation of the statute governing appeals and new trials." Middleton v. Finney, 214 Cal. 523, 528, 6 P.2d 938, 940. The doctrine applies with equal force to both the plaintiff and the defendant.

For the foregoing reasons the order appealed from is reversed.

We concur: YORK, P. J.; WHITE, J.

DE ARYAN v. AKERS.*

Civ. 2063.

District Court of Appeal, Fourth District, California.

Aug. 2, 1938.

Hearing Granted by Supreme Court Sept. 29, 1938.

1. Licenses 🔑7(1)

Provisions of Retail Sales Tax Act prohibiting a retailer from advertising that tax will be assumed or absorbed by him or that it will not be added to selling price of property sold, or if added that it or any part thereof will be refunded, and providing that tax shall be collected by retailer from consumer in so far as it could be done, are invalid as purporting to require one person to pay the debt of another. St.1933, p. 2602, §§ 8, 8½.

2. Payment 🔑82(1)

Generally, one who has paid an illegal demand with full knowledge of its illegality cannot recover it back unless payment was necessary to protect his person or property, notwithstanding payment was made under protest.

3. Payment 🔑82(2)

If an illegal demand is made by one holding an official position with color of authority to enforce it and such demand operates as a restraint upon exercise of an undoubted right or privilege and in its enforcement there is no opportunity of contesting its validity, payment of demand in order to remove such restraint is "compulsory" and not "voluntary," notwithstanding exaction has been made in entire good faith and for benefit of public treasury but under color of statute subsequently declared unconstitutional.

[Ed. Note.—For other definitions of "Compulsory Payment" and "Voluntary Payment," see Words & Phrases.]

4. Evidence 🔑5(2)

The court will take judicial notice that attitude of retail seller of cardboard to collect retail sales tax has been practically universal among retailers in state in endeavoring to comply with what they have conceived to be their duties under Sales Tax Act. St. 1933, p. 2600, § 2(e).

5. Licenses 🔑34

A consumer's payment under protest of 1 cent sales tax to retailer on purchase of cardboard for 15 cents was not "voluntary" and hence was no obstacle to maintenance of action to recover the cent from retailer where seller of cardboard assumed position of state's mandatary for collection of tax and turning in to public treasury so much of cent exacted as was actually due the state. St.1933, p. 2602, §§ 8, 8½.

6. Courts 🔑125

The superior court had jurisdiction of action by consumer to recover 1 cent which consumer paid to retailer as sales tax on 15-cent purchase, since validity of Sales Tax Act in so far as it was susceptible of being construed as authorizing exaction of tax as such from the consumer was involved. St. 1933, p. 2602, §§ 8, 8½.

7. Constitutional law 🔑42

A consumer is entitled to question validity of any statutory authorization purporting to require him to pay an indebtedness due from the retailer to the state under Sales Tax Act. St.1933, p. 2602, §§ 8, 8½.

8. Licenses 🔑34

A consumer who paid 1 cent sales tax to retailer for purchase of cardboard for 15 cents, effect of which collection was to collect in guise of a tax nearly 7 per cent. on amount of sale, whereas only 3 per cent. was permitted by Sales Tax Act, could recover the 1 cent from retailer where retailer never made any claim that cent exacted was any part of price of cardboard and hence the cent amounted in his hands to money had and received for use and benefit of consumer. St.1933, p. 2602, §§ 8, 8½.

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*For subsequent opinion see 87 P.2d 695.

◆

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by C. Leon de Aryan against Roy O. Akers to recover one cent sales tax which plaintiff had paid to defendant in purchase of a 15-cent item. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

C. Leon de Aryan, in pro. per.

Roy O. Akers, in pro. per.

HAINES, Justice pro tem.

Respondent Roy O. Akers has, at all of the times mentioned in the pleadings, been engaged in the business of selling certain supplies at retail at San Diego, California, and has, therefore, been a "retailer" within the meaning of that term as used in paragraph (e) of section 2 of the California Retail Sales Act of 1933, St.1933, p. 2600; and has been licensed as such retailer by the state board of equalization. On February 1, 1937, Akers sold to appellant two sheets of four-ply cardboard for 15 cents, and exacted from him as a sales tax and as something which he was required by the state to exact, an additional one cent which appellant paid under protest and brings this action to recover. Respondent testified that in making his reports at quarterly intervals to the state board of equalization and paying the tax to it on his sales he pays a tax of 3 per cent on the sales made by him for the accounting period, but does not report each individual sale or the amount collected by him on account of the tax for each individual purchase. The effect of collecting on an individual 15-cent sale an entire cent, is to collect in guise of a tax nearly 7 per cent on the amount of the sale. Since only 3 per cent on the amount of the sale is accounted for to the state the result is that the retailer by virtue of the collection which he has thus made over and above the selling price, retains a profit on a sale of that size of practically 4 per cent, or more than the state gets from it, all at the actual expense of the purchaser. The case presents no disputed question of fact. Judgment was given for respondent in the trial court and from such judgment the present appeal is taken.

As was said in National Ice & Cold Storage Company of California v. Pacific Fruit Express Company, Cal.Sup., 79 P.2d 380, with respect to the act under consideration (page 381):

"As far as here is important, the title of that statute is: 'An act imposing a tax for the privilege of selling tangible personal property and for the privilege of furnishing, preparing or serving tangible personal property, providing for permits to retailers, [and] providing for the levying, assessing, collecting, paying and disposing of such tax.' In part, section 3 of the statute, p. 2600, provides that: 'For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers.' Various other excerpts from the statute which contain implications of the fact that the tax was intended to be levied upon retailers, are as follows: By section 9, p. 2602, it is provided that: 'The tax levied hereunder shall be a direct obligation of the retailer. * * * The retailer shall * * * make out a return. * * * The retailer shall deliver the return together with a remittance of the amount of the tax due to the office of the board.' By section 12, p. 2603, retailers are required to obtain permits to engage in the business of selling tangible personal property at retail. By section 13, p. 2604, a permit fee of $1 for each place of business of the retailer is required. By section 17, p. 2604, the Board of Equalization is authorized to make additional assessments of tax against a retailer. Section 18, p. 2605, authorizes the Board of Equalization to make arbitrary assessments of tax against a retailer. By section 20, p. 2605, a retailer is authorized to obtain a hearing for reassessment of taxes assessed against him. By section 23, p. 2606, refunds to retailers are authorized. Section 24, p. 2606, has reference to fraud or evasion of the tax on the part of a retailer. Section 26, p. 2607, provides for the collection of the tax from retailers; and the tax is declared a lien against his property. Section 27, p. 2609, requires retailers to keep records. Section 31, p. 2610, allows a retailer who has paid a tax under protest to bring an action for the recovery of such tax; and by section 32, p. 2611, penalties are provided for against retailers who may violate an order of the Board of Equalization.

"In opposition to that which may be termed the manifest intent of the foregoing provisions, the statute also contains certain other provisions, to wit: By section 4 thereof, p. 2600, it is provided that: 'In any case where tangible personal property is sold at retail under a contract made prior to the effective date of this act, which specifies and fixes the sale price and such sale is taxable under this act, the seller may add the tax imposed by this act to the sale price and collect it from the buyer.' Section 8½ of the statute, p. 2602, contains the declaration that: 'The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done.' By section 8 of the statute, p. 2602, a retailer is inhibited from advertising in any manner that the tax will be assumed or absorbed by him, 'or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded.'"

The earliest case that has been brought to our attention in which the act is discussed is Meyer Construction Company et al. v. Corbett, D.C., 7 F.Supp. 616, where the complainants, which were corporations having contracts with the federal government for the erection of certain structures for military purposes, sought to enjoin certain retailers from adding to the prices of materials sold to the complainants for such erections, the amount necessary to reimburse themselves for the sales tax payable to the state under the terms of the act upon such sales. The opinion alludes to the above-quoted provision of section 8½ of the act, p. 2602, to the effect that: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done * * *" and proceeds as follows (page 618):

"But that does not make the tax a consumer's tax. The provisions relating to the collection by the retailer from the consumer authorize or grant permission to the retailer to reimburse himself for the tax which he must pay to the state to be allowed to sell tangible personal property at retail. That this was the legislative intent is shown by section 9, paragraph 3 of the act [p. 2603], which reads:

"'The board may by regulation provide that the amount collected by the retailer from the consumer, in reimbursement of taxes imposed by this act, shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sale.'

"The Retail Sales Tax Act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer."

It had earlier in the opinion been said that the complainants were "not the proper parties to raise the issue that the United States of America will be hampered or impeded by the collection of a sales tax as here set forth". The court concluded by saying that no one of the complainants was a retailer of tangible personal property, and that no one of them, therefore, was a proper party to oppose state legislation on the ground of its repugnance to the Federal Constitution.

In People v. Herbert's of Los Angeles, Inc., 3 Cal.App.2d 482, 39 P.2d 829, the state had brought an action to enforce the payment of taxes claimed under the provisions of the act and the situation was that a café operator, having enjoyed a retail sales business providing gross receipts of a certain volume, had failed to pay the tax imposed by the act, and thereafter executed a common-law assignment for the benefit of creditors. The question was what preference should, in the circumstances, be given to the tax, and whether such tax was any basis for imposing a lien upon the property in the hands of the assignee. Judgment had been entered against the assignee requiring the payment of the tax from the assets in his hands. The judgment was, on appeal affirmed. The court held that the tax was one imposed on the retailer and not the consumer and that not only was this evident from the preamble of the act but from "declarations to that effect which recur frequently in the statute, as, for example, in sections 3, 9, 22, 24 and 27" (page 829). Reference was made to Meyer Construction Co. v. Corbett, supra, as, though not of binding authority in the state court, yet having persuasive force. The court referred to the provisions of section 8½, p. 2602, already alluded to, of the act and also to section 2, subdivision (f), pp. 2599, 2600, to the effect that: "for the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer". The court then went on to say:

"These provisions do, of course, indicate the source from which the retailer is authorized to reimburse himself for the tax which he must pay to the state 'for the privilege of selling tangible personal property at retail.' Section 3. The tax is upon the privilege of transacting the business. But we find in the statute nothing which imposes the tax upon the consumer, or which conflicts with the clearly expressed imposition of tax upon the retail dealer and upon him only. That in ultimate effect the fund out of which payment is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer."

A hearing in the case was denied by the Supreme Court.

The act was again under discussion in Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022, (hearing denied by Supreme Court). In that case the constitutionality of the statute was vigorously attacked but the imposition of the tax was held to be within the inherent power of the legislature, and specifically authorized, as well, by section 15 of article 13 of the State Constitution, authorizing the legislature to provide for the raising of revenue by any form of taxation not prohibited by the Constitution. Under the statute as it then stood the rate of the tax was 2½ per cent of the retailer's gross receipts. St.1933, p. 2600, § 3. By amendment it is, as we have noted, now 3 per cent. St.1935, p. 1252, § 3. The court, inter alia, said (page 1028):

"The appellants contend that the act is not uniform in its application for the reason that section 8½ thereof provides that, 'The tax hereby imposed shall be collected by the retailer *from the consumer in so far as the same can be done,'* and that since section 3 imposes a tax of 2½ per cent. only on the gross receipts of sales it is impossible for the retail merchant to collect the tax from the purchaser on a single item which sells for less than 40 cents for the reason that the tax would then amount to less than one cent, which is the smallest coin known to the American financial system. It is argued that a tax based on the gross income of all retail businesses is discriminatory, unjust and void for the reason that it results in penalizing the honest, efficient merchant who relies for success on his good will, established by maintaining a large volume of business on small margins of profit which profit may even fall below 2½ per cent. of his gross receipts, while others, who enjoy a small business with greater profit, may better afford to pay the tax. It is suggested the 15-cent stores, the drug stores, and other enterprises which depend for success upon numerous sales of small value, under the 'breakdown' system adopted by the California merchants, find it impossible to charge the tax to purchasers of numerous single articles of small value. It is asserted the overhead expense of maintaining a business for the sale of articles of small value is relatively greater than that of selling automobiles, machinery, household furniture, or equipment which normally return a much larger percentage of profit, and that the present tax system therefore favors the last-mentioned enterprises to the detriment of the former. We are of the opinion these distinctions furnish no reason for declaring the act unconstitutional for lack of uniform operation. The validity of an excise tax for the privilege of maintaining a business is not dependent on the various methods or conditions of every private enterprise."

And again: "The act is not unconstitutional because section 8½ thereof authorizes the retailer to collect the tax 'from the consumer *in so far as the same can be done.'* This act does not impose the tax on the consumer. The last-mentioned section merely authorizes the retail merchant to reimburse himself from the consumer in so far as it may be consistently done. He is not required to do so. He may waive that right."

The court went on to say that: "there is no provision of the act which prohibits merchants from increasing the selling price of their commodities so as to cover the tax or any other legitimate item of cost which will enable them to make a fair profit on sales. Good will may be acquired by gaining the reputation of selling goods for small profit, but that practice may be extended to an extreme limit so as to invite bankruptcy as a penalty for enjoying good will." The tax was further characterized as "an excise tax on the privilege of operating retail mercantile enterprises * * *."

In People v. Ventura Refining Co., 204 Cal. 286, 268 P. 347, 283 P. 60, in construing the cognate provisions of the Motor Vehicle Fuel License Tax Act (Stats.1923, p.

571, and amendatory acts) the Supreme Court said of these provisions, that (page 350): "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel and thus in effect collect the tax from the consumer." The Motor Vehicle Fuel License Tax Act was again under consideration in Rio Grande Oil Company v. Los Angeles, 6 Cal.App.2d 200, 44 P.2d 451 (hearing denied by Supreme Court), wherein a distributor of gasoline, having sold a quantity of the same to the city sought to recover the selling price inclusive of a separately stated item representing the amount of the tax, and the city defended on the ground that the effect would be to require the tax to be paid by the purchaser and that the municipality as purchaser could not be compelled to pay such a tax on fuel which it used for essential governmental purposes. The plaintiff nevertheless had judgment which was affirmed on appeal, the Appellate Court saying (page 452):

> "It is apparent from what has been said that the tax is levied against the distributor and not against the city or its property; that in the enforcement of the tax the state is exercising its sovereign power against the distributor, which power it is authorized to so use, and not against the city, and therefore the city's contention is not tenable."

In a companion case, Graham Bros., Inc. v. Los Angeles, 6 Cal.App.2d 203, 44 P.2d 452, decided by the same court on the same day wherein the same situation as concerning the Retail Sales Tax Act was involved as between the plaintiff and the city of Los Angeles, the same result was reached. In this case also the Supreme Court denied a hearing.

The Appellate Court for the Third District was, in M. G. West Co. v. Johnson, 20 Cal.App.2d 95, 66 P.2d 1211, confronted with a situation wherein the plaintiff and respondent had sold furniture to the Federal Land Bank of Berkeley and certain other fiscal agencies of the United States government, and paid under protest to the state the state sales tax upon its gross receipts from such sales and brought suit against the state treasurer to recover the amount so paid. The recovery had been allowed by the Superior Court of Sacramento county. The judgment was affirmed by the Appellate Court and a hearing in the Supreme Court denied. Under the applicable federal statute the institutions to which the furniture had been sold were exempt from state taxation. The Appellate Court said (page 99, 66 P.2d page 1213):

> "The fact that the seller and not the purchaser is required to report and make payment to the state has been held to be immaterial. The excise tax, as we have shown, is passed on and becomes an added burden upon the purchaser."

And again (page 102, 66 P.2d page 1214): "The impositions involved herein, claimed under the Sales Tax Act, supra, being an excise tax, and therefore a burden placed upon the privilege of doing business or preparing to do business by governmental agencies, constitute, to the extent of the tax, an unauthorized limitation of that privilege. The extent of the burden we think immaterial. We therefore conclude that, so far as the excise tax is concerned, calculated upon the price of office equipment purchased by the four banks, was and is invalid, and that the same having been paid under protest, the plaintiff is entitled to recover same."

In Standard Oil Co. v. Johnson, Cal.Sup., 76 P.2d 1184, the plaintiff sought to recover from the state treasurer the amounts paid by it under protest as state gasoline tax calculated on the gross receipts from sales of gasoline made within the limits of the Yosemite National Park, and a like action involving payments made under the Retail Sales Tax Act was involved in a companion case known as Yosemite Park & Curry Co. v. Johnson, Cal.Sup., 76 P.2d 1191, and was coincidentally decided. The gist of this litigation centered about the question whether the effect of the legislation whereby the state relinquished to the federal government for most purposes its jurisdiction of the area included within the national park reserved a right of taxation sufficiently broad to include the imposition of the gasoline tax and retail sales tax upon retailers making sales therein, and the reservations were held to be sufficiently broad for that purpose. However, the court said (page 1190):

> "A consideration of the taxing statutes shows that the tax is imposed respectively 'upon retailers,' section 3, Stats.1933, p. 2599, Stats.1935, p. 1252, and upon 'distributors' of gasoline, and it has so been held. Roth Drug, Inc., v. Johnson, supra, page 736, 57 P.2d 1022; People v. Herbert's of Los Angeles Inc., 3 Cal.App.2d 482, 39 P.2d 829; People v. Ventura Refining Co.,

supra, page 294, 268 P. 347, 283 P. 60; Rio Grande Oil Co. v. Los Angeles, 6 Cal. App.2d 200, 201, 44 P.2d 451. This language in the statutes will not, of course, be construed to disturb the classification of taxable subjects—persons, property and business. State Tax on Foreign-held Bonds, 15 Wall. 300, 82 U.S. 300, 319, 21 L.Ed. 179; 26 R.C.L. p. 34; 1 Cooley on Taxation, p. 172. Neither does it mean that the excise taxes imposed should be considered as a tax 'on persons' as a subject of taxation. The language of the statutes and the decisions still leaves the sales and gasoline taxes in the category of 'excises' or tax on business."

Western Lithograph Co. v. State Board of Equalization, Cal.Sup., 78 P.2d 731, again involved substantially the same question considered in M. G. West Co. v. Johnson, supra. The proceeding was one in mandamus to compel the state board of equalization to honor a claim for refund of sales taxes imposed pursuant to the Retail Sales Tax Act on account of certain sales made by the petitioner to the Bank of America Trust & Savings Association. The petitioner had included in its return for the quarter involved the gross amount received from the sales so made and had paid a tax of 3 per cent computed thereon. Its claim was that the purchaser is an instrumentality of the United States government and is not subject to any tax by the state except in the manner prescribed by section 5219, Revised Statutes (12 U.S.Code, sec. 548, 12 U.S.C.A. § 548), in conjunction with article 13, section 6, of the Constitution of California and the Bank and Corporation Franchise Act (Stats.1929, p. 19, as amended), which do not permit the imposition on the bank of a tax such as contemplated by the Retail Sales Tax Act. The court said (page 732): "We may assume, for the purposes of this proceeding, that if the tax imposed pursuant to the provisions of the State Retail Sales Tax Act is a tax on the consumer or purchaser of the goods sold, then the petitioner is entitled to the relief sought." For the purpose of the discussion the court further assumed that the bank as a national bank is an instrumentality of the United States and as such not subject to tax by the state except with the consent of and in the manner prescribed by congress. The court then discussed the principles on which rest the respective immunities of the federal government and its agencies and the state and its agencies from taxation by each other and the limitations upon such immunities and then proceeded to consider various provisions of the Retail Sales Tax Act, saying, inter alia:

"Section 3 of the Act, as amended, St. 1935, pp. 1252, 1253, provides: 'For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent * * * on and after July 1, 1935.' The term 'gross receipts' is defined, section 2 (f), as amended, St.1935, p. 1257, as the total amount of the sale price, with other inclusions not pertinent here; but also that 'for the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided that the retailer shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer'."

Thereafter the court proceeded as follows:

"The provisions of the act itself specifically are that the tax is laid upon and is a direct obligation of the retailer. Although the act furnishes the method by which the retailer may calculate reimbursement to himself by listing separately the amount of the tax from the sales price, nevertheless section 8½ and other provisions of the act specially negative any intent of the Legislature that the tax should be considered as a tax on the consumer. In every case in which that question has arisen under the California Retail Sales Tax Act, the courts have uniformly and consistently recognized the legislative intent and adhered to the construction that the tax is upon the retailer and not upon the consumer." (Citing cases hereinbefore discussed.) "Where the same question has arisen with reference to the administration and effect of similar provisions in the Motor Vehicle Fuel License Tax Act, St. 1923, p. 571, as amended, the same answer has uniformly been given." (Citing other cases hereinbefore discussed.)

"The law contemplates the imposing of the fixed rate of the tax on the gross receipts, as defined by the act, and not on the individual sale of merchandise; and the provision for a bookkeeping method to compute the amount of the tax separately from the sales price does not alter this fact."

In its further discussion the court went on to say:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales."

The court concluded that no right to recover the tax existed, thereby in effect overruling M. G. West Co. v. Johnson, of which it said:

"It is true that a petition in the West Company Case for a hearing in this court was denied. * * * It is likewise true that the denial of the petition for a hearing in this court after decision by the District Court of Appeal in the West Company Case was not 'an affirmative approval by this court of the propositions of law laid down in such opinion'."

We are thus brought back to the last decision of the Supreme Court affecting the act, from which we have already quoted, National Ice & Cold Storage Company of California v. Pacific Fruit Express Company. That action was brought for declaratory relief. The defendant had entered into a contract with the plaintiff extending over a period of years for supplying it with ice for cars used in both interstate and intrastate business. The contract had been in existence prior to the enactment of the Retail Sales Tax Act and fixed the prices at which ice was to be furnished. Upon the act becoming effective the plaintiff undertook to add to the price the tax imposed by the statute under the purported authority of section 4 of the act, p. 2600, and to obtain an adjudication that such additional amount was payable by the defendant. It was otherwise held both by the trial court and the Supreme Court, not upon the ground that the contract for the ice was antecedent to the enactment of the statute but upon the ground that it has become settled law that the tax is one imposed upon the retailer and not upon the consumer. The court did not question the legislature's power to impose such a tax upon the consumer but held that it could not in one breath impose it upon the retailer, who alone was made liable to the state for its payment, and then provide for his reimbursement at the expense of the consumer. Reasoning from the circumstances that the imposition is in terms made upon the retailer the court said:

"As a legal deduction, it has been judicially declared that a tax constitutes a debt owed by the person upon whom such tax has been legally imposed; and aside from equitable considerations (which here are not involved), to baldly legislate that without, and in the absence of either due or any process of law, a legal debt that is owed by one person must be paid by another, is quite at variance with ordinary notions of that which may be termed the administration of justice. *It therefore may be deemed concluded, that as far as may concern the particular or any other provision of the statute to which attention hereinbefore has been directed, which purports either directly or indirectly to authorize the retailer of 'tangible personal property' to collect from or to charge to the purchaser thereof the tax imposed upon its retailer 'for the privilege of selling' such property, is unconstitutional and consequently invalid.* But it should be noted that it is not because of any asserted or assumed lack of power in the state in the first instance to impose a tax on a purchaser of 'tangible personal property' that the invalidity of the several provisions of the statute is adjudged, but rather for the reason that having first directed the imposition of a tax on the retailer of such property, by the terms of the statute he is authorized to compel the purchaser to assume the retailer's direct liability in that regard, that the unconstitutionality of the several provisions of the statute is made to appear. However, such declaration of the law is not intended to indicate the illegality of authority which may be lodged in a retailer to 'pass on' the tax to a purchaser with the latter's consent thereto, either expressly or impliedly given. That sort of arrangement between interested parties in such a sale is not here involved."

[1] The court in terms decided that section 4 of the act is invalid as purporting to require one person to pay the debt of another and we are of the opinion that it necessarily follows from the language of

the decision above italicized that sections 8 and 8½ of the act, p. 2602, are for the same reason invalid and unenforcible.

We come then to the situation presented by the instant case. There was no legal inhibition against the addition by Akers, to the 15 cents which the parties treated as the price of the two sheets of cardboard bought by de Aryan, of one cent or any other amount that Akers might have chosen to ask for the cardboard. When Akers should have fixed his price it would have been de Aryan's privilege either to pay or to refuse to buy at that price. Indeed, it may, for the purposes of the present discussion, be conceded that had the denominations of available coins admitted doing so, Akers and de Aryan might, if they chose, have freely agreed that de Aryan should pay to Akers 15 cents for the cardboard and 4½ mills as a tax, and that Akers might then with propriety have collected the 15 cents, together with the 4½ mills and under the permission accorded him by the closing provision of subdivision (f) section 2 of the act, pp. 2599, 2600, have, in accounting to the state, paid it the 4½ mills as the tax computed upon the basis of a 15-cent sale. Akers did not, however, in fact take either of these courses. On the contrary, he represented to de Aryan that he was in effect deputized by the state to collect the 4½ mills for its use and benefit and that, since there was no coin small enough to enable that to be done without paying more, that he was required by the state to collect an entire cent additional to the 15 cents at which he chose to fix the price of the cardboard. Doubtless all this was done in good faith, but it was, nevertheless, done. Because he could not otherwise get the cardboard and because other merchants in the region selling cardboard were making the same representations and demands, de Aryan paid the exaction under protest. Thereupon he brought the instant action in the Superior Court to recover the final cent so paid. In disposing of his appeal to this court from the judgment given against him we must necessarily determine, (a) whether or not his payment of the additional cent may be regarded as in effect a voluntary payment, leaving him without standing to test in any court any question of illegality in its exaction; (b) if he is entitled to litigate the question anywhere, whether or not in the bringing of his suit in the Superior Court he was in the proper forum; and, (c) if both of the foregoing inquiries are to be resolved in his favor, then whether or not upon the merits of the case he is entitled to recover the cent sued for.

[2, 3] It is the general rule that one who has paid an illegal demand with full knowledge of its illegality cannot recover the same back unless the payment was necessary to protect his person or property, even though the payment was made under protest. 20 Cal.Jur. 965, and cases cited. On the other hand it is also the rule that: "If an illegal demand is made by one holding an official position with color of authority to enforce the same and such demand operates as a restraint upon the exercise of an undoubted right or privilege and in its enforcement there is no opportunity of contesting its validity, payment of the demand in order to remove such restraint is compulsory and not voluntary. Thus payment exacted by and made to an officer in excess of his legal fees in order to obtain the performance of an official duty to which the payor is entitled without such payment is compulsory and may be recovered back." 20 Cal.Jur. 968; 21 Cal. Jur. 963, and cases cited. This is true even though the exaction has been made in entire good faith and for the benefit of the public treasury but under color of a statute subsequently declared unconstitutional. Lewis v. San Francisco, 2 Cal.App. 112, 82 P. 1106; Trower v. City and County of San Francisco, 152 Cal. 479, 92 P. 1025, 15 L.R.A.,N.S., 183.

In denying the appellant relief the trial court relied, according to its memorandum, on Texas Company v. Harold, 228 Ala. 350, 153 So. 442, 92 A.L.R. 523. There the Texas Company had been engaged in the business of distributing gasoline and motor oils brought by it from without the state of Alabama but stored in its tanks at Mobile for sale and distribution to its customers. Taxes were imposed upon it for the privilege of making such sales of gasoline and motor oil at stated rates per gallon sold. The Texas Company raised its price per gallon for gasoline and motor oil in corresponding amounts and collected the increased prices on making sales. Harold, a customer engaged in operating service stations, paid the increased prices, which he testified that he was able in turn to pass on in making sales to his customers in respect of the gasoline but not in respect of the motor oil. The Texas Company paid the taxes to the county under protest. Subsequently the taxes were adjudged unconstitutional and the amounts thereof refunded to the Texas Company. Thereupon Harold sued it to recover the difference between what it had charged him for gasoline and oils after the tax had been imposed as compared with what he had paid for the same theretofore. Recovery was allowed by the trial court but judgment reversed on appeal by the Supreme Court, which said (page 444):

"This question is to be answered by a determination here of the further question, viz., Was the price paid by the plaintiff [referring to Harold who was plaintiff in the lower court] the composite price to be paid at all events for the gasoline and oil? In other words, Was the item of tax absorbed in a total price to be paid at all events for the gasoline?

"The plaintiff, it is true, was allowed over the objection and exception of the defendant to state in terms that he paid the tax to the defendant, but this statement was only a conclusion of the plaintiff, which his testimony, as well as the other evidence in the case, showed was erroneous. * * *

"If the tax was absorbed in the total price to be paid at all events, then it would follow, as we see it, that the plaintiff has no right to the money sued for. In other words, if the price charged the plaintiff for the gas was placed at such figures as to take care of, or absorb the tax, and was to be paid at all events as the selling price of the gas and oil, the plaintiff is without remedy. His position would be no different than that of any other purchaser of goods who has to pay therefor a price, increased by the seller to take care of tariff or other taxes. We take it, in such a case, if the tariff or tax should be held illegal, the purchaser would not have a remedy against the seller to recover the amount of tariff or tax figured by the seller in fixing the price of the commodity."

The Alabama Supreme Court then went on to hold that such was the situation in the case before it and therefore that Harold had no legitimate grievance.

[4, 5] It seems clear to us that Texas Company v. Harold involved a different situation from the one with which we are here confronted. In the instant case Akers was assuming the position of the state's mandatary for collecting this tax and turning in to the public treasury so much of the cent exacted by him as was actually due the state. In other words, he claimed to be acting not only by the authority but under the compulsion of the Retail Sales Tax Act pursuant to the purported inhibitions and requirements of sections 8 and 8½ thereof. While it may be true that de Aryan was not compelled to buy cardboard of him, the fact is nevertheless one of sufficient public notoriety to invoke our judicial notice that Akers' attitude has been practically universal among retailers in this state in endeavoring to comply with what they have conceived to be their duties under the act. So that, for practical purposes, we may consider that de Aryan would have had to submit either to the exaction on Akers' part or to a like one elsewhere if he wanted cardboard. The exaction being thus made under color of public authority we do not think that de Aryan's payment of it under protest is any obstacle to his maintaining, in a proper tribunal, an action to recover it. A case in point, so far as that question is concerned, is Wayne County Produce Co. v. Duffy-Mott Co., Inc., 244 N.Y. 351, 155 N.E. 669, decided by Chief Judge Cardozo. There the plaintiff had bought from the defendant certain sweet cider and been charged for it a price stated to be 14½ cents per gallon, subject to a stated discount, plus the manufacturer's war tax of 10 per cent, which was to be paid in full without discount. After the tax had thus been collected and paid over by the seller of the cider to the federal government a court ruling was made that sales of sweet cider were subject to no tax. Thereupon the seller recovered the tax paid from the government and the buyer brought suit to recover it from the seller. The court said:

"We think the plaintiff must prevail. This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N.Y. 359. This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise. The form of the transaction was not thoughtless or accidental. It was deliberate and purposed."

[6, 7] We have reached the further conclusion that the Superior Court was the proper forum for bringing the action. Indeed, by reason of the small amount sued for it could be such only if the legality of a tax is involved. There has, of course, been some suggestion in the argument that the attack made on the particular exaction complained of goes to the validity of the Retail Sales Tax Act as a whole. Whatever may, in that respect, be appellant's position, we think that the validity of the tax as an excise tax on the retailer's right to engage in making sales is, in view of the decisions, no longer open to question. We do agree, however, that the legality of the attempt to exact the tax, as a tax, from an unwilling consumer is involved in the instant case and that section 8½ of the act though in the Roth Drug Case, supra, described as permissive, purports to require the retailer to make such an exaction wherever possible. We think that the question involving the legality of the incidence of the tax is in that respect a question involving the legality of the tax, though not as a tax upon the retailer. This action certainly does involve the legality of using the tax under the authority purported to be given by the express terms of section 8½ of the act and under the purported sanction of section 8 of the act for exacting its amount, specifically *as a tax,* from the consumer. The validity of the act in so far as it is susceptible of being construed as authorizing the exaction of the tax as such from the consumer is therefore indubitably here involved. We think that this case is therein distinguished from Meyer Construction Co. v. Corbett, supra, wherein, as we saw, the consumer was held not to be entitled to raise the question of the constitutionality of the tax because it is a tax upon the retailer. The consumer is entitled to question the validity of any statutory authorization purporting to require him to pay an indebtedness due from the retailer to the state. In the circumstances we hold that the Superior Court had jurisdiction of the action and therefore that jurisdiction exists to entertain the appeal.

[8] We think that the third and final inquiry is, in effect, answered by the conclusion reached by the Supreme Court in National Ice & Cold Storage Company of California v. Pacific Fruit Express Company, supra. Akers has disclaimed in attitude and argument any intention to have exacted the additional cent under discussion otherwise than as he was compelled to do so by the terms of the act, and he made his attitude in that respect known to de Aryan at the time the cent was exacted. Therein this case is distinguished from Texas Company v. Harold, supra. Those provisions of the act purporting to require the retailer to exact anything from the consumer as a tax have now been adjudged invalid and their invalidity, though declared in general terms by the Supreme Court in the National Ice & Cold Storage Company Case, goes in our opinion to all the purported inhibitions and requirements of sections 8 and 8½ of the act. Akers never did make any claim that the final cent which he exacted was any part of the price of the cardboard sold. In these circumstances it amounts, in his hands, to money had and received for the use and benefit of de Aryan.

The judgment is reversed and the Superior Court is directed to enter judgment in de Aryan's favor against Akers for one cent.

We concur: BARNARD, P. J.; MARKS, J.

28 Cal.App.2d 8

In re PIERCE'S ESTATE.

PIERCE et al. v. PIERCE et al.

Civ. 6098.

District Court of Appeal, Third District, California.

July 28, 1938.

Rehearing Denied Aug. 27, 1938.

Hearing Denied by Supreme Court Sept. 26, 1938.

1. **Executors and administrators** 🔑76

Where testator devised estate to adopted son and five brothers, son disappeared and executor, who was brother of testator, was appointed trustee for the son, judgment creditor of son levied on son's interest in the estate, whereupon executor obtained order authorizing investment of estate's funds for purchase of son's interest at execution sale, order was not void as exceeding court's jurisdiction, since court has general authority to order funds to be invested. Probate Code, § 584.

2. Executors and administrators 🔑82

The probate court is authorized to make an order concerning the investment of the funds of an estate, and any objection to the particular manner of exercising that power must be taken advantage of by direct appeal and not by collateral attack. Probate Code, § 584.

3. Executors and administrators 🔑82

Where testator devised estate to adopted son and five brothers, son disappeared and executor, who was brother of testator, was appointed trustee for son, judgment creditor of son levied on son's interest in estate, whereupon executor obtained order authorizing investment of estate's funds for purchase of son's interest at execution sale, and all interested persons except missing son consented to the order, executor could not claim order was void on ground that no notice of hearing of the petition had been given, since the executor's notice as such and individually sufficed as notice in his capacity as trustee. Probate Code, § 1200.

4. Appearance 🔑20

When parties appear in litigation, notice need not be shown.

5. Estoppel 🔑91(1)

Where testator devised estate to adopted son and five brothers, son disappeared and executor, who was brother of testator, was appointed trustee for son, judgment creditor of son levied on son's interest in estate, whereupon executor obtained order authorizing investment of estate's funds for purchase of son's interest at execution sale, and trustee as such had knowledge of the investment at the time it was made and waited 2½ years before objecting thereto, trustee was estopped from asserting invalidity of order authorizing investment. Probate Code, § 584.

6. Execution 🔑260

A sale by the sheriff on execution against a judgment debtor has the same force and effect as a conveyance by the judgment debtor.

7. Executors and administrators 🔑303(2)

Where testator devised estate to adopted son and five brothers, son disappeared and executor, who was brother of testator, was appointed trustee for son, judgment creditor of son levied on son's interest in estate, whereupon executor obtained order authorizing investment of estate's funds for purchase of son's interest at execution sale, and executor did so purchase for the estate, court properly distributed the property to the purchaser at execution sale. Probate Code, §§ 1000, 1010, 1020.

8. Executors and administrators 🔑303(2)

The Probate Code provision that any executor, heir, assignee, etc., may petition the court to distribute a legacy, devise, or share of the estate to the person entitled thereto, indicates legislative intent that an assignee, grantee, or successor in interest has a right to petition for and have distributed to him that portion of the estate to which he is entitled. Probate Code, §§ 1000, 1010, 1020.

9. Executors and administrators 🔑303(2)

An assignment of an interest in an estate by a legatee or devisee entitles the transferee to distribution. Probate Code, §§ 1000, 1010, 1020.

10. Appeal and error 🔑151(3)

An executor is not a "party aggrieved" by a decree determining the proportions in which various claimants shall share in the residue of an estate, and therefore executor was not a proper party to appeal from a decree of distribution.

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding in the matter of the estate of Walter V. Pierce, deceased, by L. B. Pierce, individually and as executor of the last will and testament of the deceased, and as trustee of the estate of Walter Phylipps Pierce, a missing person, against H. A. Pierce and others. From a decree of distribution under the will of the deceased, plaintiffs appeal.

Affirmed.

Johnson & Curtright, of Sacramento, for appellants.

Albert L. Wagner, of Sacramento, R. G. Lenske, of Portland, Or., Sullivan, Roche & Johnson, of San Francisco, and Butler, Van Dyke & Harris, Henry & Bedeau, and E. G. Funke, all of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Walter V. Pierce died leaving a will naming L. B. Pierce, a brother, as executor, wherein he devised and bequeathed all of his estate, except two minor bequests, to Walter Phylipps Pierce, an adopted son, and his five brothers.

During the course of the probate proceedings Walter Phylipps Pierce, the adopted son, disappeared and was never located, and in the matter of Walter Phylipps Pierce, a missing person, L. B. Pierce was appointed trustee. Walter Phylipps Pierce had become indebted in a considerable sum and a creditor began suit against him and recovered a judgment for approximately $800. In due course, execution was issued upon the judgment against Walter Phylipps Pierce, and was levied upon his interest in the estate of Walter V. Pierce, deceased. In the meantime it appearing that Walter Phylipps Pierce could not be present to satisfy the judgment or to purchase the property at the execution sale, and that the interest of the missing heir was about to pass into the hands of a stranger to the estate, a petition was filed by L. B. Pierce, the executor, for authority to invest funds of the estate. The petition recited that some two or three years prior thereto Walter Phylipps Pierce disappeared and had not since been located or heard from; that the sheriff of Sacramento county was about to sell at public auction the interest of Walter Phylipps Pierce to satisfy a certain judgment and asked the court to authorize the executor in behalf of the estate to expend funds of the estate, not to exceed $800, in the purchase of the interest of Walter Phylipps Pierce. All of the heirs, legatees and devisees except Walter Phylipps Pierce, the missing heir, consented to the making of the order. Accordingly the order was made authorizing the executor to expend not more than $800.00 from the funds of the estate to purchase at execution sale the interest of Walter Phylipps Pierce in the estate.

Thereafter, in December, 1934, an order was made settling and approving the second account and report of the executor, which account showed a disbursement of $808.77 paid the sheriff at the execution sale, and in the report was a recital of the transaction as above set forth, which account and report was settled and approved by the probate court.

Thereafter the estate continued in the usual course until October 14, 1936, at which time the executor filed his petition for final distribution. After due notice, the court made its order for final distribution, setting over to the missing heir 1/36 of the residue of the estate and the remainder in equal proportions to the five surviving brothers.

Subsequent thereto, appellant, in his capacity as trustee for the missing heir (who was also, it will be recalled, the executor who had filed the petition in the probate proceeding asking the court to protect the estate by purchasing the interest of the missing heir at the execution sale, and who also filed a second account and report containing a detailed statement of the purchase and also his final account and petition for distribution) filed a petition asking the court to set aside its order for final distribution on the ground that the court was attempting to distribute the property in a manner not authorized by the will, and was acting in excess of its jurisdiction. This order was denied.

Shortly thereafter and in October, 1937, L. B. Pierce, as trustee, moved for an order vacating and setting aside the order authorizing the executor to invest funds of the estate made June 4, 1934. This motion was also denied. Thereupon an appeal was taken by L. B. Pierce personally, L. B. Pierce as executor, and L. B. Pierce as trustee of Walter Phylipps Pierce, a missing heir from that part of the decree of distribution distributing to L. B. Pierce as such trustee a 1/36 interest in the estate, and to each of the five brothers 7/36 of the estate.

[1, 2] The first point presented by appellant is that the order authorizing the investment of funds to purchase the interest of the missing heir was void. It may be true as pointed out by appellant, the Probate Code does not specifically sanction the investment of funds of an estate for the purchase of real property, but it does confer upon the court the general authority to order funds invested, so the order here made was not in excess of jurisdiction. Section 584 of the Probate Code provides: "* * * On the petition of the executor * * * and upon good cause shown therefor, the court may order any money * * * invested." Being authorized to make an order concerning the investment of the funds of the estate any objection to the particular manner of exercising that power must be taken advantage of by direct appeal and not by collat-

eral attack. Appellants have here overlooked the distinction between an excess of jurisdiction and a lack of jurisdiction.

[3, 4] Appellants also claim the order to invest was void because no notice of hearing of the petition was given as required by section 1200 of the Probate Code, and therefore the court never acquired jurisdiction to make the order. The appellant raising this point was himself the moving party invoking the court's jurisdiction, ready to accept its benefits. In Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122, the plaintiff was there held to have been estopped because she had accepted the benefits of a decree and later attempted to attack the validity of such decree. Furthermore all persons interested in the making of the order to authorize the investment, except the missing heir, consented to the court making such an order. When parties appear no notice is necessary to be shown. McLeran v. Shartzer, 5 Cal. 70, 63 Am.Dec. 84.

It is true that Walter Phylipps Pierce, the missing heir, was not present nor had personal notice, but his duly appointed and acting trustee, the appellant herein, was the moving party, although moving in the capacity of executor rather than as trustee. We do not believe that this court should entertain the objection as to lack of notice where the same individual, filling two offices, purports to act only in one, but in fact acting for the benefit of the entire estate and the ward in petitioning for the order.

[5] Furthermore the petitioner as trustee of the missing heir had knowledge of the investment at the time it was made, and now having waited two and one-half years he should not at this late day be heard to object to the making of the order. Estate of Seaman, 51 Cal.App. 409, 196 P. 928; Norton v. Atchison, etc., R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am.St.Rep. 198.

[6-7] The sale by the sheriff on an execution against a judgment debtor has the same force and effect as a conveyance by the judgment debtor, and the court was correct in distributing the property to the purchaser at the execution sale.

Authority for the distribution of an estate in that manner is found in sections 1000, 1010 and 1020 of the Probate Code. 11B Cal.Jur. 776. Section 1000 of the Probate Code reads in part as follows: "At any time after the lapse of four months from the issuing of letters testamentary or of administration, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court to distribute a legacy, devise or share of the estate, or any portion thereof, to any person entitled thereto. * * *"

[8] Somewhat similar language is found in section 1020 of the Probate Code, and having in mind the rule that requires the giving of meaning and effect to the language of the Code, the intention of the legislature clearly appears that an assignee, grantee or successor in interest had the right to petition for, and have distributed to him that portion of the estate to which he was entitled.

[9] Such an assignment of an interest by a legatee or a devisee entitles the transferee to distribution. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026.

In that case the court held that distribution could be made to an assignee of a devisee or legatee where the assignment was admitted, but where the assignment was challenged distribution should properly be made as in the will provided, the decree not precluding the assignee from establishing his rights in an independent proceeding. Here no attack was made upon the assignment nor the terms of the decree of distribution until after its entry.

Furthermore, under the facts of the instant case, the estate itself was the purchaser of the interest, and the assets of the absent heir then became the assets of the estate. It would certainly appear that the probate court, distributing the assets of the estate regardless of what they might be, their origin would have the right and power to distribute the same to the persons entitled thereto.

Appellants also object to the holding that the execution sale divested the missing heir of his entire interest in the estate. It is to be recalled that it was the entire interest of Walter Phylipps Pierce that was sold at execution. Everything to which he was entitled under the will in that estate was sold. At the moment the estate became vested by virtue of its purchase of the interest of Walter Phylipps Pierce, he ceased to be an heir or devisee of the estate.

[10] This appeal, from a portion of the decree of distribution, is taken by L. B. Pierce, as executor of the last will and testament of Walter V. Pierce, deceased. An executor is not a party aggrieved by a decree determining the proportions in which various claimants shall share in the residue. The executor, therefore, is not properly an appellant in this proceeding. Estate of Ross, 179 Cal. 358, 182 P. 303; Estate of Williams, 122 Cal. 76, 54 P. 386.

We believe the foregoing disposes of the principal points urged by appellant. It is our conclusion that the court had jurisdiction to make the order complained of, and that the decree of distribution was to the proper parties, and that the judgment appealed from should be affirmed. It is so ordered.

I concur: THOMPSON, J.

27 Cal.App.2d 761

BECKER et al. v. MUNKELT et al.

Civ. 1990.

District Court of Appeal, Fourth District, California.

July 26, 1938.

1. Deposits in court ⚷9

Under agreement by parties to suit involving title to land that land should be leased and mortgaged, and that rent should be paid to third person and applied to mortgage and that balance of rental remaining after discharge of mortgage should be paid into court to be disposed of in accordance with order or judgment directing disposal thereof, and in absence of such order or judgment that money should be paid into court pending final determination of case, intention of parties was to protect their interests in proceeds of land rather than to provide for application of funds to any specific purpose, and that fund should be impounded by court by which disposition was to be finally determined.

2. Deposits in court ⚷9

Under agreement by parties to suit involving title to land that land should be leased and mortgaged, and that balance of proceeds of rentals remaining after discharge of mortgage should be paid into court pending final determination of case, the ownership of the balance of proceeds remaining after discharge of mortgage was governed by general rules of law, in absence of other provision in agreement.

3. Mortgages ⚷199(1)

Where parties to suit, involving title to land which plaintiff had conveyed to defendant by instrument ultimately adjudged to be an equitable mortgage, agreed that land should be leased and mortgaged and that proceeds of land after discharge of mortgage should be paid into court pending final determination of suit, balance of rentals remaining after discharge of mortgage which had been paid before decree of foreclosure of equitable mortgage was entered, and before land was sold under such decree, belonged to mortgagor and not to mortgagee in absence of special agreement to contrary.

4. Deposits in court ⚷11

Where, during pendency of suit involving title to land which plaintiff had conveyed to defendant by instrument ultimately adjudged to be an equitable mortgage of which foreclosure was decreed, parties agreed that balance of rentals remaining after discharge of mortgage executed during pendency of suit should be paid into court, and disposed of according to determination of court, and in its decree of foreclosure of equitable mortgage, court put matter over for further consideration, court had jurisdiction to complete matter by providing for disposal of rentals after entry of decree of foreclosure.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Myrtle Becker and another against Glenn H. Munkelt and others to require reconveyance of realty. From an order directing payment to plaintiffs of the sum of $1,188.34 which had been deposited with the clerk of the court, the defendants appeal.

Affirmed.

Hamilton, Lindley & Higgins and Glenn H. Munkelt, all of San Diego, for appellants.

Harry W. Horton, of El Centro, for respondents.

BARNARD, Presiding Justice.

The defendants have appealed from an order directing the payment to the plaintiffs of the sum of $1,188.34 which had been deposited with the clerk of the court.

The plaintiffs conveyed by grant deed a certain parcel of real property to the defendants as trustees for certain creditors of the plaintiff husband. Thereafter, and on April 22, 1929, the plaintiffs brought this action alleging that this deed had been obtained by fraudulent representations and seeking a reconveyance of the property. The defendants filed an answer supporting the validity of the conveyance and their right to sell the property for the purposes of the trust. After a hearing the court filed findings and an interlocutory judgment, finding in effect that this deed was an equitable mortgage given to secure debts but that the property involved was not to be sold until certain other securities had been exhausted; that it could not be told without a further hearing whether such other securities had been exhausted; and that the defendants could not foreclose said deed as a mortgage until they had filed a report and accounting showing the necessity for such procedure. The interlocutory judgment followed these findings and provided that the defendants, as trustees, should file an account and report within a designated time and naming the time within which objections thereto might be filed.

A report and accounting was filed and no objection being made the court filed its findings of fact, conclusions of law and a decree of foreclosure. After finding that a sale of the property was necessary the court found that while this action was pending and on July 26, 1929, the parties to the action entered into a written agreement which provided that the property in question should be leased, that it should be mortgaged to one Cline for the purpose of paying off certain delinquent taxes, that the rent should be paid to a certain title company and applied by it upon the principal and interest of the Cline mortgage until the same was paid in full, that the title company should have the right to use any portion of said rental "to pay before delinquency any taxes that may be hereafter accrued upon said premises during the life and term of said mortgage to the said H. C. Cline", and that after said mortgage had been paid any balance of said rental remaining in the hands of the title company should be paid into court in this action "or shall be paid in accordance with such final order or judgment in said cause as shall direct and control the payment of said money. If no order or judgment shall have been made directing the disposition of the said money then the same shall be paid into said court pending a final determination of said case." The court then found that after the Cline mortgage was paid the title company had paid into court $1,188.34 "to be disposed of by the court in accordance with the provisions" of said agreement; that no taxes had been paid on this property after the commencement of this action except such as were paid pursuant to said agreement; and that certain taxes amounting to about $1,300 "are now unpaid". The usual decree of foreclosure and order of sale was entered on April 25, 1934, and in addition thereto the decree provided as follows:

"Wherefore, it is ordered, adjudged and decreed that said sum of $1,188.34 shall not now be applied in payment of taxes nor paid to the plaintiff, but shall be held by the Clerk of this Court, pending final determination of this cause, in accordance with and subject to the rights of the parties under that certain agreement, hereinabove referred to, under which said sum was accumulated, and the law and facts applicable thereto."

The last-quoted provision was included in the decree of foreclosure in response to an application made by the defendants to have the $1,188.34 then in the hands of the clerk paid upon delinquent taxes on this property and objections thereto filed by the plaintiffs. The property was sold on June 1, 1934, and was purchased by the defendants as such trustees. On April 19, 1935, the plaintiffs gave notice that they would move the court for an order directing that said money in the hands of the clerk be paid over to them. Shortly thereafter the defendants filed notice of a motion seeking to have this money applied in payment of the taxes which were then delinquent. A hearing was had on both of these motions resulting in this order from which the defendants have appealed.

The appellants' main contention is that the court erred in ordering this money paid to the plaintiffs instead of applying it upon the taxes. In making this claim they virtually admit that they are not entitled to this money except as they are given the right to benefit therefrom by the agreement of July 26, 1929. That agreement contained no provision for the use of the rental money in the payment of taxes which might accrue after the Cline mortgage was paid, but the right given to the title company to use such funds in the payment of taxes was expressly limited to those which had accrued "during the life and term of said mortgage". The agreement provided, so far as is material here, that any balance remaining in the hands of the title company after that mortgage was paid should be turned over to the court "pending a final determination" of this case. The appellants argue that the parties intended by these portions of the agreement to provide that when the case was finally decided the money so deposited should follow the land as disposed of by the judgment of the court and that in the event the appellants were found to have any interest in the land these funds should be used to pay the taxes which had accrued upon the land during the litigation.

[1] We are unable to agree with this interpretation of the terms of this agreement. There is no ambiguity in the language used with respect to the payment of taxes and the only provision in that regard is that the title company might use these funds to pay taxes which had accrued before the Cline mortgage was paid. There is no provision for the use of such rental money in the payment of taxes after any remaining balance has been turned over to the court. The only provision then applying is that the money shall be held by the court "pending a final determination of said case". In discovering what was meant by this phrase it must be kept in mind that at the time the agreement was entered into the respective parties were claiming title to the land as owners, legal or equitable. It would seem that their intention must have been to protect their respective interests in the proceeds of the land, rather than to provide for the application of the funds to any specific purpose. We think that the parties intended to and did, by the clause in question, provide that the money should be thus impounded and that the court, as a part of the final determination of the case, should decide who was entitled to it.

That the court thus interpreted this clause fully appears from the provision included in the decree of foreclosure to the effect that said money should neither be applied to the payment of taxes nor paid to the respondents at that time, but should be held "pending a final determination of this case in accordance with and subject to the rights of the parties" under the agreement under which the sum was accumulated "and the law and facts applicable thereto". The appellants argue that it appears from this language that the court considered that the cause would not be fully determined until the year of redemption had expired, but intended thereby, and did, decide that the money should go to the respondents if they redeemed the land, otherwise to be used to pay the taxes for the benefit of the purchaser at the foreclosure sale. In our opinion, this language clearly indicates that the court was not then deciding this phase of the case but was expressly leaving it for determination at a future time, when it was to be considered in accordance with the rights of the parties under the agreement and the law and facts applicable thereto.

[2, 3] The matter was later considered and, we think, correctly determined. Under the terms of the agreement the court was to determine who was entitled to the money under the law and the facts. The agreement having not otherwise specifically provided, the ownership of the money was governed by general rules of law. The money had come from rents which were paid before a decree of foreclosure was entered and before the land was sold under such a decree. Under such circumstances, and in the absence of a special agreement, it belonged to the mortgagor and not to the mortgagee. Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am.St.Rep. 201; Shoobert v. De Motta, 112 Cal. 215, 44 P. 487, 53 Am.St.Rep. 207; First Nat. Trust & Savings Bank v. Staley, 219 Cal. 225, 25 P.2d 982; Casey v. Doherty, 116 Cal.App. 42, 2 P.2d 495.

[4] The only other point raised is that the court was without jurisdiction to make the order appealed from. The contention is that since the decree of foreclosure was a final judgment the court exhausted its jurisdiction in entering the same. The matter in question arose out of and in connection with the issues in this equity case, and the parties had expressly submitted it to the court for determination. In its decree of foreclosure the court expressly put the matter over for further consideration, no final judgment with respect to that phase of the case was then entered, and the court had jurisdiction to complete the matter by deciding the remaining question.

The judgment is affirmed.

I concur: MARKS, J.

28 Cal.App.2d 23

FINTEL v. ENGELBRECHT.

Civ. 11826.

District Court of Appeal, Second District, Division 2, California.

July 29, 1938.

1. Appeal and error ⚿1060(2)

In an automobile collision action, the questioning by defendant's counsel, who contended that an insurance company had settled with defendant and had no right to assign its claim against defendant to plaintiff for purpose of suit, of plaintiff's attorney who was also attorney for the insurance company, relating to whether the attorney knew that the insurance company paid defendant certain damages, was not ground for reversal, whether or not the contention of defendant's counsel was proper, where the court sustained objection to the question which was apparently asked in good faith, and gave jury a written instruction to disregard the matter.

2. Appeal and error ⚿204(1)

Objection to questions answered by a witness could not be made for the first time on appeal.

3. New trial ⚿29

The overruling of motion for new trial on ground that the questioning by the defendant's counsel, who claimed that an insurance company had settled with the defendant and therefore had no right to assign its claim against defendant to the plaintiff for purpose of suit, of plaintiff's attorney who was also attorney for the insurance company, relating to whether the attorney knew that the insurance company had paid the defendant certain damages, was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by C. H. Fintel against Winifred Engelbrecht for injuries sustained in an automobile collision. From an adverse judgment, the plaintiff appeals.

Affirmed.

Bruce Murchison, of Los Angeles (Mort L. Clopton, of Los Angeles, of counsel), for appellant.

Parker & Stanbury, Harry D. Parker and Vernon W. Hunt, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment for damages in another automobile collision case. The first contention of the plaintiff (appellant) is that the deliberate misconduct of defendant's counsel prevented plaintiff from having a fair trial in the following respects: Cross-examination: "Q. (By Mr. Parker) Now, did you [Murchison] as their attorney—you knew did you not that they paid Mrs. Engelbrecht [defendant] in this case $275 damages? Mr. Clopton: I object to that as entirely improper, incompetent, irrelevant and immaterial and I am going to ask the court to cite the asking of that question as misconduct in the record—Mr. Parker: Well, if the court please, I submit he is representing himself as attorney for this company and that his company settled with Mrs. Engelbrecht and that was part of the settlement, that the insurance company claim was through; I believe it is material and relevant to the issues in this case. (Argument.) The Court: Objection sustained; motion to cite misconduct denied. The jury instructed to disregard all statements recently made by counsel in respect to assignments of claims."

[1] The trial court must have concluded that the question was asked in good faith, it being the contention of counsel for defendant that he should be permitted to show that Mr. Murchison's client, the Hardware Mutual Casualty Company, had made a settlement of all its own claims when it settled with Mrs. Engelbrecht, and therefore had no right to assign its claim to appellant for the purpose of this law suit. Whether or not this was a proper contention, he thought it was. The jury was instructed to disregard the matter, and later the jury was given a written instruction to disregard the matter. Later the trial court denied a motion for a new trial based upon said ground. Owing to all of said circumstances we are of the view that the jury could not have been influenced or prejudiced by such interrogation, and that it would not be proper to reverse the judgment on this ground.

[2] It is the next contention of the plaintiff that the trial court's rulings upon objections to evidence prejudiced appellant's rights as follows: "The Court: Overruled; you may answer. Q. By Mr. Parker: In Wisconsin, do they require any examination for you to obtain a license? A. Yes, they have a driver's li-

cense and that is all. Q. Beg pardon? A. We get a driver's license. Q. But in order to obtain that license, are you required to take any kind of an examination? A. No, sir, we do not." It will be observed that there was no objection made to the questions which were answered, and the plaintiff cannot be heard for the first time to raise the objection in this court. 2 Cal.Jur. 805; Durkee v. Chino Land & W. Co., 151 Cal. 561, 91 P. 389; Code Civ. Proc. § 646.

[3] Finally, the plaintiff contends that the trial court's order denying a new trial constituted an abuse of discretion and prejudicial error. On the motion for new trial the same question with regard to the insurance company was raised and argued. The motion for new trial was overruled by the court, and we see no abuse of discretion.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 1

PEOPLE v. EKSTRAND.

Cr. 3111.

District Court of Appeal, Appellate District, Division 1, California.

July 28, 1938.

1. Criminal law 🔑561(1)

In a criminal case the law requires that regardless of whether the evidence be direct or circumstantial or a combination of both it must be sufficient to establish defendant's guilt beyond a reasonable doubt.

2. Criminal law 🔑1159(3)

On appeal in a criminal case the jury's findings on disputable fact questions whether supported by direct or circumstantial evidence, or both, must be given full faith and credit, and it is only where as a matter of law there is no legal evidence supporting the charge that a reviewing court may disturb a verdict.

3. Criminal law 🔑1144(13)

On appeal in a criminal case the reviewing court must assume, in favor of the verdict, the existence of every fact which the jury could have reasonably deduced from the evidence and thus determine whether defendant's guilt is deducible therefrom.

4. Criminal law 🔑1159(2)

The question for the reviewing court to pass on in a criminal case is whether there were facts before the jury to justify the inference of guilt.

5. Criminal law 🔑1144(13)

The reviewing court must view the evidence in a criminal case in the light most favorable to the prosecution.

6. Criminal law 🔑308

Where evidence is open to two equally reasonable hypotheses, one pointing toward guilt and the other toward innocence, the jury must adopt that hypothesis tending toward innocence, but the two hypotheses must be equally reasonable.

7. Robbery 🔑24(1)

Evidence was sufficient to sustain conviction for attempted robbery and robbery of employee and operator of bookmaking agency.

8. Weapons 🔑8

A "deadly weapon" within statutes prohibiting the carrying of deadly weapons does not cease to be such by becoming temporarily inefficient, and its essential character is not changed even by dismemberment if the parts may be easily assembled so as to become effective.

[Ed. Note.—For other definitions of "Deadly Weapon," see Words & Phrases.]

9. Robbery 🔑24(1)

In prosecution for attempted robbery and robbery, evidence that defendant was armed with a 22-caliber long rifle was sufficient for jury to find that defendant was armed with a "deadly weapon" within statute defining that term as a pistol, revolver, or any other firearm, notwithstanding rifle was loaded with a 22-short caliber cartridge, where there was testimony that though it would be possible for rifle to misfire, if firing pin hit rim of cartridge it would probably discharge. Pen.Code, §§ 969c, 1168, subd. 2; St.1923, p. 695, as amended.

Appeal from Superior Court, Los Angeles County; Kenneth C. Newell, Judge.

Leo Ekstrand, Jr., was convicted of attempted robbery and of robbery, and he appeals.

Affirmed.

Fred G. Sutherland, of Pasadena, and William W. Larsen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an information filed by the district attorney, defendant was accused in counts I and II of the crimes of attempted robbery, while in count III he was charged with the offense of robbery. Count I was dismissed on motion of the district attorney, and after the entry of not guilty pleas to counts II and III, a trial was had thereon before a jury, resulting in the conviction of appellant on both counts and a finding by the jury that at the time of the commission of each offense the defendant was armed with a deadly weapon. From the judgments pronounced, and from the order denying defendant's motion for a new trial, this appeal is taken.

[1-4] Appellant's first contention is grounded upon the claim that the evidence is insufficient to support the verdicts, in that it falls short of the degree of proof necessary to identify appellant as the perpetrator of the crimes. We have given considerable time and care to this contention, because the evidence is entirely circumstantial. The law makes no distinction in the degree of proof required in either direct or circumstantial evidence, but requires that regardless of whether the evidence be direct or circumstantial, or a combination of both, it must be sufficient to establish the guilt of the defendant beyond a reasonable doubt. However, on appeal, the findings of a jury upon disputable questions of fact, whether supported by direct or circumstantial evidence, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may disturb a verdict. The rule upon an appeal in a criminal case is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether or not the guilt of the defendant is deducible therefrom. The question for this court to pass upon is whether there were facts before the jury to justify the inference of guilt. People v. Tom Woo, 181 Cal. 315, 184 P. 389.

[5-7] Viewing the evidence, as this court must, in the light most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), such testimony can be epitomized as follows: During the months of September, October, November and December, 1937, Vernon R. Haggard was operating a bookmaking office on the third floor of a building in Pasadena. On November 18, 1937, at five o'clock in the evening, and while Walter Coburn, an employee of the bookmaking agency, was counting the cash, a robber appeared, wearing a hood, and in the presence of Coburn and one Tim Donovan pointed a rifle at Mr. Coburn and took from him about $83 in cash, then disappearing and running down the stairs. Fifteen days later, on the 3rd of December, 1937, at approximately the same hour, Mr. Haggard was present in the same premises with Tim Donovan. Again a robber appeared, wearing a hood and carrying a rifle, and demanded the cash, whereupon, Donovan said, "Why, you haven't got guts enough to pull that trigger," and grabbed the barrel of the gun and struck the intruder. There was a struggle and the robber escaped, running downstairs, but leaving his gun.

The defendant, Leo Ekstrand, Jr., was a patron of this particular bookmaking office, where he had from time to time placed bets and had been seen by the aforesaid Haggard, Coburn and Donovan, as well as by the janitor of the building, about the place from time to time for approximately thirty days before the first hold-up. The defendant was known to the attachés of the bookmaking establishment as Mr. Nash, under which name he placed his bets. On the day of the second robbery, December 3, according to the testimony of Mr. Haggard, the defendant was on the premises from about 1:30 or 2 o'clock until about ten minutes to five, and was wearing that day a pair of white corduroy trousers, a pinkish polo shirt and some heavy canvas shoes. About 5:30 p. m. on December 3, approximately twenty minutes after the second robbery, the janitor found a box in the men's toilet on the third floor, containing a pair of cords and a polo shirt identified by the witness Haggard as being those worn by defendant earlier in the day. The defendant admitted that the clothes found in the toilet belonged to him, but claimed that he had loaned them to a man known to him only as "Dick". The gun which was taken away from the robber by Donovan was admittedly a rifle borrowed by defendant on November 1 from one Kenneth Hudson. The defendant himself admitted that the rifle left at the scene of the crime was a rifle he had borrowed from Hudson, but claimed that the rifle was also loaned to this man "Dick". The shoes worn by the robber were described by the witness Haggard as being of unusual appearance and similar to those usually worn by the defendant when he was in and about the bookmaking establishment; while the box containing the clothes found in the toilet was admitted by the defendant to be one which had contained a vacuum cleaner purchased by the mother of defendant. There was further testimony by the janitor that he had seen the defendant carrying a similar box into the building before the first hold-up, and that about ten minutes after the first hold-up he saw the defendant running very fast down stairs from the third floor and out of the building, carrying a similar box. It was testified that the rifle used in the first hold-up on November 18 looked like the same rifle used in the hold-up of December 3, and the hood worn by the robber at the second hold-up was testified to as being similar to the one seen on the perpetrator of the previous robbery. The defendant, following his arrest, made conflicting statements to the police, and while testifying in his own behalf at the trial admitted that he had borrowed the aforesaid rifle from Kenneth Hudson, but claimed that about 1:30 p. m. on the day of the original robbery he loaned the gun, together with some clothes, to a man named "Dick", whose last name or address he did not know, and whom he had known only slightly for some time prior to the robbery. The eye witnesses to each robbery testified that the perpetrator thereof was about the height and build of the defendant. At all times the defendant denied his guilt, and presented evidence to support his alibi defense. Several inconsistencies appear in statements made by the defendant to the police officers, as well as in his testimony.

From the foregoing facts testified to at the trial, if believed by the jury, they were entitled to infer that the defendant was a customer of this bookmaking agency; that he was about the place a great deal, and was familiar with the time and manner of counting the cash, as well as the time the customers left and the place was closed; that he borrowed the rifle from Kenneth Hudson and that a few days before the 18th of November, which was the date of the first robbery, he brought some dark clothes and the rifle, in the vacuum cleaner box, down to the bookmaking establishment; that a few minutes before closing time on November 18, he went to the men's toilet on the third floor, changed his clothes, took the rifle, and accomplished the hold-up; and that he then went back into the men's toilet, put the clothes, the rifle and the money back into the vacuum cleaner box, and carrying the same, dashed bareheaded down the stairs and out of the building. With reference to the second robbery, the foregoing facts would justify the jury in concluding that the defendant again stayed about the bookmaking establishment until approximately closing time, and went again into the wash room and changed his clothes; but that his plans miscarried thereafter due to the fact that the witness Donovan engaged the defendant in a scuffle and took his gun away from him, whereupon the defendant rushed from the building, not having time to go to the wash room and obtain his other clothes; because it will be remembered that the vacuum cleaner box of clothes in the wash room was found by the janitor approximately twenty minutes after the second hold-up. The jury was not required to believe the defendant's story about having loaned these clothes and gun to some mythical person known to him only as "Dick". While it is true that when evidence is open to two equally reasonable hypotheses, one pointing toward guilt and the other toward innocence, the jury must adopt that hypothesis tending toward innocence; nevertheless it will be noted that the two hypotheses must be equally reasonable. A mere reading of the facts of this case as narrated above leaves no room for doubt that the only reasonable hypothesis tended to prove the defendant's guilt, and that from the evidence the jury was justified in acting upon that theory.

[8, 9] Finally, appellant urges that the finding of the jury that he was armed with a deadly weapon at the time of the commission of both offenses should be set

aside, on the ground that the rifle used in the hold-ups was loaded with a cartridge which did not fit that particular gun. In connection with this issue, the evidence shows that the rifle was a "22-caliber long", while the caliber of the cartridge found therein was a "22-short". There is testimony in the record that at the time the witness Donovan challenged the robber to pull the trigger on the rifle, the latter did so, but the weapon did not discharge. There is also testimony that while it would be possible for the rifle with the aforesaid "short" caliber cartridge in it to misfire, nevertheless, if the firing pin hit the rim of the cartridge it would probably discharge.

In this connection, appellant asserts that although any firearm, including a rifle, is enumerated in the Penal Code, section 969c and section 1168, subdivision 2, as being a dangerous or deadly weapon, such a weapon as the rifle herein referred to is not enumerated as a deadly weapon in the Deadly Weapon Act (Stats. 1923, p. 695, and amendments thereto), and that the last-named act, being an attempt to legislate upon the entire deadly weapon field, is controlling over the Penal Code sections and entirely supersedes them.

A deadly weapon is defined generally as one "capable of producing death, or of inflicting great bodily injury" (2 Words and Phrases, First Series, pp. 1853, 1854), while in subdivision 2 of section 1168 of the Penal Code, the term "deadly weapon" as used therein is defined to include any instrument or weapon of the kind commonly known as "* * * pistol, revolver or any other firearm". In People v. Williams, 100 Cal.App. 149, 279 P. 1040, and cases therein cited, it is held to be the well settled rule that a deadly weapon does not cease to be such by becoming temporarily inefficient, and that its essential character is not changed even by dismemberment, if the parts may be easily assembled so as to become effective. In the case at bar it cannot therefore be said that the jury was not justified in concluding, from an examination of the rifle and the cartridge therein contained, together with the foregoing testimony, that the rifle was capable of firing such cartridge. It should also be here noted that section 969c of the Penal Code, which directs the pleading in the information of the fact that a defendant was armed at the time of the commission of an offense, and which section requires the jury to find upon that issue, provides that such fact shall be pleaded "whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of subdivision 2 of section 1168 of the Penal Code relating to 'Certain Minimum Penalties'". Clearly, subdivision 2 of section 1168 of the Penal Code, by its very language, "or any other firearm", includes a rifle of the type and character of the one here involved.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

PEOPLE v. HINES.*

Cr. 1641.

District Court of Appeal, Third District, California.

Aug. 8, 1938.

Hearing Granted by Supreme Court Sept. 1, 1938.

Constitutional law ⚷221

In prosecution of negro for murder, stipulated evidence, in support of challenge to panel and motion to quash venire, showing that over 7 per cent. of county's population were negroes who were qualified electors, many of whom possessed statutory qualifications entitling them to act as jurors and that no negro had ever been permitted to serve on a jury in county, showed a deliberate exclusion of negroes from service on juries in the county because of race and constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Pen.Code, § 1058; U.S.C.A. Const. Amend. 14.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Luther Hines was convicted of murder of the second degree, and he appeals.

Reversed and remanded.

Stephen P. Galvin, of Merced, for appellant.

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*For subsequent opinion see 86 P.2d 92.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, a negro, was convicted of murder of the second degree for shooting and killing a colored man. His challenge to the panel under the provisions of section 1058 of the Penal Code, on the ground that all negroes were excluded from the venire, contrary to the mandate of the Fourteenth Amendment of the Federal Constitution, U.S.C.A.Const. Amend. 14, was denied. A motion to quash the venire on the same ground was also denied. From the judgment and from an order overruling his motion for a new trial the defendant has appealed.

It is contended the verdict and judgment are not supported by the evidence; that the defendant was denied due process and equal protection of the law, and that he was not afforded a trial by an impartial jury, which privileges are guaranteed by Amendments 6 and 14 of the Constitution of the United States, U.S.C.A.Const. Amends. 6, 14.

The evidence is conflicting, but it satisfactorily shows that the defendant, a colored man, attended a party given by negroes at the Clayton ranch in Merced county on the evening of November 20, 1937. Many of the guests remained until early the following morning. During the progress of the party a quarrel occurred between two other negroes named Banks and Bailey, over a game of craps. In the course of the melee Banks cut Bailey with a knife, after which he fled and hid for a time in an adjoining cotton field. After midnight, Banks returned and entered the south room of the house. Soon thereafter, and about 1 o'clock on the morning following the affray, Hines reappeared with a revolver in his hand. He was very angry with Banks for cutting his friend Bailey. He cursed Banks in the vilest of language and threatened to shoot him saying, "He don't need to live, and cannot live." With his revolver in hand, he entered the kitchen where he was met by a colored woman who protested with him against shooting Banks. He brushed her aside and entered the south room, where he found Banks standing near the center of the floor. He deliberately shot him three times. One bullet struck his victim in the front right side of the abdomen. Another bullet struck him in the face, fracturing his jaw and lodging in the vertebrae in the back of his neck. Banks fell to the floor and subsequently died from the effect of his wounds.

The defendant fled from the state. He became a fugitive from justice. Finally he was arrested in Mississippi and was returned to California for trial. He pleaded self-defense, claiming that the deceased made an attack upon him with a knife, and that he shot him believing that he was then in imminent danger of being killed. Evidently the jury did not believe his story that the deceased assaulted him with a knife. They must have believed that armed with a loaded revolver, and threatening to shoot the deceased, the defendant deliberately hunted him up and killed him. The jury found the defendant guilty of murder of the second degree. From the judgment which was accordingly rendered and from an order denying defendant's motion for a new trial he has appealed.

The verdict and judgment are adequately supported by the evidence.

Upon the challenge to the panel and the motion to quash the venire, which were filed in writing, before the jury was sworn, evidence was adduced, from which it appears without conflict that all individuals of the negro race were excluded from the venire and from the jury regardless of their statutory qualifications as prescribed by section 198 of the Code of Civil Procedure. The district attorney stipulated to all of the facts offered by the defendant with relation to the exclusion of negroes from the venire and from the jury. No evidence was offered in rebuttal of the showing made by the defense. The stipulated evidence contains statements by the county clerk and three of his deputies, by the county auditor, the official reporter, the district attorney, a judge of the superior court, and an attorney who had practiced his profession in Merced county for twenty-eight years, to the effect that no negro had ever been placed on the venires or called for jury service in criminal cases in Merced county. At least it appears that practice was followed for the period of a generation or more. There is no evidence that a negro ever sat upon a jury in Merced county. It also appears that over eight per cent of the entire population of Merced county are negroes, and that seven per cent of the entire population are negroes who are qualified voters. It specifically appears that at least forty-two of them possess all the qualifications to act as jurors required by section 198 of the Code of Civil Procedure. No attempt was made to justify or excuse the deliberate exclusion of negroes from service on juries in Merced county during all that period of time. The defendant, over his protest, was tried and convicted by a jury consisting entirely of white men and women. Because of the custom which had prevailed in Merced county to exclude from jury service all colored people, the defendant was not afforded the possibility of selecting upon his jury a single member of his own race. This was clearly in conflict with the inhibitions of Amendments 6 and 14 of the Constitution of the United States. Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567; Hale v. Kentucky, 58 S.Ct. 753, 82 L.Ed. ——, April, 1938.

Amendment 6 of the Federal Constitution provides in part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

Amendment 14 of the Federal Constitution also provides, in accordance with the principle declared in Magna Charta: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Clearly the preceding mandates imply that one who is on trial for an alleged crime is entitled to a jury from which individuals of his own race who are otherwise qualified as jurors in the particular case, have not been arbitrarily excluded merely because of their nationality, race or color. That does not mean that an accused is entitled to a jury upon which there are members of his own race. It only means that qualified jurors must not be excluded from service merely because of their nationality, race or color. The California statutes with relation to the method of selecting and impaneling jurors in criminal cases are fair, impartial and constitutional. The denial of an impartial jury, of due process and equal protection of the laws in the present case are not attributable to the defects of our law, but rather to the custom of the officers to exclude negroes in selecting and impaneling juries in Merced county. In the Norris Case, supra, it is said in that regard (page 580): "Although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination."

Part 1, title 3, chapter 1, articles 3 and 4, of the Code of Civil Procedure, § 204 et seq., provide for the method of selecting and impaneling trial jurors by means of the regular venire. Section 227 of the same code provides for a special venire under designated circumstances. Section 198 of that code specifies the required qualifications of all such jurors. It is declared that such qualified "men and women" shall be so selected for jury service. That implies they must be selected regardless of their race, color or nationality. The statutes of California do not restrict the selection of jurors to members of the Caucasian race.

In view of the affirmative showing in the present case, which tends to prove there was a deliberate practice on the part of the officers of Merced county, who are charged with the selection and impaneling of juries, to exclude therefrom under all circumstances all individuals of the negro race, regardless of their statutory qualifications, we are impelled to hold that the challenge to the venire was erroneously denied, and that the defendant was not afforded such equal protection of the law and an impartial jury as are guaranteed by the Federal Constitution.

It appears that over seven per cent of the population of Merced county are negroes who are qualified electors therein, and that many of them possess all the statutory qualifications entitling them to act as jurors. To exclude from jury service, in a criminal case against a colored defendant, all members of his race who are otherwise qualified, merely because of their race or color, is an unconstitutional discrimination against the accused. It may not be reasonably said there is a presumption that an individual lacks intellectual, moral or physical qualifications to act as a juror merely because he belongs to the negro race. In the Neal Case, supra, Mr. Justice Harlan of the United States Supreme Court said in that regard: "It was * * * a violent presumption * * * that such uniform exclusion of that [colored] race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries."

The Norris Case, supra, which was decided by the United States Supreme Court in 1935, is decisive of the question presented on this appeal with relation to the unlawful exclusion of negroes from the venire. In that case a negro was convicted in Morgan county, Alabama, of rape and sentenced to be hanged. A challenge to the panel and a motion to quash the venire were made and denied in that case just as they were presented and overruled in this case, upon the same ground and supported by similar evidence. Upon appeal to the Supreme Court of the United States, the judgment was reversed on the ground that the conduct of the officers in excluding from the jury impaneled to try the defendant all negroes regardless of their statutory qualifications, was a violation of the constitutional guaranty of due process, equal protection of the laws and a trial by an impartial jury assured by amendments 6 and 14 of the Federal Constitution. In that case a strenuous effort was made to justify the omission of names of colored persons from the jury list. No such effort was made in this case. It appeared that in Morgan county, where the case was tried, about eighteen per cent of the population were negroes. They had never been placed on the jury lists. The statute in Alabama is practically the same as that of California with respect to the qualifications which are required of competent jurors. In the Alabama case, 229 Ala. 226, 156 So. 556, the commissioners attempted to justify their exclusion of negroes from jury service by the inherent right of exercising a liberal discretion in determining the qualifications which a competent juror should possess. In explaining their uniform failure to place negroes on the available jury list one of the commissioners testified that he never knew a negro in that county who possessed the intelligence, integrity, character or judgment which would qualify him as a competent juror. In response to that extravagant statement the court said: "In the light of the testimony given by defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan county."

The evidence in the present case evidently offered to conform to the facts disclosed by the record in the Norris Case. It seems to fit the situation presented in that case almost exactly. The same uniform practice existed in Morgan county, Alabama, which was followed in Merced county for a generation or more, to exclude all colored people from jury service without regard to their qualifications. The Norris Case is decisive of this appeal. The court there said:

"Summing up precisely the effect of earlier decisions, this Court thus stated the principle in Carter v. Texas, 177 U.S. 442, 447, 20 S.Ct. 687, 44 L.Ed. 839, 841, in relation to exclusion from service on grand juries: 'Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. * * * The principle is equally applicable to a similar exclusion of negroes from service on petit juries. * * * Although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination. * * *

"The testimony in itself made out a prima facie case of the denial of the equal protection which the Constitution guarantees. * * *

"For this long-continued, unvarying, and wholesale exclusion of negroes from jury service we find no justification consistent with the constitutional mandate. * * *

"Upon the proof contained in the record now before us, a conclusion that their continuous and total exclusion from juries was because there were none possessing the requisite qualifications, cannot be sustained.

"* * * In view of the denial of the federal right suitably asserted, the judgment must be reversed and the cause remanded for further proceedings."

On the authority last cited and upon principle, it is apparent the challenge to the panel in this case, and the motion to quash the venire should have been granted for the reason that the constitutional guaranty of equal protection of the laws and of a trial in a criminal case by an impartial jury were not afforded to the appellant for the reason that all persons of the negro race to which he belongs were exempted from the venire and from the jury by which he was tried.

The judgment and the order are reversed and the cause is remanded for a new trial.

I concur: PULLEN, P. J.

28 Cal.App.2d 26

FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO v. EDMONDS.

Civ. 2027.

District Court of Appeal, Fourth District, California.

July 29, 1938.

1. Mortgages 🔑32(2)

A deed, absolute on its face but in fact intended to secure a debt, is a "mortgage."

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

2. Mortgages 🔑33(5)

The fact that an option to repurchase land conveyed is given, is not, in itself, sufficient to show that the conveyance was intended to secure a debt.

3. Mortgages 🔑32(5)

The existence of an indebtedness is absolutely essential to make a deed, absolute on its face, an equitable mortgage.

4. Pleading 🔑350(3)

On motion for judgment on the pleadings, the affirmative allegations of the answer must be taken as true.

5. Mortgages 🔑33(5)

In action against administrator to quiet title, administrator's allegation that to avoid foreclosure of trust deed he, by conveyance absolute in form, conveyed realty in compromise and satisfaction of debt represented by note secured by trust deed, was given an option by plaintiff to repurchase the realty, and that transaction was approved by the probate court, was insufficient to constitute a defense to the action, since, there being no debt, conveyance was absolute in fact, as well as in form.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the First National Trust & Savings Bank of San Diego against Douglas L. Edmonds, as administrator de bonis non, with the will annexed, of the estate of John W. Mitchell, deceased, to quiet title to certain realty. From a judgment in favor of the plaintiff on the pleadings, the defendant appeals.

Affirmed.

Eckman & Lindstrom, of Los Angeles, for appellant.

William G. Mirow, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment quieting plaintiff's title to certain real property.

The complaint is in the usual form, paragraphs IV and V thereof alleging ownership and right of possession in the plaintiff and the invalidity of any claim of interest asserted by the defendant. The answer makes no general denial of these allegations but with respect thereto "Denies the allegations of paragraphs IV and V and alleges that the ownership, seizure in fee and right to possession of the lands and premises described in plaintiff's complaint are as in this defendant's second and affirmative defense set out". In the second defense which follows this allegation it is alleged that on July 11, 1931, the defendant, after authorization duly obtained from the court in the probate proceeding, borrowed $25,000 from the plaintiff and executed and delivered a note for that amount, payable three years after date with interest at 7 per cent, together with a trust deed covering the property in question as security for said note; that the defendant was unable to pay said note when due and on or about November 30, 1935, the defendant entered into an agreement with the plaintiff, a copy of which is attached to the answer; that on that date, pursuant to this agreement, the defendant filed in the estate proceedings "a petition for leave to compromise the claim of plaintiff against said estate on said promissory note by the making, execution and delivery by this defendant as such administrator of a deed conveying the property in plaintiff's complaint described, in full compromise, accord, satisfaction and settlement of said note for twenty-five thousand dollars"; that said petition came on for hearing and the court sitting in probate entered an order directing the defendant as said administrator to make and deliver a deed conveying said real property to the plaintiff; that thereafter and pursuant to said order the defendant as such administrator executed and delivered such a deed; that by the agreement referred to it was provided that the defendant as such administrator should be given and he was given an option to repurchase said real estate as a whole or in parcels on payment of certain sums and interest thereon as set forth in said agreement; that at the time the defendant entered into said agreement, filed said petition for leave to compromise, secured said order of the court, and made and delivered the deed he was unable to pay the note with the interest and accrued taxes and was threatened with foreclosure of the deed of trust by the plaintiff; and that for this reason he entered into said agreement, procured said order and "executed and delivered said deed in lieu of and to avoid foreclosure of said deed of trust". It is then alleged that the defendant submits to the decision of the court as to whether "said action in lieu of and to avoid foreclosure is sufficient to divest this defendant as such administrator and said estate" of title in and to these lands without foreclosure proceedings or trustee's sale proceedings; that this answer and defense is thus submitted by reason of the fiduciary status of said defendant as such administrator; and that the property in question was originally appraised in said estate at $160,000 but was on November 30, 1935, and ever since has been, of the value of $75,000.

The agreement attached to the answer recites that the estate is indebted to the plaintiff in the sum of $25,000, evidenced by the note and secured by the trust deed which have been described; that unpaid interest in the sum of $1,520 has accrued together with unpaid taxes amounting to $2,385.73; that the estate is unable to pay said amounts and on account of the defaults of the estate the bank is entitled to request the trustee under the deed of trust to sell said real property to satisfy the indebtedness; that in consideration thereof the administrator agrees to convey said property to the bank subject to unpaid taxes and the "bank gives to said administrator, his nominee or successor, an option to purchase the same" at any time up to November 1, 1936, for the sum of $25,000, plus accrued interest of $1,520, plus interest thereafter on both amounts at 7 per cent and plus any amount thereafter advanced and paid by the bank for taxes or assessments with interest on such advances at 7 per cent; that said option may also be exercised as to various parcels which are designated with the amount which must be paid in order to have the respective parcels conveyed; that if the option is exercised as to separate parcels the remainder of the property will be conveyed without further consideration when the entire amounts provided for in the option have been paid; that the agreement is subject to the approval of the court; and that when the court has approved the same the bank will upon receiving a conveyance of the property, record its reconveyance under the trust deed.

A motion for judgment on the pleadings was granted and a judgment entered from which this appeal was taken. The question involved is whether the facts alleged in the answer constitute a defense to the action. The appellant's sole contention is that under these facts the deed given to the respondent, though absolute in form, must be deemed a mortgage against which title cannot be quieted.

[1-4] It is, of course, well settled that a deed absolute on its face but in fact intended to secure a debt, is a mortgage. The fact that an option to repurchase the land conveyed is given is not, in itself, sufficient to show that the conveyance was intended to secure a debt. Henley v. Hotaling, 41 Cal. 22. In that case it is said: "There can be no question that a party may make a purchase of lands either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage." Aside from any other consideration or requirement, it is also well settled that the existence of an indebted-

ness is absolutely essential in order to make such a deed an equitable mortgage. Henley v. Hotaling, supra; Dietrichson v. Western Loan & Bldg. Co., 123 Cal.App. 358, 11 P.2d 64; Robinson v. Barnard, 5 Cal.App.2d 396, 42 P.2d 711. While on a motion for judgment on the pleadings the affirmative allegations of the answer must be taken as true (Cuneo v. Lawson, 203 Cal. 190, 263 P. 530), if it appears from such allegations here that there was no indebtedness it must be held, as a matter of law, that no defense has been alleged. In Dietrichson v. Western Loan & Bldg. Co., supra, where the appeal was from a judgment after a demurrer had been sustained, the court said (page 65):

"Whether a deed can be treated as a mortgage or not must depend upon whether there was a continuing indebtedness from appellant to respondent to be secured by it, for if there was no indebtedness there clearly could be no mortgage. Ahern v. McCarthy, 107 Cal. 382, 40 P. 482; Beckman v. Waters, 161 Cal. 581, 119 P. 922; Stevens v. Fetterman, 76 Cal.App. 741–752, 246 P. 102.

"It is manifest from the allegations of the complaint that the money to be paid under said agreements was not a debt owing by appellant to respondent. It was entirely optional with appellant whether he paid said sum or not, and in the event that he decided not to pay it, no liability or debt was thereby created against him in favor of respondent for said sum."

[5] We think these rules are controlling here. It appears from the agreement alleged that the appellant was to convey the property and the respondent was to record a reconveyance of the trust deed and give the appellant an option to purchase the property within a year at a fixed price. This agreement was necessarily made subject to the approval of the court and the appellant sought and obtained such approval by directly representing to the court that the claim against the estate was to be compromised by conveying the property in full satisfaction and settlement of the indebtedness arising from the note given for the money borrowed by the estate. The court, which had necessarily authorized the creation of the debt in the first place, thereupon authorized the conveyance, which could not otherwise have been made, as a full satisfaction and settlement of the debt. The effect of the answer is that this debt, created by permission of the court, had been discharged and paid by a conveyance which, while agreed upon by the parties, had been made and could only have been made under the approval and direction of the court. After the conveyance was made in pursuance of the court's order there was no indebtedness. It seems perfectly clear that under such circumstances the respondent could not have proceeded to enforce collection of the note or of that claim against the estate. There remained merely an option to purchase the property at a fixed price which the respondent was free to exercise or not as he saw fit. There was no agreement to repurchase the land or to pay anything, and no debt which could have been secured by a mortgage. It follows that the conveyance of this property was absolute in fact, as well as in form, and that the facts alleged in the answer were not sufficient to constitute a defense to the action.

The judgment is affirmed.

I concur: MARKS, J.

28 Cal.App.2d 112

DONNER FINANCE CO. et al. v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10537.

District Court of Appeal, First District, Division 1, California.

Aug. 11, 1938.

1. Pleading 🔑214(1)

A demurrer admits the facts pleaded in the petition and questions their legal sufficiency to entitle the pleader to the relief sought.

2. Prohibition 🔑1

Prohibition is a preventive rather than a corrective remedy, and a writ of prohibition issues only to restrain the commission of a future act and not to undo an act already done. Code Civ.Proc. § 1102.

3. Prohibition 🔑1

A writ of prohibition does not reach acts simply ministerial in their nature and in no sense judicial. Code Civ.Proc. § 1102.

4. Prohibition ⚿5(2)

The issuance of a writ of execution is a "ministerial act" which cannot be arrested by a writ of prohibition. Code Civ.Proc. § 1102.

[Ed. Note.—For other definitions of "Ministerial Act," see Words & Phrases.]

5. Prohibition ⚿5(2)

A writ of prohibition would not lie to restrain enforcement of a judgment in any manner, and particularly by the issuance of execution thereon. Code Civ.Proc. § 1102.

6. Prohibition ⚿28

An appellate court may treat an original application for a writ of prohibition, insufficient for that purpose, as an application for a writ of review, where the entire record of the inferior tribunal, including the evidence upon which it acted, is presented. Code Civ. Proc. § 580.

7. Certiorari ⚿1

Where the record did not contain the evidence adduced before the municipal court, the District Court of Appeal would not treat an original application for a writ of prohibition, which was insufficient for that purpose, as an application for a writ of review. Code Civ.Proc. § 580.

8. Prohibition ⚿34

The respondents could not on appeal change the theory upon which the sufficiency of their petition for a writ of prohibition was predicated and decided in the trial court.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas D. Johnston, Judge.

Action by the Donner Finance Company, a copartnership consisting of Joseph Magnin and Fred Addlestone, and others, against the Municipal Court of the City and County of San Francisco, State of California, and Honorable A. J. Fritz, Judge thereof, and others, for a writ of prohibition, to restrain the defendants from enforcing a certain judgment in any manner and particularly by issuing execution thereon. From a judgment ordering the issuance of the writ of prohibition, the defendants appeal.

Reversed with instructions.

Leon Samuels, Dreher & McClellan, and Edgar C. Levey, all of San Francisco, for appellants.

J. A. Seaman and Morris M. Grupp, both of San Francisco, for respondents.

GRAY, Justice pro tem.

[1] The Municipal Court of the City and County of San Francisco, Honorable A. J. Fritz, a judge thereof, and R. W. Dennis, its clerk, appeal from a judgment ordering the issuance of a writ of prohibition which was granted after their demurrer to respondents' petition had been overruled. The demurrer admitted the facts pleaded in the petition but questioned their legal sufficiency to entitle respondents to the writ. Our decision, therefore, depends upon the correctness of the ruling on the demurrer.

The petition avers these facts. Respondents had filed in the Municipal Court a complaint alleging that Geneva Manufacturing Co., Ltd., a corporation, had executed and delivered to them its promissory note; that J. A. Seaman, as security for the note, had executed and delivered to them a chattel mortgage, and that the principal of the note, together with interest and attorney's fees, was due, owing and unpaid. The complaint prayed for the amount due on the note and for a foreclosure of the mortgage. Both these defendants had answered. The answer of J. A. Seaman, which alone is of present concern, admitted the execution and delivery of the note, and his execution and delivery, as guarantor of the note, of the chattel mortgage, but denied nonpayment of the note. It also affirmatively pleaded payment of the note, the substitution, by novation, of the note of a third party for the original note and his exoneration, as guarantor, by material changes in the terms of the note. It prayed for the cancellation of the chattel mortgage and for costs. This action had been duly set for trial, but two days before the day designated petitioners' attorneys had filed with the clerk of the Municipal Court a written dismissal which he had entered in his register. Notwithstanding such dismissal and in petitioners' absence, the judge of the Municipal Court had tried the action upon evidence produced by the defendants and had rendered his decision in their favor for costs and the cancellation of the chattel mortgage. Thereupon, judgment had been entered in accordance with the decision. Thereafter those defendants have threatened to cause execution to issue, and appellants have threatened to issue the same.

Respondents argue that under subdivision 1 of section 581 of the Code of Civil Procedure, they had the absolute right to dismiss and so terminate the action, and that thereafter the Municipal Court was without jurisdiction to render any judgment. Appellants reply that Seaman's answer sought affirmative relief and that therefore the exception stated in the above section prevented respondents from dismissing the action. However, it will be unnecessary to consider these arguments, as to whether the judgment was in excess of the court's jurisdiction, for appellants' further, more fundamental objection to the issuance of the writ, based upon its inherent nature, disposes of the appeal.

[2-5] The petition states that the judgment had been previously entered. This judgment, the writ purports to annul. The petition alleges that appellants threaten to enforce this judgment by the issuance of execution. The writ restrains appellants from enforcing the judgment in any manner and particularly by issuing execution thereon. The writ of prohibition "*arrests* the proceedings of any tribunal * * * exercising *judicial* functions, when such proceedings are without or in excess of the jurisdiction of such tribunal * * *." Code Civ.Proc. sec. 1102. (Italics ours.) Since prohibition is a preventive rather than a corrective remedy, the writ issues only to restrain the commission of a future act and not to undo an act already done. Therefore it can not be used to annul a judgment already rendered. Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 220 P. 306; Clark v. Superior Court, 55 Cal. 199; Davis v. Superior Court, 71 Cal.App. 646, 236 P. 151; Plocher v. Superior Court, 135 Cal.App. 337, 26 P.2d 841. The writ will not lie to prevent the enforcement of an erroneous judgment (Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903), but the party aggrieved is relegated to his right to appeal from such judgment (Greenburg v. Superior Court, 71 Cal.App. 332, 235 P. 92). Nor does the writ reach acts simply ministerial in their nature and in no sense judicial. Traffic Truck Sales Co. v. Justice's Court, supra. The issuance of a writ of execution is a ministerial act which cannot be arrested by a writ of prohibition. Harris v. Recorder's Court, 15 Cal.App. 103, 113 P. 687; Dunn v. Justice's Court, 136 Cal.App. 269, 28 P.2d 690; Valentine v. Police Court, 141 Cal. 615, 75 P. 336; Title G. & T. Co. v. Superior Court, 9 Cal.App.2d 257, 49 P.2d 318. It is apparent, accordingly, that the demurrer should have been sustained.

[6-8] In further support of the judgment, respondents argue that their petition, if insufficient to warrant issuance of a writ of prohibition, may be considered as an application for a writ of review. An appellate court may treat an original application for a writ of prohibition, insufficient for that purpose, as an application for a writ of review, where the entire record of the inferior tribunal, including the evidence upon which it acted, is presented. Van Hoosear v. Railroad Commission, supra; Traffic Truck Sales Co. v. Justice's Court, supra. This rule arises from the general principle, governing trial courts that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue". Code Civ.Proc. sec. 580. The present proceeding does not fall within the terms of the rule, because the record does not contain the evidence adduced before the Municipal Court. Davis v. Superior Court, supra. Nor is the rule applicable, for we are not trying an original proceeding, but are reviewing the judgment of the superior court. Respondents cannot now be permitted to change the theory upon which the sufficiency of their petition was litigated and decided in the trial court. 2 Cal.Jur. 239.

The judgment is reversed, with instructions to sustain the demurrer.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

28 Cal.App.2d 21

PEOPLE v. COINER.

Cr. 3108.

District Court of Appeal, Second District, Division 2, California.

July 29, 1938.

Hearing Denied by Supreme Court Aug. 25, 1938.

Gaming 🔑73

A defendant, who was found guilty of conducting a pari-mutuel method of wagering and not a banking or book-making game outside the inclosure where the racing took place, was properly convicted of violation of statute making it a crime to receive, hold, or forward a sum of money or other thing of value to be placed as a bet, rather than of misdemeanor under statute establishing regulated form of wagering on races under pari-mutuel system. Pen.Code, § 337a, subd. 2; St.1933, p. 2053, § 15.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Ficke, Judge.

Morris Coiner was convicted of violation of Penal Code, § 337a, subd. 2, making it a crime to receive, hold, or forward a sum of money or other thing of value to be placed as a bet, and he appeals.

Affirmed.

George W. Rochester, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a conviction of the crime of violation of section 337a, subdivision 2, of the Penal Code, a felony, and from the court's order denying a new trial.

The contention of the defendant is that one who is found guilty of conducting a pari-mutuel method of wagering and not a banking or book-making game outside the enclosure where the racing takes place cannot be convicted of the violation of the said section, but can only be convicted of violating section 15 of chapter 769, p. 2053, Statutes of 1933, a misdemeanor, and that therefore the superior court was without jurisdiction to hear, try and adjudge the defendant.

Since the filing of appellant's opening brief in this action the Supreme Court has decided the issue adversely to the defendant in the case Ex parte Walker, 80 P.2d 990. In that case the court said (page 991): "A legal wager could be made under the act only through the machine, within the enclosure, and only on the dates for which horse racing is licensed. Where the conditions laid down by the act are followed, wagering on horse races is legal, and therefore the statute creates an exception to the general prohibitions contained in the Penal Code. But the act does not purport to repeal section 337a of the said code. In section 3 of the act, St.1933, p. 2047, it is stated: 'All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal.' Section 15, St.1933, p. 2053, similarly declares that all other forms of wagering shall be punishable as provided in the Penal Code."

Judgment and order denying a new trial affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 14

BIAS v. OHIO FARMERS INDEMNITY CO.

Civ. 10487.

District Court of Appeal, First District, Division 1, California.

July 29, 1938.

Hearing Denied by Supreme Court Sept. 26, 1938.

1. Insurance 🔑591½

Statute, authorizing injured party to sue on indemnity policy issued to insured who causes injuries, creates a contractual relationship which inures to any person who may be negligently injured by insured as completely as if such injured person has been specifically named in the policy. St. 1919, p. 776, now St.1935, p. 716, § 11580.

2. Executors and administrators 🔑49

The right acquired by injured party under statute to sue on indemnity policy after obtaining judgment against insured who caused injuries is "property" which passes in case of death along with judgment to injured party's estate. St.1919, p. 776, now

St.1935, p. 716, § 11580; Civ.Code, §§ 954, 1044, 1458.

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

3. Property ⚿11

One of chief incidents of ownership in property is the right to transfer it. Civ. Code, §§ 954, 1044, 1458.

4. Insurance ⚿591½

The right acquired by injured party under statute to sue on indemnity policy after obtaining judgment against insured who caused injuries is assignable. St.1919, p. 776, now St.1935, p. 716, § 11580; Civ.Code, §§ 954, 1044, 1458.

5. Judgment ⚿833

An assignment of judgment may be made at any time after its entry in trial court.

6. Insurance ⚿591½

An assignee of a judgment obtained against insured for injuries caused in automobile accident was not precluded from suing on indemnity policy on ground that assignment was made pending appeal from judgment against insured, where action on policy was not commenced until several months after affirmance of judgment on appeal, and hence action was not affected by such appeal. St.1919, p. 776, now St.1935, p. 716, § 11580.

7. Judgment ⚿839

An assignment of judgment against insured under indemnity policy was not insufficient to transfer to assignee right to sue on indemnity policy where assignment covered not only assignment of judgment "and all sums of money that may be had or obtained by means of said judgment" but appointed assignee as attorney to take "all lawful ways and means for the recovery of the money due or to become due on said judgment." St.1919, p. 776, now St.1935, p. 716, § 11580.

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by A. B. Bias against the Ohio Farmers Indemnity Company to recover on an indemnity policy which defendant issued to one Lee J. Miller against whom plaintiff's assignor had obtained a judgment for injuries sustained in an automobile accident. From a judgment for plaintiff, defendant appeals.

Affirmed.

Leslie C. Gillen, of San Francisco (P. R. McEnerney, of San Francisco, of counsel), for appellant.

Harry J. Bias and W. A. Deans, both of Santa Cruz, for respondent.

KNIGHT, Justice.

A judgment for damages in the sum of $1,250 was obtained by Florence Wilson against Lee J. Miller on account of personal injuries received by her through the negligent operation of an automobile by Miller, and on appeal the judgment was affirmed. Wilson v. Miller, 1 Cal.App.2d 514, 36 P.2d 843. At the time of the accident Miller was insured under an indemnity policy which by virtue of the provisions of the statute (Stats.1919, p. 776, now sec. 11580 of the Insurance Code, St. 1935, p. 716) and under the terms of the policy inured to the benefit of any person negligently injured by the insured. Following the entry of the judgment in favor of Florence Wilson she assigned the same and all sums of money to be had or obtained by means thereof to A. B. Bias; and he brought the present action against the insurance carrier on said policy to recover the amount of said judgment. Four separate defenses were interposed by the answer, and as a result of the trial which was had before the court without a jury, judgment was entered in favor of the plaintiff, from which the insurance carrier prosecutes this appeal.

The appeal was taken on the judgment roll, and two main points are urged for reversal. Neither of them is related to any of the four defenses urged at the trial. They are in substance, first, that the right acquired by an injured party under the statute to sue on the indemnity policy is not assignable; and secondly, that in any event the purported assignment is legally insufficient to transfer to plaintiff any of the rights inuring to the injured party under the policy.

So far as the record shows, no demurrer was interposed to the complaint, nor were either of the points now urged by appellant for reversal made an issue before the trial court by way of the answer. Assuming that said points may be raised for the first time on appeal, we find no merit therein.

[1-3] It was definitely held by the Supreme Court in the case of Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 P. 512, and again in Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.

2d 999, 85 A.L.R. 13, that the effect of the statute above referred to, under the authority of which the policy herein was issued, is to create a contractual relationship which inures to the benefit of any person who might be negligently injured by the insured, as completely as if such injured person had been specifically named in the policy. Furthermore, it has been definitely held in the case of Pigg v. International Indemnity Co., 86 Cal.App. 671, 261 P. 486, that the right of action thus granted by the statute to the injured person to sue upon the indemnity policy "is property", and as such passes in case of his death along with the judgment to his estate as an asset thereof; and it is a fundamental principle of law that one of the chief incidents of ownership in property is the right to transfer it. Such right is specifically declared by several sections of the Civil Code. Among them are sections 1044, 1458, and 954, which respectively provide: "Property of any kind may be transferred, except as otherwise provided by this article." "A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. * * *"

[4] Applying the foregoing legal principles to the facts of the present case, we have this situation: Upon the happening of the accident a contractual relation was created by the statute between Florence Wilson, as the injured party, and Miller's insurance carrier, which gave her a cause of action against the insurance carrier on the policy issued to Miller, upon securing the judgment against him; "This cause of action was property" (Pigg v. International Indemnity Co., supra, page 487), and therefore, as the owner of such property she doubtless had the legal right to assign and transfer the same to another.

In further support of the above conclusion may be cited the case of Roth v. General Casualty & Surety Co., 106 N.J.L. 516, 146 A. 202. There the question involved related to the construction of a clause in an indemnity policy which does not in effect differ substantially from the terms of our statute. The clause provided (page 203): "In the event that an execution on a judgment against the assured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the Company to the same extent that the assured could have had had he paid the judgment." And in sustaining the right of the judgment creditors therein to assign their judgments and in upholding the right of their assignee to sue on the policy the court held that such a clause was not restricted to the exclusive benefit of the judgment creditor, and that an assignment by him of the judgment against the assured passes to his assignee all rights and remedies for collection possessed by the judgment creditor himself.

Appellant has cited cases from New York, claiming that they sustain its contention that the right to sue on the policy is not assignable. Evidently, however, as pointed out in Bachman v. Independence Indemnity Co., 112 Cal.App. 465, 297 P. 110, 298 P. 57, there is some material difference between the New York and the California statutes permitting actions to be brought against the tort-feasor's insurance carrier. For that reason it cannot be said that the New York cases so relied on by appellant are here controlling.

[5, 6] The remaining points urged on this branch of the case are merely incidental to the main ones already discussed, and are likewise without merit. One of them is that the assignee acquired no rights under the assignment because it was made pending the appeal from the judgment. It is well settled, however, that an assignment of a judgment may be made at any time after its entry in the trial court; and since the present action on the policy was not commenced by the assignee until several months after the affirmance of the judgment on appeal, it was in no way affected by the appeal.

[7] Nor in our opinion are the terms of the written assignment under which the present action is sought to be maintained legally insufficient to transfer to plaintiff the right to sue on the indemnity policy. It covers not only the assignment of the judgment "and all sums of money that may be had or obtained by means of said judgment", but in terms it appoints plaintiff as assignee and attorney to take "all lawful ways and means for the recovery of the money due or to become due on said judgment."

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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82 PACIFIC REPORTER

SECOND SERIES

11 Cal.2d 746

LOEW'S, Inc., v. BYRAM, Collector of Taxes.

L. A. 16697.

Supreme Court of California.

Aug. 5, 1938.

1. Taxation ⚷527½

Where special assessments were levied pursuant to proceedings taken and bonds issued under statute that did not require payment of special assessment taxes together with general taxes, subsequent amendment requiring payment of special assessment taxes together with general taxes for county purposes was inapplicable to such assessments. St.1925, p. 890, § 41, as amended by St.1927, p. 1375, and St.1931, p. 1554.

2. Taxation ⚷527½

Under statute providing that special assessment taxes "shall be in addition to all other taxes * * * and shall be levied, computed, entered, collected and enforced in the same manner and by the same persons and at the same time" as other taxes, taxpayer had the right to pay general taxes for county purposes separately from special assessments, in view of subsequent amendment of statute specifying that special assessment taxes should be collected and enforced together with general taxes. St.1925, p. 890, § 41, as amended by St.1927, p. 1375, and St.1931, p. 1554.

3. Statutes ⚷230

The amendment of a statute demonstrates intent to change pre-existing law, and intention to change the statute in all particulars with respect to which there is a material change in language will be presumed.

◆

In Bank.

Mandamus proceeding by Loew's, Incorporated against H. L. Byram, Collector of Taxes of the County of Los Angeles, to compel respondent to accept and receipt for a tender of general taxes.

Peremptory writ granted.

Loeb & Loeb and Loeb, Walker & Loeb, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for respondent.

Marshall Stimson, of Los Angeles, amicus curiæ.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent as tax collector of Los Angeles county to accept and receipt for the petitioner's tender of general taxes on its property separately from the special assessments levied under the Acquisition and Improvement Act of 1925. Stats.1925, p. 849.

The petitioner is the owner of numerous parcels of land in Culver City, Los Angeles county. Prior to 1931 improvements were constructed thereon the cost of which was provided for by the formation of improvement districts and the issuance of improvement bonds to be retired by special assessments levied in accordance with the provisions of said act. On December 4, 1937, the petitioner tendered to the respondent all taxes for the fiscal year 1937–1938 on certain parcels located in Culver City Acquisition and Improvement District No. 4, Zone D, except the special assessments thereon levied under said act. The respondent refused the tender, stating as the ground for his refusal that the payment of said special assessments could not be made separately from the payment of county taxes on said property, and that the duty of collecting said special assessments under said act together with and not separately from taxes for county purposes was enjoined upon him by law.

As originally enacted section 41 of the Acquisition and Improvement Act of 1925, so far as pertinent, provided as follows: "Such special assessment taxes shall be in addition to all other taxes levied for state and county purposes, or for municipal purposes (as the case may be), and shall be levied, computed, entered, collected and enforced in the same manner and by the same persons and at the same time with the same penalties and interest as are other taxes for state and county purposes, or for municipal purposes (as the case may be), and all laws applicable to the levy, collection and enforcement of taxes for state and county purposes or for municipal purposes (as the case may be) are hereby made applicable to said special assessment taxes."

The foregoing provision was amended in 1927 (Stats.1927, pp. 1375, 1376) so as to eliminate all reference to the method of levying, collection and enforcement of taxes for "state" purposes and all reference to laws applicable thereto. Otherwise the provision remained the same and was in effect when said District No. 4, Zone D, was organized and the bonds issued for the payment of which the assessments involved herein were levied. As so amended the statute remained the same until August 14, 1931, at which time another and a very significant amendment thereto became effective. By this amendment the foregoing provision as amended in 1927 was re-enacted, and the following paragraph was added: "Such special assessment taxes shall be collected and enforced together with, and not separately from, taxes for county purposes or for municipal purposes, as the case may be." Stats.1931, pp. 1554, 1555.

[1] It is apparent that the amendment of 1931 is all-sufficient to require the collection of special assessments to pay for bonds issued under proceedings taken under said act after the effective date of the amendment "together with, and not separately from" taxes for county purposes, and no contention is made by either party to the contrary. It is contended by the petitioner and not seriously disputed that if the original statute did not require the collection of special assessments under said act "together with, and not separately from", taxes for county purposes, the amendment of 1931 would not be applicable to special assessments levied under said act pursuant to proceedings taken and bonds issued prior to the date of the amendment. This is so under the doctrine of County of San Diego v. Hammond, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155; Shouse v. Quinley, 3 Cal.2d 357, 45 P.2d 701; County of Los Angeles v. Rockhold, 3 Cal.2d 192, 44 P.2d 340, 100 A.L.R. 149; County of San Diego v. Childs, 217 Cal. 109, 17 P.2d 734; Jeffreys v. Point Richmond Canal, etc., Co., 202 Cal. 290, 260 P. 548. But it is the contention of the respondent that the language of section 41 as originally adopted sufficiently authorized him to demand that the petitioner's special assessments under said act be paid "together with, and not separately from" taxes for county purposes; that the amendment of 1931 added nothing to his authority and duty in that regard, but was adopted merely for the purpose of statutory clarification.

[2] It is not difficult to conclude that clarification of the statute and a material change therein were both accomplished by the amendment. To determine whether the language of the original section was broad enough to justify the position of the respondent, we look to the law in other jurisdictions to ascertain the rights of the taxpayer under similar if not identical statutory provisions, for the reason that the question is of first impression in this state. Elsewhere it is established without conflict of authority that in the absence of clear statutory provision requiring payment of special assessments together with and not separately from taxes for county purposes the taxpayer has the right to pay separately. The cases in point are collected in an annotation found in 89 A.L.R. commencing at page 715 following the statement of the general rule as follows: "The general rule is that where separate and independent taxes have been levied against the property of a taxpayer, he has the right to pay the full amount of any one tax without paying the others." The cases annotated follow the text of the opinion in Milne v. Hess, 141 Or. 469, 18 P.2d 229, 89 A.L.R. 711, wherein it was held that a taxpayer's right to pay one tax levied against his property while refusing to pay other taxes thereon is not affected by statutes providing that all taxes levied by taxing agencies or districts shall be collected by the same officer in the same manner and at the same time as county taxes, and fixing a date after which unpaid taxes shall become delinquent. See, also, State v. Cole, 43 Wyo. 209, 299 P. 1040.

Counsel for both parties seem to be of the impression that the case of Moore v.

Gas Securities Co., 8 Cir., 278 F. 111, is contrary to the general rule. A careful reading of the opinion discloses that such is not the case. There the statute made it the duty of the county treasurer of each county in Colorado in which any irrigation district was located to collect and receipt for all taxes levied as provided by law in the same manner and at the same time "and on the same receipt" as required in the receipt for the collection of taxes upon real estate for county purposes. The comments on that case in State v. Cole, supra, satisfactorily establish the fact that the Moore Case is in harmony with and not contrary to the general rule.

[3] But it is insisted that the original section denied the right to pay separately and was fully as effective for that purpose as the amendment of 1931. There is a rule of statutory construction which leads to the contrary conclusion. That rule is stated and approved in People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811, from which we quote (page 793):

"In United States v. Bashaw, 8 Cir., 50 F. 749, it was said: 'The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act.'

"'Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred.' In re Segregation of School District No. 58, 34 Idaho 222, 200 P. 138. In Rieger v. Harrington, 102 Or. 603, 203 P. 576, 580, it was said: 'By amending that statute, the Legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act.' To the same effect are the following authorities: Springfield Grocer Co. v. Walton, 95 Mo.App. 526, 69 S.W. 477; Duff v. Karr, 91 Mo.App. 16; Pierce v. County of Solano, 62 Cal.App. 465, 217 P. 545; Shearer v. Flannery, 68 Cal.App. 91, 94, 228 P. 549."

The amendment of 1931 therefore effected a material change in the statute when it provided by specific language that the special assessment taxes should be collected together with and not separately from the taxes for county purposes, and thus deprived the taxpayers of the right to pay separately—a right which he had prior to the amendment.

We conclude that the petitioner is possessed of the right asserted to pay its general taxes separately from the special assessment taxes levied under the Acquisition and Improvement Bond Act of 1925, and that the amendment of 1931, having been passed after the rights of the petitioner became fixed under the original statute, has not affected that right.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.

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11 Cal.2d 634

WHOLESALE TOBACCO DEALERS BUREAU OF SOUTHERN CALIFORNIA, Inc., v. NATIONAL CANDY & TOBACCO CO.

L. A. 15836.

Supreme Court of California.

July 28, 1938.

1. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of the Unfair Practices Act prohibiting price discrimination between different sections, communities, or cities, and giving of special rebates or use of any other device to destroy competition or prevent competition of any new dealer, is constitutional. Gen.Laws Supp.1935, Act 8781, § 1.

2. Trade-marks and trade-names and unfair competition 🔑68(2)

The purpose of the Unfair Practices Act as amended in 1935 was to regulate business as a whole by prohibiting practices which the Legislature had determined constituted unfair trade practices. Gen.Laws Supp.1935, Act 8781.

3. Trade-marks and trade-names and unfair competition 🔑68(2)

The Unfair Practices Act as amended in 1935 was enacted in an attempted exercise of the state's police power. Gen.Laws Supp. 1935, Act 8781.

4. Constitutional law 🔑81

In determining constitutionality of statute enacted in attempted exercise of state's police power, inquiry is limited to determining whether object of statute is one for which the police power may legitimately be invoked and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained.

5. Trade-marks and trade-names and unfair competition 🔑68(2)

The object of the Unfair Practices Act as amended in 1935 to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented is within the police power of the state. Gen. Laws Supp.1935, Act 8781, § 13.

6. Constitutional law 🔑81

The police power of the state extends not only to the preservation of the public health, safety, and morals, but also extends to the preservation and promotion of the public welfare.

7. Constitutional law 🔑81

The proper application of the police power of the state cannot be measured by past precedents, but the test is present-day conditions.

8. Trade-marks and trade-names and unfair competition 🔑68(2)

In determining constitutional validity of provision of Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition, court was limited to determining whether act was one reasonably connected with its avowed purpose where purpose was within the police power of the state. Gen.Laws Supp.1935, Act 8781, § 3.

9. Trade-marks and trade-names and unfair competition 🔑68(2)

Mere sincerity or honesty of purpose on the part of the Legislature, in enacting provision of Unfair Practices Act as amended in 1935 prohibiting sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition, would not alone justify the statute. Gen.Laws Supp.1935, Act 8781, § 3.

10. Constitutional law 🔑70(1)

In determining constitutional validity of provision of Unfair Practices Act of 1935 prohibiting sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition, declaration in statute as to purposes of statute was not determinative of whether means provided in statute were reasonably designed to accomplish purposes thereof and courts could properly inquire into such subject. Gen.Laws Supp.1935, Act 8781, § 3.

11. Constitutional law 🔑70(1)

In determining whether means provided in statute for accomplishing object within police power of state are reasonably designed to accomplish its avowed object, determination of Legislature is conclusive if question is reasonably debatable.

12. Constitutional law 🔑70(3)

Question whether or not the policy of a statute is economically sound or beneficial is not for courts but is matter solely for the Legislature.

13. Constitutional law 🔑70(1)

The provision of the Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition is not unconstitutional on ground that means adopted were not reasonably designed to accomplish the object of the statute, since question was fairly debatable and hence determination of Legislature thereon was conclusive. Gen. Laws Supp.1935, Act 8781, § 3.

14. Constitutional law 🔑70(1)

In determining whether means adopted by provision of Unfair Practices Act as amended in 1935 prohibiting sale of commodities below cost as defined in the act for purpose of injuring competitors and destroying competition were reasonably connected with legitimate object of statute, fact that 14 states had passed similar legislation was entitled to some weight. Gen.Laws Supp.1935, Act 8781, § 3.

15. Constitutional law 🔑296(1)

Respecting regulation consistently with due process, businesses "affected with public interest" are merely those subject to exercise of police power. U.S.C.A.Const. Amend. 14, § 1.

[Ed. Note.—For other definitions of "Affected with a Public Interest," see Words & Phrases.]

16. Trade-marks and trade-names and unfair competition 🔑68(2)

On proper occasion and by appropriate measures, a state may regulate a business in any of its aspects including selling prices of products or commodities.

17. Courts 🔑107

In determining judicial action, the character of the situation sought to be remedied, rather than its abruptness, is the governing factor.

18. Constitutional law 🔑298(1)

The sole constitutional yardstick by which price regulating statutes should be measured is the necessity for and the reasonableness of the regulation. U.S.C.A. Const. Amend. 14, § 1.

19. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of the Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition is constitutional as reasonable attempt on part of state to accomplish valid object. Gen.Laws Supp.1935, Act 8781, § 3; U.S.C.A.Const. Amend. 14, § 1; Const.Cal. art. 1, §§ 1, 14.

20. Trade-marks and trade-names and unfair competition 🔑68(2)

Although the state may not have power to regulate all trade practices affecting competition, it has power to restrict or prohibit trade practices which on reasonable grounds it determines are predatory, vicious, unfair, and anti-social.

21. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of the Unfair Practices Act as amended in 1935 that "it shall be unlawful for any person * * * to sell * * * any article * * * at less than the cost thereof to such vendor, or give, offer to give * * * any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition," requires the designated intent before selling below cost is prohibited, as against contention that unlawful intent clause applied only to giving away of articles and did not apply to clause dealing with selling below cost. Gen.Laws Supp. 1935, Act 8781, § 3.

22. Trade-marks and trade-names and unfair competition 🔑68(2)

In determining whether provision of Unfair Practices Act as amended in 1935 prohibiting sale of articles below cost as defined therein required intent to injure competitors and destroy competition before selling below cost was prohibited, action of Legislature in amending statute in 1937 by inserting comma in proper place and so changing wording as to leave no doubt that selling below cost was only prohibited when improper intent was present was entitled to weight in ascertaining the legislative intent. Gen.Laws Supp.1935, Act 8781, § 3; St.1937, p. 2395, § 3.

23. Statutes 🔑196

Where several words in a statute are followed by clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.

24. Statutes 🔑184

Every statute should be construed with reference to its purpose and the objects intended to be accomplished by it, and the language will be so interpreted, if possible, as to aid the design and intent of the Legislature and to effectuate the evident objects and purposes of the law.

25. Statutes 🔑74(1)

The provision of the Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition is not unconstitutional on ground that lack of uniformity arising because of ability of large chain and department stores to buy for less than smaller merchants defeated purpose of act to prevent monopoly, since whether provision of statute was reasonably adapted to effectuate object thereof dealt with reasonably debatable economic problem, and hence was for Legislature. Gen.Laws Supp.1935, Act 8781, § 3; Const. art. 1, § 11.

26. Statutes 🔑71

The uniformity required by the constitutional provision requiring that all laws of a general nature shall have uniform operation is uniformity in operation and not uniformity of result. Const. art. 1, § 11.

27. Statutes 🔑74(1)

The provision of the Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for purpose of injuring competitors and destroying competition is not unconstitutional as discriminatory in operation because of disparity in amount of costs at which commodities are obtainable by large and small dealers since discrimination, if any, is in result and not in the operation of the statute and especially in view of exemption from operation of statute of endeavor in good faith to meet prices of competitors. Gen.Laws Supp.1935, Act 8781, § 3; Const. art. 1, § 11.

28. Appeal and error 🔑840(3)

In determining constitutionality of provision of Unfair Practices Act as amended in 1935 in suit for injunction against violation of act, reviewing court could not consider hypothetical situations presented since attack on constitutionality of statute was limited to application of statute to factual situation before the court. Gen.Laws Supp. 1935, Act 8781, § 3.

29. Constitutional law 🔑42

In suit for injunction against violation of Unfair Practices Act as amended in 1935 by wholesale tobacco dealer, contention that Unfair Practices Act as amended in 1935 was unconstitutional because it excluded lease of motion pictures from operation of statute and hence was discriminatory could not be raised by the tobacco dealer. Gen. Laws Supp.1935, Act 8781; Const. art. 1, § 11.

30. Appeal and error 🔑170(2)

In suit to enjoin tobacco dealer from violating provision of Unfair Practices Act as amended in 1935 prohibiting sale of commodities below cost as defined in act for purpose of injuring competitors and destroying competition, contention that the definition of the cost of doing business in the act was indefinite and uncertain was not available to tobacco dealer on appeal where parties stipulated at trial and trial court found that tobacco dealer sold goods involved at less than invoice or replacement cost, plus tobacco dealer's cost of doing business and that cost of doing business in tobacco dealer's line of activity was an established fact, well known to the trade, including the tobacco dealer. Gen.Laws Supp.1935, Act 8781, § 3.

31. Injunction 🔑1

In an equity case, the trial court has broad and flexible discretionary powers and can deny injunctive relief where such relief would be inequitable.

32. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of the Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition and authorizing any person, corporation, or trade association to maintain an action to enjoin a continuance of acts in violation thereof is constitutional in so far as it grants right to injunctive relief. Gen.Laws Supp.1935, Act 8781, §§ 3, 10.

In Bank.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Suit for injunction against violation of the Unfair Practices Act, Gen.Laws Supp. 1935, Act 8781, by the Wholesale Tobacco Dealers Bureau of Southern California, Incorporated, against the National Candy & Tobacco Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion of the Court of Appeal, see 74 P.2d 848.

Abe Richman, of Los Angeles, for appellant.

J. Wesley Cupp, Cupp & Cupp, all of Los Angeles, for respondent.

Landels, Weigel & Crocker and E. R. Hoerchner, all of San Francisco, Sheldon D. Elliott, Paul R. Hutchinson, and J. Hart Dasteel, all of Los Angeles, Carleton L. Rank, of Oakland, and Leo H. Shapiro, of San Francisco, amici curiæ.

WASTE, Chief Justice.

Defendant appeals from a judgment enjoining it: (1) From selling, or offering or advertising for sale its products at less than invoice or replacement cost, whichever is lower, plus its cost of doing business; (2) from discriminating as to price between different sections, communities or cities by selling its products to customers at a lower rate in one section, community or city than in another, after making proper allowance for grade, quality, quantity and costs of transportation; and (3) from secretly paying or allowing rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, to certain customers, not extended to all purchasers purchasing upon like terms and conditions, whether used to cover up sales below cost and discrimination between localities, or otherwise. It is admitted that appellant committed all of the acts enjoined, and that the commission of said acts was in express violation of the provisions of the Unfair Practices Act, St.1913, p. 508, as amended in 1935 (Stats.1935, p. 1546; Deering, Codes, Laws and Constitutional Amendments, 1935 Supp., p. 2063, Act 8781). The sole question presented on this appeal has to do with the constitutionality of certain sections of the 1935 amendments as applied to the facts of this case. It is appellant's contention that the challenged amendments are unconstitutional in that they violate article 1, sections 1, 11, 14 and 21, and article 12, sections 22 and 23 of the California Constitution and section 1 of the fourteenth amendment to the federal Constitution, U.S.C.A.Const. Amend. 14, § 1. It is also contended that section 3 of the act, in so far as it defines the cost of doing business, is void for the reason that it is uncertain and unintelligible.

The judgment, in so far as it enjoins appellant from discriminating as to price between different sections, and from giving secret rebates, is not challenged. Appellant centers its entire attack on that portion of the judgment enjoining it from selling its products below cost or replacement cost (whichever is lower) plus the cost of doing business as defined in the act.

The trial court held the statute constitutional, and, upon the admission of appellant that it had committed the challenged acts, entered its judgment accordingly. Another department of the superior court of Los Angeles county has held the statute unconstitutional in Balzer v. Caler, now on appeal to this court. 82 P.2d 19.

It should also be mentioned that the statute has been upheld as constitutional by the appellate department of the superior court of Los Angeles county in People v. Kahn, 19 Cal.App.2d Supp. 758, 60 P.2d 596. The Supreme Court of Tennessee has recently (March 7, 1938) upheld the constitutionality of the Tennessee Unfair Sales Act (Tenn.Code Ann.; Williams, Supp.1937, §§ 6770.7 to 6770.13), which is comparable in its essential features to the act here under attack. Rust v. Griggs, 113 S.W.2d 733.

The present cause was tried upon an agreed statement of facts. So far as the charge that appellant sold its products below cost as defined in the act is concerned, it appears therefrom, that the cost of doing business in the line of activity in which appellant is engaged is an established fact well known to all engaged in the industry, including appellant; that in such business the lowest possible cost of doing business is 3 per cent above net cost; that appellant's cost of doing business is at least 3 per cent above net cost; that respondent is an incorporated trade association composed of twenty members engaged in the wholesale tobacco industry in southern California; that appellant is a member of this association; that several of appellant's competitors, also members of respondent association, had for one of their customers the county of Los Angeles to whom they have been selling their products at net cost plus 3 per cent; that appellant knew this fact; *that in order to secure this business for itself, and to injure its competitors,* appellant, on certain specified days offered to sell and subsequently sold certain of its products to the county of Los Angeles at net cost plus 1 per cent; that in so doing appellant was fully aware that the price at which it was selling these products was below its cost price as defined in the Unfair Practices Act; that these sales were not made by appellant at a loss under any of the circumstances permitted by the act, but were made to secure this customer for itself, *to injure its competitors, and for the purpose of preventing others from becoming dealers in such products in competition with appellant.*

[1] The Unfair Practices Act as amended in 1935 was adopted as an urgency measure. Section 1 prohibits merchants, manufacturers, producers and distributors, with intent to destroy competition or to prevent competition of any new dealer, from discriminating as to price between different sections, communities or cities, and likewise prohibits the giving of special rebates or the use of any other device to accomplish this result. This portion of the act, although reenacted in 1935, has been an integral part of our law since 1913 when the original Unfair Practices Act was adopted. Stats. 1913, p. 508. It is predicated upon a similar statute first adopted in South Dakota. The constitutionality of such provision is beyond question. State v. Central Lumber Co., 24 S.D. 136, 123 N.W. 504, 42 L.R.A.,N.S., 804;

Central Lumber Co. v. South Dakota, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164.

Section 3 of the act is the provision against which the main attack of appellant is directed. It provides:

"§ 3. *Sales at less than cost.* It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

"*Definitions.* The term 'cost' as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution 'cost' shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

"The 'cost of doing business' or 'overhead expense' is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

Section 4 prohibits the seller, in establishing his cost of an article at less than present replacement cost from using the invoice cost paid by him at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade, unless the article so purchased is kept separate from goods purchased in the ordinary channels of trade, and unless said article is advertised and sold as merchandise purchased at a forced, bankrupt, or closeout sale.

Section 5 permits the use of cost surveys in proving the cost of an article in any proceeding under the act.

Section 6 is the section which permits sales at less than cost under any of the following circumstances:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in that article, or the sale of seasonal or perishable goods to prevent loss by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) "In an endeavor made in good faith to meet the legal prices of a competitor * * * selling the same article or product * * * in the same locality or trade area."

Section 7 declares that the secret payment or allowance of rebates in any form not offered to all purchasers purchasing upon like terms and conditions "to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice" and any person resorting to the same is guilty of a misdemeanor.

Section 8 declares that it is the duty of the attorney-general, upon the third violation of the act by any corporation, to institute quo warranto proceedings for the forfeiture of the charter of any such corporation.

Section 9 provides that any contract made in violation of the act is illegal, and no recovery thereon shall be had.

Section 10 authorizes any person, corporation or trade association to maintain an action to enjoin a continuance of acts in violation of the statute, and if injured thereby to recover three times the actual damages sustained.

Section 11 makes violation of sections 1 to 7 a misdemeanor, while section 12 contains the usual severability clause.

Section 13 should be quoted. It provides:

"The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved."

Section 14 provides that the act shall be known as the "Unfair Practices Act".

Section 15 declares the act to be an urgency measure. It provides:

"This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety, within the meaning of section 1 of Article IV of the Constitution, and shall therefore go into immediate effect. The facts constituting the necessity are as follows:

"The sale at less than cost of goods obtained at forced, bankrupted, close out, and other sales outside of the ordinary channels of trade is destroying healthy competition and thereby forestalling recovery. If such practices are not immediately stopped many more businesses will be forced into bankruptcy, thus increasing the prevailing condition of depression. In order to prevent such occurrences it is necessary that this act go into effect immediately."

[2] This act represents an attempt on the part of the legislature to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices. Its stated purpose (sec. 13) is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage free, open and fair competition. So far as the present case is concerned, the practice prohibited by the statute is selling below cost. As will later appear this practice is only prohibited when performed "for the purpose of injuring competitors and destroying competition".

[3, 4] It is manifest that the statute was passed in the attempted exercise of the state's police power. That being so, the inquiry of this court is limited to determining whether the object of the statute is one for which the police power may legitimately be invoked, and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained. These two problems involve substantially different considerations, and shall be separately discussed.

[5-7] That the avowed purpose of the act as stated in section 13 "* * * to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented"—is well within the state's police power cannot be seriously doubted. It has now become firmly established that the police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare. In recent years the state, in promoting and advancing the general welfare of its citizens, has frequently and properly used this power to promote the general prosperity of the state by the regulation of economic conditions. This apparent extension of the police power is in fact no extension at all. The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare, and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. These principles have frequently been enunciated by this court and by the Supreme Court of the United States. In Miller v. Board of Public Works, 195 Cal. 477, 484, 234 P. 381, 383, 38 A.L.R. 1479, they are summarized as follows:

"The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied * * * In short, the police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. * *

"Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. * * *"

In People v. Associated Oil Co., 211 Cal. 93, 98, 294 P. 717, 720, this court stated: "But there is no longer any doubt that this general rule has been extended so as to include measures which relate to the general welfare. In the case of Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, at page 592, 26 S.Ct. 341, 349, 50 L.Ed. 596, 4 Ann.Cas. 1175, the Supreme Court stated: 'We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety' * * * If the question between the taking of private property and a proper exercise of the police power is fairly debatable, the statute will be upheld [citing cases]. Also where a strong and preponderant opinion prevails in the state that a particular measure is greatly and immediately necessary to the public welfare, that factor has an important influence in establishing the limitations of the police power in a particular case * * *."

In Graham v. Kingwell, 218 Cal. 658, 659, 24 P.2d 488, this court stated: "In the exercise of its police power the state may prescribe regulations tending to promote the public health, safety, morals, and welfare of the people. It may also legislate so as to increase the industries of the state, develop its resources and promote its welfare and prosperity."

In Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442, 54 S.Ct. 231, 241, 78 L.Ed. 413, 88 A.L.R. 1481, the United States Supreme Court stated:

"It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to and increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, *but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.*" (Italics ours.)

With these cases, and many others that could be cited, in mind, it is obvious that the object of the present statute is within the state's police power. That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no further citation of authority. In fact this is not seriously challenged by appellant. The main arguments advanced by appellant are that the act is unconstitutional in that it curtails its previously enjoyed privilege or right of fixing the price at which it is willing to sell its goods and of selling them at such prices, and that the act unlawfully deprives it of its freedom of action; that it is unreasonable and will not accomplish the purposes intended. These contentions go to the reasonableness of the statute in its relation to its avowed object, and do not attack the validity of that object.

[8] So far as pertinent here, the present act prohibits the sale of commodities below cost as defined in the act (with certain enumerated exceptions) but, as will later appear, such sale is only prohibited when engaged in "for the purpose of injuring competitors and destroying competition". Section 3. In determining the validity of this provision (the object of the statute being within the police power of the state) we are limited in our inquiry to determining whether the act is one reasonably connected with its avowed purpose. In other words, are the means adopted reasonably designed to accomplish this purpose; do they have a real and substantial relation to the objects sought to be attained?

[9, 10] In passing on these questions there are two fundamental principles which must be kept in mind:

In the first place, mere sincerity or honesty of purpose on the part of the legislature does not alone justify the statute. The declaration in the statute as to its purposes, does not determine whether the means provided in the statute are reasonably designed to accomplish those purposes. The courts may properly inquire into that subject.

[11, 12] In the second place, in determining whether the means provided in the statute are reasonably designed to accomplish its avowed object, if that question is reasonably debatable, the determination of the legislature is conclusive. It is not for the courts, except within the limits herein set forth, to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature. These principles have recently been discussed at length by this court in Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177, affirmed by the United States Supreme Court, 299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122, a case involving the validity of the Fair Trade Act as amended in 1933 (Stats.1933, p. 793). That statute permitted the owner of trademarked goods to fix the resale price of his commodity, and such price so fixed was made binding on all into whose hands such goods should fall as provided in the act. In that case (page 454, 55 P.2d page 181) it is stated: "In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the Legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price cutting." After pointing out that one school of economic thought was of the opinion that from a social standpoint, free and open competition was desirable, while another school of thought believed that from a social standpoint the owner of a trademarked article should be permitted to fix the resale price of such article, and after discussing the basis of each argument, this court continued (page 455, 55 P.2d page 181):

"By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state Legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's power, and, if so, to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of Nebbia v. New York, 291 U.S. 502, at page 537, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, Mr. Justice Roberts, speaking for the majority of the court, said:

"'So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." Northern Securities Co. v. United States, 193 U.S. 197, 337, 338, 24 S.Ct. 436, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"'The lawmaking bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.'

"In Central Lumber Co. v. South Dakota, 226 U.S. 157, 160, 33 S.Ct. 66, 57 L.Ed. 164, Mr. Justice Holmes stated:

"'If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.'"

In Old Dearborn D. Co. v. Seagram-Distillers Corporation, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476, in upholding the validity of the Illinois Fair Trade Act, Smith-Hurd Ill.Stats. c. 121½, § 188 et seq. (identical in substance with the California act involved in the Max Factor Case, supra), the United States Supreme Court stated (page 195, 57 S.Ct. page 145):

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature."

See, also, Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853; Fox v. Standard Oil Co., 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780; Central Lumber Co. v. South Dakota, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164; Purity Extract & T. Co. v. Lynch, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184.

In discussing the question as to whether the statute is reasonably designed to accomplish its avowed purposes, the parties, and various amici curiae on their behalf, have written many briefs covering a wide field of discussion. On behalf of appellant it is urged that the means adopted by this statute—prohibiting sales below cost—cannot possibly prevent the creation of monopolies and will not foster free, open and fair competition. It is contended that this legislation in fact will stifle free and open competition and will foster monopolies and that it favors the large chain stores and large distributors as against the small merchant. On behalf of respondent the contrary is urged. It should be noted that amici curiae briefs have been filed on behalf of respondent by several of the trade associations representing the independent grocers and druggists of the state.

[13, 14] It is not the province of this court to determine where the truth of this argument lies. If the subject is fairly debatable the determination of the legislature is conclusive. That the economic wisdom of such legislation is fairly debatable cannot be gainsaid. Courts have frequently commented on the destructiveness of price-cutting tactics. Nebbia v. New York, supra; Hegeman Farms Corporation v. Baldwin, 293 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259; Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; Max Factor & Co. v. Kunsman, supra; Agricultural Prorate Comm. v. Superior Court, 5 Cal. 2d 550, 55 P.2d 495. The use of "loss leaders" for the purpose of injuring a competitor has been condemned by many economists. It has been urged that their use is injurious to the consumer in that the losses so sustained will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of employees, lowering of rents, depressing the wholesale prices, etc. It has many times been urged that such practices are destructive of competition and tend to create monopolies. See discussion in State v. Central Lumber Co., supra, and Central Lumber Co. v. South Dakota, supra. These arguments are mentioned not because we necessarily believe that they are sound, but to demonstrate that the practice condemned by this statute, according to the views held by a large portion of the body politic, tends toward the stifling of free and open competition, the creation of monopolies, and is injurious to the consuming public. It should also be mentioned that some 14 states have passed similar legislation. This is entitled to some weight in determining whether the means provided in the statute will tend to accomplish the valid and expressed purpose of the legislature.

Appellant, and amici curiæ on its behalf, urge that, except as to businesses affected with a public interest, the owner of an article has the constitutional right to sell his property at any price he may desire; that the statute is a price fixing statute; that price fixing statutes, except as to businesses affected with a public interest are per se unconstitutional; that the statute unlawfully interferes with its freedom of contract and unlawfully interferes with its freedom of action. Appellant relies on such cases as Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280; Tyson & Bro. Ticket Offices v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L. Ed. 718, 58 A.L.R. 1236; Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163; Ribnik v. McBride, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, 56 A.L.R. 1327; Williams v. Standard Oil Co., 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596; New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747.

[15, 16] We do not find it necessary to analyze the above-cited cases. There is no doubt some general language in these cases which tends to sustain appellant's contentions. The point is that in more recent decisions of the United States Supreme Court these cases have been discussed and have been held not to prohibit the enactment of state statutes predicated on substantially similar concepts as the one here involved. The leading case on the subject is Nebbia v. New York, supra, involving the validity of the Milk Control Law of New York, which provided for a milk control board with the power to fix the minimum and maximum retail price to be charged for milk. Nebbia was prosecuted for selling milk below the price fixed by the board. Both the New York court of appeals (People v. Nebbia, 262 N.Y. 259, 186 N.E. 694) and the United States Supreme Court, supra, upheld the statute as a valid and proper exercise of the police power. After commenting on the various factors leading to the enactment of the statute, including the disruption of the milk business caused by demoralizing competition resulting in destructive price cutting practices by retailers, the court held the business was subject to control and regulation and sustained the statute. After discussing at length the police power and its proper use in promoting the general welfare, the court pointed out (page 524, 54 S.Ct. page 510) that "these correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public;

no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need." The court then commented upon many cases upholding statutes limiting the individual in the use of his property, including statutes forbidding the giving of trade inducements "and other forms of price discrimination" and statutes prohibiting monopolies and fostering free and open competition. The court then stated that Nebbia's contentions, which are exactly the same contentions made by appellant here, were unsound, using the following language (page 531, 54 S.Ct. page 513):

"But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends." The court then held that the dairy industry was not a public utility, and that there was not present any suggestion of monopoly, and then continued (page 532, 54 S.Ct. page 514): "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a 'virtual monopoly.' This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's De Portibus Maris, to the effect that when private property is 'affected with a public interest, it ceases to be juris privati only'; but the court proceeded at once to define what it understood by the expression, saying: 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.' Page 126 of 94 U.S. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression." After referring to many illustrations of the valid regulation of private business the court stated (page 536, 54 S. Ct. page 515): "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

[17, 18] It is quite significant that the various cases relied upon by appellant in the instant case were cited in the dissenting opinion in the Nebbia Case. The rule of the Nebbia Case has been since followed. Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669. It is true that in these cases the United States Supreme Court emphasized the emergency nature of the legislation. The emergency referred to was in fact part of the background of the statutes. In determining judicial action, however, the character of the situation sought to be remedied rather than its abruptness is the governing factor. As we interpret the Nebbia Case and the cases from this court hereafter referred to, in passing upon the validity of such statutes the sole constitutional yardstick by which they should be measured is the necessity for and the reasonableness of the regulation. The question as to whether the statute involves direct or indirect price fixing is a false quantity.

In Old Dearborn D. Co. v. Seagram-Distillers Corporation, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476, the court upheld the validity of the Illinois Fair Trade Act, Smith-Hurd Stats. Ill. C. 121½ § 188 et seq., a statute substantially identical with the California Fair Trade Act, upheld in Max Factor & Co. v. Kunsman, supra. Such statutes permit the owner of trade-marked articles to fix the resale price of such articles. The basic purpose of such a statute and the one here involved is the same. Both are aimed primarily at cut price retailing and the ruinous use of loss leaders. The Fair Trade Act aims to correct the evil from above by legalizing resale price maintenance, by penalizing all who sell trade-marked articles in disregard of the owner's contract even though not parties to it. The present statute operates from below and is broader in scope. In its true sense it is not a price fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor. In all other respects price is the result of untrammelied discretion. This was the exact holding of the supreme court of Tennessee, in Rust v. Griggs, 113 S.W.2d 733, in upholding the Tennessee act comparable to the statute here involved.

This court in the Max Factor & Co. Case, supra, in answering the contention that the Fair Trade Act unlawfully restricted the owner of property in selling the same at prices fixed by himself stated (page 458, 55 P.2d page 182): "When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not per se brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more complex, the necessity for such regulation has become more acute. Neither the State nor the Federal Constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty rather than an absolute liberty." And again at page 459, 55 P.2d at page 183, it is stated:

"Under its police power, the state, in a proper case, has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, supra, which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.

"The fact that a statute limits the rights of the owner of property, lowers its value, or limits its use, or limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the Legislature is supreme. These limits cannot be fixed by precedent. As the state progresses, the police power, within reason, develops to meet the changing conditions."

After citing many illustrations of state statutes held valid although a direct limitation on the alleged right of free bargaining, this court held that in the proper case (page 462, 55 P.2d page 184) "this power to regulate free bargaining includes the power to regulate the price" relying on the Nebbia Case, supra.

It is true that the Max Factor & Co. and Old Dearborn Cases involved only trade-marked articles but the theory of those decisions is also applicable here.

Another case to which reference should be made is Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 55 P.2d 495, upholding the constitutionality of the California Prorate Act. By that act the growers of certain agricultural products and a state commission, in the manner therein provided, are permitted to control the quantity of the product that shall be harvested and marketed by the industry and by the individual grower, even as against dissenters. This court upheld the statute, chiefly relying upon the Nebbia Case, and expressly pointed out (page 582), after citing the exact cases relied on by appellant in the instant case, that those cases have apparently been overruled. The court concluded (page 582, 55 P.2d page 511): "Under the authorities cited herein, we are of the opinion that the Prorate Act does not violate the due process clauses of the State and Federal Constitutions, nor those sections which provide against the taking of private property for public use. Neither is the act in conflict with the Federal Constitution which accords to all persons the equal protection of the law. If the state has the authority to fix the price at which a commodity such as milk may be sold and thus avoid the ruinous effect of unrestrained competition, as we understand the decisions of the highest court in this land so held, we can see no difference in principle in a state statute which attempts to regulate the production and marketing of a commodity, where without such regulation the industry would be practically destroyed to the great detriment not only of those engaged therein, but to the state and its citizens as well."

In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, decided in March of 1937 the United States Supreme Court expressly overruled two of the cases relied upon by appellant. Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, and Morehead v. New York, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445. The statute there involved was one providing a minimum wage law for women. The court commented at length on the existing economic conditions intended to be remedied by the statute. It pointed out that the freedom of contract guaranteed by the Constitution is one subject to proper regulation. The exact statement of the court is worth quoting (page 391, 57 S.Ct. page 581): "The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment [U.S.C.A. Const.Amend. 14] governing the states, as the due process clause invoked in the Adkins Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.

Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

[19, 20] Other cases could be cited. We believe that these cases clearly establish the constitutionality of the statute here under attack. The statute must be held to be a reasonable attempt upon the part of the state to accomplish a valid object. It must be borne in mind that this statute does not regulate the selling of commodities—it is the predatory trade practice of selling below cost with intent to injure competitors which the legislature on reasonable grounds has determined is vicious and unfair that is prohibited. Such determination is clearly within the legislative power. The state may not have power to regulate all trade practices affecting competition, but it clearly has power to restrict or prohibit trade practices which upon reasonable grounds it determines are predatory, vicious, unfair and anti-social.

[21] It is next urged by appellant that every sale below cost, except as provided in section 6, is made unlawful by section 3 regardless of intent, and that so construed the act is unconstitutional. It would certainly add to the weight of appellant's argument on the main issue if the statute omitted intent as an integral part of the act prohibited. It is one thing, from a legal standpoint, to prohibit sales below cost engaged in for the purpose of injuring competitors and destroying competition, and quite another to merely prohibit all such sales regardless of intent. It may well be that an absolute prohibition regardless of intent would be unreasonable. See Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163. However, it is our opinion that section 3, properly interpreted, requires the designated intent before selling below cost is prohibited. The language of this section, so far as pertinent to this contention, is as follows: "It shall be unlawful for any person * * to sell * * * any article * * * at less than the cost thereof to such vendor, or give, offer to give * * * any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition." Because of the absence of a comma after the word "trade", it is urged that the unlawful intent clause applies only to the giving away of articles and does not apply to the preceding clause dealing with selling below cost. This contention is without merit. We are of the view that the intent clause modifies and qualifies not only the words immediately preceding but also the selling below cost clause. We are led to this construction by several considerations.

In the first place, various sections of the act contain provisions clearly indicating that intent is a necessary element of the offense. See secs. 1, 3, 5, 7, 13 and 15.

[22] In the second place the legislature amended section 3 in 1937 (Stats. of 1937, p. 2395) by inserting the comma in the proper place, and by so changing the wording of the section as to leave no doubt that selling below cost is only prohibited when the improper intent is present. This is entitled to some weight in ascertaining the legislative intent.

[23, 24] In the third place, there are certain rules of construction which lead to the same conclusion. These rules were clearly stated and applied in People v. Kahn, supra, in construing this identical provision. It is there stated (page 762, 60 P.2d page 598):

"It is our opinion, however, that selling below cost is not made a public offense except where it is done for the purpose, that is, with the specific intent, of injuring competitors and destroying competition.

"Several rules of construction unite in leading us to this conclusion. The first is enunciated in Porto Rico Ry., etc., Co. v. Mor (1920) 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944, where the omission of a comma between the qualifying clause and the words immediately preceding gave rise to the argument that the clause was applicable only to the nearest group of words and not to those first appearing and separated from those later used by a comma. In answer to the argument the Supreme Court stated: 'When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.' The phrase 'for the purpose of injuring competitors and destroying competition' is as applicable to the words dealing with selling below cost as it is to those having to do with making gifts. An even stronger case, considering the same problem of statutory construction, and arriving at the same conclusion, is Hillsboro Coal Co. v. Knotts (D.C.1920) 273 F. 221.

"Our statement that the phrase quoted is applicable to both sales and gifts becomes clear when we consider the next rule of construction which is expressed in 23 Cal. Jur. 764 and quoted in Re Sekuguchi (1932) 123 Cal.App. 537, 538, 11 P.2d 655: 'Every statute and Code section should be construed with reference to its purpose and the objects intended to be accomplished by it. The language will be so interpreted, if possible, as to aid the design and intent of the legislature and to effectuate the evident objects and purposes of the law.' As appears throughout the statute spread before us, the Legislature was not solicitous lest someone in business lessen his profits by selling below cost or by giving away his substance. It is implicit throughout the act that the concern of the Legislature is that which it explicitly stated in section 13 (Stats.1935, p. 1550): 'The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally [sic] construed that its beneficial purposes may be subserved.' We reiterate, therefore, that the Legislature intended to declare and has declared that selling below cost is a misdemeanor only when accomplished for the purpose of destroying competition and injuring one's competitors."

[25] It is also asserted that the statute fails to conform to article 1, section 11, of the California Constitution, which requires that all laws of a general nature shall have uniform operation. This lack of uniformity is asserted to exist in that large chain and department stores, because of their large purchasing power, can buy for less than the smaller merchant, and may, therefore, under the act, sell for less. It is claimed that this not only constitutes unlawful discrimination, but necessarily defeats the claimed purpose of the act, in that such a situation fosters rather than prevents monopolies. This last contention, as has already been pointed out, deals with a reasonably debatable economic problem, and is therefore within the legislative field. The first contention has two complete answers.

[26, 27] In the first place, the uniformity required by such a provision as article 1, section 11, is uniformity in operation, not uniformity of result. State v. Darling, 216 Iowa 553, 246 N.W. 390, 88 A.L.R. 218; Bowers v. Glos, 346 Ill. 623, 179 N.E. 80. If there is any theoretical "discrimination" resulting from the statute it is due to the very fact that the law is uniform in its operation, and does not classify.

In the second place, although it is true that by fixing the minimum permissible price at cost section 3 may permit one merchant to sell for less than another, as expressed by one commentator "the poison, if such it be, contains its own antidote by exempting from operation of the statute, any endeavor made in good faith to meet the legal prices of competitors" (47 Yale Law Journal 1201) as provided in section 6(d).

[28] Appellant and amici curiae present various hypothetical situations, and contend that as applied to these situations the statute is unconstitutional. We are not permitted to consider these hypothetical situations. In answering the identical problem in the Max Factor & Co. Case, supra, page 468, 55 P.2d page 187, this court stated: "Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239. The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable."

[29] The contention that because section 1 excludes the lease of motion pictures from the operation of the act, the act is discriminatory, cannot be properly raised by this appellant. Smiley v. Kansas, 196 U.S. 447, 457, 25 S.Ct. 289, 49 L.Ed. 546.

[30, 31] The last contention of appellant necessary to be discussed is that the definition of "cost of doing business" found in section 3 is indefinite and uncertain.

Appellant is in no position to urge this point. The parties stipulated and the trial court found that appellant sold the goods here involved at less than invoice or replacement cost, plus the appellant's cost of doing business. The parties likewise stipulated that the cost of doing business in appellant's line of activity was an established fact, well known to all in the trade, including appellant. Obviously, the provisions defining cost of doing business must have been sufficiently certain and definite to appellant at the time it stipulated to the fact. We have no way of ascertaining in this case whether the provisions relating to the cost of doing business contained in the act are too uncertain and indefinite to reasonably be applied by any merchant. Appellant and its supporting amici curiae urge with great vehemence that it is practically impossible for any merchant to have available the necessary facts for an accurate calculation of cost of doing business as applied to each article during the course of any current year. Respondent and its supporters urge that simple and proper accounting practices will disclose the necessary information. Under such circumstances the issue cannot and should not be determined in this proceeding. When and if the issue is properly presented against a proper factual background with appropriate evidentiary material, this court can then and only then determine the reasonableness of this provision. It may well be that such evidence will disclose that the apprehensions of appellant are groundless. Moreover, the present case involves an application for an injunction. We are not now considering the criminal provisions of the act. In an equity case the trial court "has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable". Max Factor & Co. v. Kunsman, supra. It should also be mentioned that in Rust v. Griggs, supra, the Tennessee supreme court upheld a provision in relation to cost of doing business that on its face appears to be more vague and uncertain than the one here involved.

[32] For the foregoing reasons it must be held that, as applied to the facts of this case, the Unfair Practices Act is constitutional, in so far as it grants to those in the position of respondent the right to injunctive relief. The statute embodies the concept that sales made at a loss to the seller, when made for the purpose of injuring or destroying competition, are predatory and anti-social in character. The economic wisdom of such a concept may be debatable, but being debatable, the legislature is empowered to choose between its acceptance or rejection. The statute, so far as the facts here involved are concerned, goes no further than reasonably necessary to effectuate that choice.

It is our opinion that neither the due process clause, nor any other constitutional restraint, state or federal, prohibits the legislature from acting to curb predatory merchandizing practices which tend to injure or destroy fair and open competition.

The judgment appealed from is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SEAWELL, J.; HOUSER, J.; SHENK, J.

11 Cal.2d 663

BALZER v. CALER.

L. A. 15859.

Supreme Court of California.

July 28, 1938.

1. Appeal and error ⚷843(2)

In suit for injunction to prohibit defendant from selling in grocery stores staple articles for less than cost in violation of Unfair Practices Act as amended in 1935, trial court's finding, based on substantial competent evidence, that sales below cost by defendants were not performed for purposes of injuring competitors and destroying competition, rendered it unnecessary for reviewing court to pass on constitutionality of the Unfair Practices Act as applied to facts of case, since under the Unfair Practices Act sales below cost are only prohibited when engaged in with intent to injure competitors and destroy competition. Gen. Laws Supp.1935, Act 8781, § 3.

2. Trade-marks and trade-names and unfair competition ⚷68(2)

The Unfair Practices Act as amended in 1935 only prohibits sales below cost when engaged in with intent to injure competitors and destroy competition. Gen.Laws Supp.1935, Act 8781, § 3.

3. Trade-marks and trade-names and unfair competition ⚷92

In suit for injunction to prohibit defendant from selling in his grocery stores staple articles for less than cost in violation of Unfair Practices Act, causes of action alleging that on specified dates defendant offered and advertised for sale in his stores certain designated articles at less than invoice or replacement cost, without allegation that such acts were for purpose of injuring competitors and destroying competition, failed to state cause of action. Gen. Laws Supp.1935, Act 8781, § 3.

4. Appeal and error ⚷1010(1)

Fact finding of trial court supported by competent evidence cannot be disturbed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Suit by Everett L. Balzer against Donald L. Caler for an injunction to prohibit the defendant from selling in his grocery stores staple articles for less than cost in violation of the Unfair Practices Act, Gen.Laws Supp.1935, Act 8781. From a judgment refusing to issue an injunction, the plaintiff appeals.

Affirmed.

For prior opinion of the Court of Appeal, see 74 P.2d 839.

Hanna & Morton, Albert Mosher and Leon B. Brown, all of Los Angeles, for appellant.

E. R. Hoerchner, Landels, Weigel & Crocker and Stanley A. Weigel, all of San Francisco, amici curiæ.

Otto A. Gerth, of Los Angeles, for respondent.

Pierson & Block, of Los Angeles, McNamara & Seymour, of New York City, Chase, Barnes & Chase and Ray C. Eberhard, all of Los Angeles, and Orrick, Dahlquist, Neff & Herrington, of San Francisco, amici curiæ.

WASTE, Chief Justice.

A hearing was granted in this cause in order to consider the constitutionality of the Unfair Practices Act as amended in 1935. Stats. of 1935, Ch. 477, p. 1546; Deering's Codes, Laws and Constitutional Amendments, 1935 Supp., Act 8781. Upon further deliberation, for reasons hereafter appearing, it is our opinion that the constitutionality of the statute is not involved in this proceeding.

This cause is a companion case to Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 82 P.2d 3, this day decided. The appeal is by the plaintiff from a judgment refusing to issue an injunction to prohibit the defendant from selling in his grocery stores certain staple articles for less than cost. It is claimed that such sales were in violation of the above-mentioned act. The complaint upon which the action was predicated is in four counts. The first count alleges that on specified dates defendant offered and advertised for sale in his stores certain designated articles at less than invoice or replacement cost. The third cause of action alleges that defendant on the days specified sold the articles so advertised for less than invoice or replacement cost. In neither of these counts is it alleged that the acts charged were performed for the purpose of injuring competitors and destroying competition.

The second and fourth causes of action allege the same facts as do the first and third causes of action, but add the allegation that these acts were performed "for the purpose of injuring competitors and destroying competition."

Demurrers to each count were overruled. The defendant answered admitting the offers and sales at less than his invoice or replacement cost, but he denied that these acts were performed with the intent to injure competitors or destroying competition, alleging, in this connection, that he offered for sale and sold the goods for less than cost for the sole purposes of meeting the competition of other merchants and of advertising and stimulating his own business.

[1-4] Upon a trial of the cause, upon admittedly competent evidence, the trial court found that although defendant admittedly sold certain articles below cost these acts were not performed for the purposes of injuring competitors and destroying competition.

This last mentioned finding, based as it is upon substantial competent evidence makes it unnecessary to pass upon the constitutionality of the Unfair Practices Act as applied to the facts of this case.

It was held in the Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co. Case, supra, that under section 3 of the act sales below cost are only prohibited when engaged in with the intent to injure competitors and to lessen competition. Under this ruling, obviously, the first and third causes of action fail to state a cause of action. As to the second and fourth causes of action the finding of the trial court is supported by the evidence, and cannot be disturbed on appeal.

Appellant contends that inasmuch as the cause involves a request for an injunction that the existing law rather than the law in force at the time of the judgment should be applied. In this connection it is pointed out that in 1937 the act was amended to clearly state that intent to injure competitors and lessen competition is a necessary element of the act prohibited, but that section 5 of the act was also amended to provide that in any action brought under the act the selling of an article below cost, together with proof of the injurious effect of such act "shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition." Stats., 1937, Ch. 860, p. 2395, 2397. Even if this section were held applicable to the instant case it would nevertheless still have to be held that the only competent admissible evidence introduced on this issue rebutted the presumption.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SEAWELL, J.; HOUSER, J.; EDMONDS, J.; SHENK, J.

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27 Cal.App.2d 554

THARP v. SAN JOAQUIN COTTON OIL CO. et al.

Civ. 6013.

District Court of Appeal, Third District, California.

Aug. 12, 1938.

Hearing Denied by Supreme Court Sept. 8, 1938.

1. Trial 🔑377(2)

The trial court did not abuse its discretion in denying application by plaintiff in action for injuries to truck driver while assisting defendants' employees to replace belt on pulley after unloading cotton seed on defendants' conveyor to open case after its submission for further evidence of custom of truck drivers, delivering products at defendants' mill, to render such assistance, where evidence that some drivers did so was fully considered in court's opinion and plaintiff failed to plead such custom.

2. Customs and usages 🔑18

A custom, not so general that it will be presumed to have been known to parties or of which court will take judicial knowledge, must be pleaded to warrant admission of evidence thereof.

◆

Appeal from Superior Court, Madera County; Ernest Klette, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 81 P.2d 443.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for appellant.

Ray W. Hays and W. M. Conley, both of Fresno, for respondents.

PER CURIAM.

[1, 2] In his petition for rehearing the appellant insists that the trial court erred in refusing his request to open the case after it was submitted, to permit him to prove that it was the custom of truck drivers delivering products to the defendants' warehouse and mill to assist defendants' employees in installing and replacing belts on the pulleys.

We are of the opinion the court did not abuse its discretion in denying the application to open the case for further evidence of an alleged prevailing custom. We are unable to see how such a custom on the part of truck drivers to volunteer their services would inure to the benefit of the appellant. There was evidence in the record that some truck drivers did assist in installing and replacing the belts. That evidence is fully considered in the opinion of this court. Moreover, it is the invariable rule that evidence of a custom which is not so general in its character that it will be presumed to have been known to the parties or of which a court will take judicial knowledge must be pleaded to warrant the acceptance of evidence of such custom. Pray v. Trower Lumber Co., 101 Cal.App. 482, 489, 281 P. 1036; 25 Cal.

Jur. 422, sec. 8; 17 C.J. 516, sec. 80; 27 R.C.L. 195, sec. 40. The appellant failed to plead the custom, the proof of which he sought to introduce.

The other issues on appeal are adequately covered by the opinion.

The petition for a rehearing is, therefore, denied.

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28 Cal.App.2d 102

In re CAMPBELL'S ESTATE.

Petition of WOOLMAN.

Appeal of GETZ et al.

Civ. 2078.

District Court of Appeal, Fourth District, California.

Aug. 10, 1938.

Perpetuities 🔑4(2)

A provision in will giving remainder of estate to the four chair officers of fraternal organization in office at time of distribution of estate was void as violating rule against perpetuities because of possibility that distribution of estate might not take place for more than 25 years after testator's death. Civ.Code, §§ 715, 716; Const. art. 20, § 9.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding in the matter of the estate of Wesley S. Campbell, deceased, wherein Claude Woolman, executor, filed his final account and petition for distribution. Martin J. Campbell and another filed objections. From the decree of distribution, Thomas Getz and others, beneficiaries, appeal.

Affirmed.

Charles B. De Long, of San Diego, for appellants.

Frank M. Downer, Jr., of San Diego, for respondents.

BARNARD, Presiding Justice.

Wesley S. Campbell died on October 4, 1935, leaving a will containing the following clause:

"All the rest, residue, and remainder of my estate, of whatsoever kind and nature and wheresoever situated, I give, devise and bequeath to the four chair officers of San Diego Lodge No. 168 Benevolent and Protective Order of Elks, being the four chair officers in office at the time of distribution of my estate, designated as 'Exalted Ruler', 'Exalted Leading Knight', 'Lecturing Knight' and 'Loyal Knight'. Such officers shall take the same free of any trust, but it is my expectation that they will employ the same for charitable purposes conformable to the policies of such San Diego Lodge No. 168, and I earnestly request them to make such use thereof. I particularly commend to them my friend May Skinner, if she should survive me, with the purpose that her needs be provided for should her own resources be insufficient."

The will was admitted to probate and in due course a final account and petition for distribution, with objections thereto, came on for hearing, it being stipulated that "the four chair officers" of this lodge were elected annually, and that the individuals who occupied those positions at that time were not the same individuals who had occupied them at the date of decedent's death. The court found that the quoted clause of the will is invalid and void as in contravention of the provisions of sections 715 and 716 of the Civil Code, and that the said Campbell died intestate as to the residue of his estate, and ordered the same distributed to his heirs at law. The four individuals who at that time held the designated positions in this lodge have appealed from the decree of distribution.

The sole question presented is whether this provision of the will is invalid because of a possibility that distribution of the estate might not take place for more than twenty-five years after the death of the testator. If distribution should be thus delayed the provision in question would contravene the rule against perpetuities (sec. 9, art. 20, State Constitution), and also section 716 of the Civil Code, which reads in part: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter." This includes the provision of section 715 of that code that such a power shall not be suspended for more than twenty-five years from the time of the creation of the suspension, which in this case would be the date of the decedent's death.

The appellant relies particularly on the case of Belfield v. Booth, 63 Conn. 299, 27 A. 585. That case involved a provision of a will which left certain property in trust, the trust to continue for fourteen years after the executor "has settled with the judge of probate". In considering this provision, under the common-law rule against perpetuities, it was held that the time set for the division of the trust estate was not so remote as to contravene that rule. In so holding the court interpreted the will as, in effect, providing that the fourteen-year trust period was to commence "at the expiration of such reasonable time after his decease as will suffice for the proper settlement of his estate", and stated that it was not to be presumed that such settlement would be delayed longer than that. To follow this reasoning in the instant case would be not only to read into the will something which is not there but to flatly disregard the provision of our statute which makes void any future interest which by any possibility may suspend the absolute power of alienation for a period longer than that prescribed.

In considering a problem similar to the one now before us the supreme court of Illinois in Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001, 10 L.R.A.,N.S., 564, said (page 1004):

"It is clear, from the language of the will itself, that whatever interest the executor took under it could not vest in him until the probate of the will, and while this event would, in the ordinary and usual course of events, probably occur within a few months, or at most a few years, after the death of the testatrix, yet it cannot be said that it is a condition that must inevitably happen within 21 years from the death of the testatrix. Since a bare possibility that the condition upon which the estate is to vest may not happen within the prescribed limits is all that is necessary to bring the devise in conflict with the rule, we see no escape from the conclusion that the devise to the executor offends the rule against perpetuities, and is therefore void."

That decision quoted from the case of Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273, as follows:

"'The event here is: "When the estate of Thomas Mason is settled up." Can it be said to have been morally certain, when the instrument was executed, that the estate ever would be settled up? The law requires estates to be settled, and fixes a period within which it shall be done; but it does not, of and by itself, settle them. The presumption is that the law in this regard, as in others, will be obeyed. But this presumption does not amount to absolute certainty. The enforcement of the law, depending on human agencies, is liable to be affected or controlled by many circumstances, and instances where it is not only not fully enforced, but is openly violated, are within the experience of all, so that it is impossible to predict with moral certainty that a thing will be done simply because it is the command of the law that it shall be.'"

Similar principles have been applied, although upon very different facts, in People v. Simonson, 126 N.Y. 299, 27 N.E. 380, and in Cruikshank v. Chase et al., 113 N.Y. 337, 21 N.E. 64, 4 L.R.A. 140.

In Estate of Troy, 214 Cal. 53, 3 P.2d 930, the court said (page 932):

"It has frequently been stated that the provisions of section 716 of the Civil Code do not permit us to wait and see what happens in order to determine the validity or invalidity of the limitation. It is the possibility of the event that will suspend unlawfully the power of alienation which serves to void the limitation at the time of its creation."

The question before us narrows down to whether or not it can be said that this estate must of necessity have been distributed within twenty-five years after the testator's death and that such distribution could not "by any possibility" have been longer delayed. One possibility, which cannot be overlooked, is that probate proceedings might not have been started for many years. Cases are not unknown where parties, through ignorance or neglect, have continued to occupy and use for a long period property left by a decedent before resorting to probate. Property in the form of bank deposits has remained unclaimed for years before probate proceedings were commenced. The closing of many estates has been delayed for years both through neglect and by intention, because of circumstances and conditions. A long delay by reason of protracted litigation is a very real possibility. All of these possibilities, not to mention others, might become realities in a particular case, causing a delay beyond the time limited. While it can be said that the reasonable probabilities were in favor of a distribution of this estate well within the time required, to hold that such a result, with the consequent vesting of interest, was certain to occur and would inevitably take place would be to disregard the statute by accepting a high degree of probability as a certainty.

While statutes of the kind here in question may at times seem unnecessarily harsh in a particular case, they are adopted with a definite aim and purpose in view. These particular statutes are a part of the expression of a well-defined public policy. In so far as material here the language therein used is not ambiguous and to interpret the phrase "by any possibility" as in effect meaning "by any probability" would be to alter a plain provision of the statute. Such a change in statutory law should come, if at all, from the legislature and not from the court.

The judgment and decree is affirmed.

I concur: MARKS, J.

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28 Cal.App.2d 149

PEOPLE v. SPAHN et al.

Cr. 368.

District Court of Appeal, Fourth District, California.

Aug. 15, 1938.

1. Criminal law ⇨1178

The mere statement that the trial court erred in refusing to give certain instructions, without argument or authority, presented nothing for review by the District Court of Appeal.

2. Criminal law ⇨829(1)

The modification of or failure to give certain instructions proffered by the accused, which were covered by given instructions, was not error.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

John Spahn and Raymond Peterson were charged with robbery perpetrated by means of a deadly weapon, and Raymond Peterson was convicted, and he appeals.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

GORDON THOMPSON, Justice pro tem.

Raymond Peterson and one John Spahn were charged in an information filed by the district attorney of San Bernardino county with the crime of robbery perpetrated by means of a deadly weapon, to-wit, a pistol. A trial was had before a jury and a judgment of conviction rendered against Peterson.

It is not contended by appellant Peterson, who alone prosecutes this appeal, that the evidence was not sufficient to justify the verdict of conviction. Appellant does, however, contend that the trial court committed error in its refusal to give certain instructions and in modifying others, requested by appellant. No argument whatsoever is advanced by appellant in support of this contention. There is just the bare statement that the appellant was deprived of a fair and impartial trial and that the case should be reversed and a new trial granted.

[1, 2] It is settled law that the mere statement that the trial court erred in refusing to give certain instructions, without argument or authority, presents nothing for an appellate court to decide. People v. Foss, 7 Cal.2d 669, 62 P.2d 372. However, from the record, it appears that the contention of appellant is without merit. The trial court's instructions to the jury were adequate, and no error appears from the court's modification of or failure to give appellants' proffered instructions which were covered by those given.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

28 Cal.App.2d 121

PEOPLE v. GILBERT.

Cr. 437.

District Court of Appeal, Fourth District.
California.
Aug. 11, 1938.

Criminal law ⇨1104(1)

Where reporter's transcript was not filed and record contained no application for a reporter's transcript or statement of grounds of appeal or points relied on, appellate court was without jurisdiction and appeal would be dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 2, § 7.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Proceeding by the State against Eugene Gilbert. From the judgment, defendant appeals.

Dismissed.

Don C. Bitler, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal on the ground that no application was filed by the appellant setting forth the grounds of the appeal, the points relied upon and designating what portions of the reporter's notes it was necessary to have transcribed in order to fairly present the points relied upon, as provided for in section 7 of rule II of the Rules for the Supreme Court and District Courts of Appeal.

No reporter's transcript has been filed. It appears from the clerk's transcript that judgment was pronounced on July 1, 1938, and written notice of appeal was filed on July 2, 1938. The record before us contains no application for a reporter's transcript or statement of the grounds of appeal or points relied upon. It is well settled that under these circumstances the Appellate Court is without jurisdiction to consider the appeal, and that a motion to dismiss should be granted. People v. Lewis, 219 Cal. 410, 27 P.2d 73; People v. Foster, 132 Cal.App. 636, 23 P.2d 305; People v. Martin, 127 Cal.App. 93, 15 P.2d 202; People v. Riga, 104 Cal.App. 477, 285 P. 1069; People v. Davis, 103 Cal.App. 318, 284 P. 516.

The appeal is dismissed.

We concur: MARKS, J.; GORDON THOMPSON, Justice pro tem.

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28 Cal.App.2d 89

EDDY v. CITY OF LOS ANGELES et al.

Civ. 11490.

District Court of Appeal, Second District,
Division 1, California.
Aug. 10, 1938.
Hearing Denied by Supreme Court
Oct. 7, 1938.

1. Appeal and error ⇨907(3)

Where plaintiff appealing from judgment for defendant brings up the judgment roll only, reviewing court must presume that evidence was sufficient to support the findings, and affirm the judgment unless findings do not support the judgment as a matter of law.

2. Automobiles ⇨187

Under statute making state, districts, and political subdivisions liable for negligent operation of motor vehicles, a governmental agency, as a city, may be liable under certain circumstances for the misconduct of its employees in the operation of an emergency vehicle. Civ.Code, § 1714½; St.1929, p. 568.

3. Statutes ⇨240

Though statutes imposing liability on governmental agencies in derogation of the common law are to be strictly construed, courts may not nullify legislation where the statute evinces clear intention to depart from the common-law rule.

4. Automobiles ⇨175(1, 5)

Under statute making city or other public employer liable for "negligent operation" of an emergency vehicle, while relieving fireman or policeman responding to an emergency call from personal liability, "negligent operation" exists only where driver of vehicle fails to give timely warning or otherwise makes an arbitrary exercise of his exemption from the rules of the road, which can be said to amount to willful misconduct. Civ.Code, § 1714½; St.1929, p. 568.

[Ed. Note.—For other definitions of "Negligent Operation," see Words & Phrases.]

5. **Automobiles** ⟹175(3)

Under statute making state, districts, and political subdivisions liable for negligent operation of motor vehicles, drivers of emergency vehicles must give notice to persons required to yield the right of way, whether such persons are riding in another vehicle or walking upon the public highway, before such persons may be charged with obligation to give precedence to emergency vehicles. Civ.Code, § 1714½; St.1929, p. 568.

6. **Automobiles** ⟹187, 196

Where city policeman, answering an emergency call in city's automobile, which was not equipped with a siren, drove at excessive speed on wrong side of street without even sounding horn until within 200 feet of intersection, and struck pedestrian at intersection, the city but not the policeman was liable under statute for "negligent operation" of emergency vehicle. Civ.Code, § 1714½; St.1929, p. 568.

7. **Appeal and error** ⟹1176(4)

In action against city for personal injuries, where trial court gave judgment for city but made findings determining amount of damage sustained by plaintiff, and plaintiff appealed on the judgment roll alone, reviewing court would direct entry of judgment for plaintiff in reversing the judgment, without requiring new trial.

◆

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Pearl Edwards Eddy, an infant, by Gilbert K. Edwards, her guardian ad litem, against the City of Los Angeles and another, for injuries suffered when plaintiff was struck by an automobile. From a judgment in favor of the named defendant, plaintiff appeals.

Affirmed in part and reversed in part.

Hearing denied by Supreme Court; SHENK, J., dissenting.

H. E. Gleason and John F. Poole, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., Albert E. Wheatcroft, Deputy City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff, Pearl Edwards Eddy, a minor of the age of 17 years, by and through her guardian ad litem, commenced this action against the City of Los Angeles and E. L. Vinsant to recover damages for personal injuries received by the minor plaintiff, a pedestrian, while crossing York boulevard, a public street in the City of Los Angeles, in the lane marked for pedestrians, when she was struck by an automobile owned by the defendant city and driven by defendant Vinsant in the course of his employment.

[1] From the judgment in favor of defendant city, plaintiff has appealed, and has brought up the judgment roll only. It must therefore be presumed that there was evidence at the trial sufficient to support the findings; and unless as a matter of law it can be said that the findings do not support the judgment, the latter must be affirmed.

The trial court found that on February 6, 1934, defendant city owned the automobile in question and that the same was being driven by defendant Vinsant in the course of his employment as a member of the Los Angeles city police department; that the automobile at the time and place of the accident was being driven in response to an emergency call and was equipped with a horn in good order, *but was not equipped with a siren of any type or description whatsoever.* The court further found that the minor plaintiff as a pedestrian was crossing York boulevard in the lane marked for pedestrians, and that defendant Vinsant drove and operated the automobile in "such a grossly careless and negligent manner as to cause the same to violently collide with and strike the plaintiff while plaintiff was so crossing York Boulevard, and in particular, that while plaintiff was so crossing said York Boulevard in said pedestrians' lane, there were two motor vehicles parked parallel to each other, just to the east of said pedestrian lane, occupying almost all of the north half of said York Boulevard; that said defendant E. L. Vinsant on approaching said intersection was recklessly, carelessly and negligently driving at 45 miles per hour; that within 200 feet thereof he sounded his horn, and without slackening his speed until almost the moment of impact, recklessly, carelessly and negligently turned his automobile to the left of said parked vehicles and upon the south (wrong) side of the street, and then proceeded on and recklessly, carelessly and negligently struck plaintiff, who had also then reached the south side of said street."

The court further found that by reason of the acts of defendant city and its servant and employee plaintiff suffered injuries, to her damage in the sum of $1,756; and that such damages sustained by plaintiff were not the result of an inevitable or unavoidable accident; and further, that plaintiff was not guilty of contributory negligence.

Upon these findings, the court made the following conclusions of law: "That said motor vehicle at the time of said collision was an authorized emergency vehicle being operated by said officer of said police department in responding to an emergency police call; that said defendant, E. L. Vinsant, was grossly negligent in the operation of said vehicle, but that under the express provisions of law he is not liable in damages thereof, nor is said City of Los Angeles." Based upon the foregoing, judgment was entered in favor of defendants.

Section 1714½ of the Civil Code, in effect at the time of the happening of this accident on February 6, 1934 (since repealed and reenacted as section 400 of the Motor Vehicle Code, St.1935, p. 152), in so far as material to this cause, may be summarized as providing that a city and other political subdivisions owning any motor vehicle are responsible for injuries, death or damage "as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment". The statute further provides that in the event of a recovery against the entities mentioned, they "shall be subrogated to all the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment, and costs". Provision is also therein made enabling the city or other political subdivision to insure against the liability created by the statute.

In their efforts to sustain the judgment herein notwithstanding the findings of negligence amounting to wilful misconduct, respondents claim that the legislature did not intend to include the operation of emergency motor vehicles in the exercise of fundamentally governmental functions when it enacted section 1714½ of the Civil Code, because, argues respondent city, since the law expressly relieves from personal liability the drivers of police and fire department motor vehicles when responding to emergency calls and alarms (Stats.1929, p. 568, ch. 263), it of necessity follows that the legislative body had no intention of imposing liability in such cases upon a municipality as that would be contrary to the well-settled rule of law that a master will not be held liable for an act participated in, only by a servant, but for which the servant is exempted from liability. In other words, respondent city contends that its liability is secondary, and when the employee who commits the tort and whose liability is primary is relieved from responsibility, the master cannot be held responsible when its servant is relieved. It is further claimed by respondent city that the portion of the statute imposing liability upon the municipality is inseparable from the right of subrogation of the municipality against the officer or employee committing the tort, and that because the exemption of the employee from personal liability destroys the city's right of subrogation, it was never intended that the latter should be held responsible when its vehicle was engaged in making an emergency police call.

[2] With reference to the first contention of respondent city, it is firmly established in the case of Lucas v. City of Los Angeles, 75 P.2d 599, decided by the Supreme Court January 20, 1938, that under certain circumstances a governmental agency is liable under the provisions of section 1714½, supra, for the misconduct of its employees in the operation of an emergency vehicle.

The remaining contentions raised by respondent city were held to be without merit in the case of Raynor v. City of Arcata, 77 P.2d 1054, decided by the Supreme Court April 1, 1938. In that decision, while conceding that the decisions of the appellate court were up to that time somewhat confusing on the question of whether a public employer may be held liable for "negligent operation" of a police or fire department car under section 1714½ of the Civil Code when the operator himself is free from liability under chapter 263 of the Statutes of 1929, supra, the Supreme Court clarifies any then existing confusion with the following quotation from Lossman v. City of Stockton, 6 Cal.App.2d 324, 44 P.2d 397:

"* * * It is a well-recognized rule that statutes upon the same subject-matter should be read together and each given full force and effect as far as possible. The Legislature recognized that members of the police and fire departments in the performance of their duties are often called upon to exceed the ordinary speed limit and take the right of way. If such employees were compelled to weigh the chances and assume a personal responsibility, speed and efficiency would be affected. The Legislature, however, realized that such operation of motor vehicles on the streets did create a hazard to the general public and therefore provided that the city should be held liable when the exercise of governmental functions resulted in injury to its people. The Legislature also at the same time authorized its governmental agencies to obtain insurance to indemnify itself against loss by such actions. If, too, an employee is unduly reckless or careless in the operation of the vehicle under his control the municipality still retains its rule-making and disciplinary powers and can, as any private concern, under similar circumstances, exercise restraint over its employees.

"It cannot be argued that because the state deemed it expedient to waive its right of subrogation against its employees, that it thereby denied a right of action against itself. Subrogation is the substitution of one in the place of another, and if for any reason the one in whose favor such subrogation runs cares to waive such privileges, no one can complain. Subrogation is considered as the creature of equity and is so administered as to secure real and essential justice without regard to form. * * *." (77 P.2d page 1058.)

[3, 4] While mindful of the rule that statutes imposing a liability on governmental agencies in derogation of the common law are to be strictly construed, the Supreme Court calls attention to the fact that this does not confer upon courts the power to nullify legislation where the statute itself evinces a clear intention on the part of the lawmakers to depart from the common-law rule. In the case of Raynor v. City of Arcata, supra, it is held that the liability of the city or other public employer still rests on the doctrine of respondeat superior, because in order that the public employer may be held there must be a "negligent operation" of the vehicle by the employee. As therein pointed out, while it is true the fireman or policeman responding to an emergency call is relieved of personal liability for his negligence and the city is held therefor, nevertheless the "negligent operation" of an authorized emergency vehicle responding to an emergency call arises only where the driver of such vehicle fails to give a timely warning or otherwise makes an "arbitrary exercise" of the exemption from the rules of the road which can be said to amount to wilful misconduct. It is further held in the same case that the decisions which hold that after an ordinary private employee has been held not negligent, his private employer may not be held on the doctrine of respondeat superior, are not controlling in cases like the one now before us, for the reason that in the situation before us the exemption of the employee does not rest on an adjudication of his freedom from negligence, but on a statutory declaration that he should be free from personal liability for his negligent acts. In the final analysis, legislation of the character with which we are here concerned simply tends to protect life and limb, and, as was held in the Raynor case, supra, it arises from the exercise of the police power of the state which inheres in sovereignty, and the purpose and intent of the legislation is in the interest of the public welfare.

[5, 6] There is no merit in respondents' contention that under the rule requiring strict construction of statutes imposing additional liability on governmental agencies, it cannot be held that the sounding of a siren is necessary to require a pedestrian to yield the right of way for the reason, as respondent city argues, that the statute providing for the sounding of a siren by an emergency vehicle mentions only "other vehicles" upon the highway and makes no mention of pedestrians. Manifestly, it would do violence to reason to hold that by the passage of this legislation the lawmaking power intended to impose upon the drivers of emergency vehicles the duty to give notice of their demand for the right of way only to those persons who were driving other vehicles and not to pedestrians. We hold that notice to the persons required to yield the right of way is essential, whether that person be riding in another vehicle or lawfully walking upon the public highway, so that either may have a reasonable opportunity to stop or otherwise yield the right of way, before such person may be charged with the obligation fixed by law to give precedence to emergency vehicles. Plaintiff's duty to give the right of way to the police emergency vehicle was based upon her knowl-

edge of its approach. Unless she knew or in the exercise of ordinary care should have known that an emergency vehicle was approaching, plaintiff was under no obligation to anticipate its presence. It is the sounding of the audible signal that fixes the right of way and relieves the emergency car driver of negligence.

The very fact that emergency vehicles are allowed to use sirens while other vehicles are forbidden the use of them immediately suggests that the legislative authority intended that a peculiar and significant warning, other than the usual and ordinary sounding of a horn, should be given by the drivers of emergency vehicles in order to claim their superior rights to the use of the highway. A mere reading of the findings made by the trial court at once suggests that the actions of the driver of the emergency vehicle here in question present circumstances disclosing knowledge upon his part, express or implied, that an injury was a probable result of his driving at an excessive rate of speed on the wrong side of the street, without his vehicle being equipped with or his sounding a siren at all, or even sounding his horn until within two hundred feet of the intersection, and amounted to an absolute disregard of the consequences of such conduct upon his part. There is no question but what the driver of the emergency vehicle here involved was guilty of an "arbitrary exercise" of the privileges conferred upon him by reason of his status. In the instant case it is true that the findings of the trial court determined that there was an emergency call within the terms of the statute, but the same findings indicate that the emergency vehicle was not equipped with a siren; that no statutory warning was given; and clearly show that the exercise of such privileges as are accorded emergency vehicles was in this instance "arbitrary".

As to the defendant E. L. Vinsant, he being the driver of an emergency vehicle responding to an emergency police call, he is exempt from personal liability for his negligence under the provisions of the Statutes of 1929, supra, and the judgment in his favor was therefore correct.

[7] As to the defendant City of Los Angeles, a reversal of the judgment is required, but a new trial is unnecessary, for the reason that in its findings the trial court determined the amount of damage sustained by plaintiff were she entitled to recover, and we are bound to assume, when the judgment roll alone is before us, that sufficient evidence was introduced at the trial to support this, as well as all other findings.

For the foregoing reasons, therefore, the judgment is affirmed as to the defendant E. L. Vinsant, while as to defendant City of Los Angeles the judgment is reversed, with directions to the court below to enter judgment in favor of the plaintiff in the sum of $1,756 as against said defendant city.

We concur: YORK, P. J.; DORAN, J.

28 Cal.App.2d 46

KAHRS et al. v. LOS ANGELES COUNTY et al.

Civ. 11506.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1938.

1. Counties ⚷209
Statutes ⚷211

The fact that damages suffered by plaintiffs and for which recovery was sought from county were not on public property, did not render inapplicable the statute having for its heading "Claim for damages suffered on public property," since the heading was no part of the statute as adopted by the Legislature. St.1931, p. 2475, § 1.

2. Statutes ⚷211

The headings of certain sections of the codes are a part thereof only when the headings were a part of the sections at the time of their adoption as the law of the state.

3. Counties ⚷209
Statutes ⚷225½

The general statute dealing with claims against a county was inapplicable to action against the county for damages alleged to have resulted from floods following a heavy rain, in view of particular statute relating to claims for injuries to persons or property, since a general statute must yield to

a particular statute. Pol.Code, § 4075; St. 1931, p. 2475, § 1.

4. Counties ⚷209

The statute dealing with claims for injuries to persons or property was applicable in action against the county for damages alleged to have resulted from floods following a heavy rain. St.1931, p. 2475, § 1.

5. Counties ⚷211

Statutes relating to claims for injuries to persons or property, and making certain steps essential before a suit may be filed against the county, must be at least substantially complied with. St.1931, p. 2475, § 1.

6. Counties ⚷213

The statute dealing with claims for injuries to persons or property is mandatory, and no right of action against county accrues thereunder until claim is presented under the provisions of the statute. St.1931, p. 2475, § 1.

7. Counties ⚷200

A claim filed against county on April 2, 1935, for damages which according to claim occurred "on and after" October 17, 1934, did not sufficiently comply with statute requiring claim to be made within 90 days after accident, notwithstanding that some of the damage allegedly occurred on February 7, 1935. St.1931, p. 2475, § 1.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by George H. Kahrs and others, against the Los Angeles County and others to recover damages allegedly resulting from floods following a heavy rain. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

R. A. Newell, Lawrence Hall, and Hugh G. Maddox, all of Long Beach, for appellants.

Everett W. Mattoon, Co. Counsel, W. B. McKesson, Deputy Co. Counsel, and Beach Vasey, Deputy Co. Counsel, all of Los Angeles, for respondents.

DORAN, Justice.

This is an action wherein plaintiffs sought to recover damages from the County of Los Angeles, alleged to have resulted from floods following a heavy rain. A verified claim for damages in the following words and figures was duly filed on April 2, 1935: "The undersigned hereby makes claim and demand for the payment of the sum of $1475.00 being the amount of damage due said claimant for damages to real and/or personal property owned by claimant and located in Drainage Improvement District Number One, County of Los Angeles, State of California; that said damage occurred on and after October 17, 1934."

It will be noted at once that the claim was filed five months and fifteen days after October 17, 1934. To the amended complaint, which was based on the above claim, a demurrer was sustained without leave to amend on the ground that the claim was not filed within ninety days. The period within which the claim could be amended to conform to the law had long since elapsed at the time of the ruling on the demurrer.

It was alleged in the complaint that damage also resulted from a storm occurring on the 6th day of February, 1935, but the trial court in effect held that the phraseology in the claim above noted, to-wit, "and after", was of no significance, and, to the extent of including February 6, 1935, could not be construed as the equivalent of the "date and place of the accident and the extent of the injuries or damages received" within the meaning of chapter 1167, Statutes of 1931, page 2475, § 1. This act, which the trial court held to be controlling, provides that said claim must be filed within ninety days after such accident has accrued, and shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received.

[1, 2] It is appellants' contention that "the language of the above claim is specific enough and broad enough to include the damage occurring on the 6th day of February, 1935, and that the Board of Supervisors of the County of Los Angeles, having rejected said claim in its entirety, are presumed to have rejected the claim upon its merits, and not by reason of any uncertainty or ambiguity in said claims, and having so rejected said claims, said defendants could not thereafter object thereto upon the grounds that it did not include the words and figures '7th day of February, 1935', or that it did not in truth and in fact include any day subsequent to the 17th day of October, 1934, and prior

to the 2nd day of April, 1935, said last date being the date the claims were filed." In support thereof it is argued that plaintiffs were entitled to one year within which to file the above claim by virtue of the provisions of section 4075 of the Political Code. It is also argued that chapter 1167 of the Statutes of 1931, is not applicable. Act 5149 of Deering's General Laws of California is relied upon by appellants in support of this last-mentioned argument, in connection with which it is urged that the phraseology in the black-letter heading, to-wit, "Claim for damages suffered on public property" is part of the law and that inasmuch as the damages suffered by plaintiffs were not "on" public property the act therefore does not apply. The argument is without merit. Act 5149 of Deering's General Laws is merely the arrangement, by the editor of the code, of chapter 1167, Statutes of 1931, page 2475. The editor's heading of subdivision 1 of said act, to-wit, "Claim for damages suffered on public property", as well as the other headings preferred by the editor, are no part of the act as adopted by the legislature which a reading thereof will reveal. The authorities relied upon by appellants are not in point. It is true that the headings of certain sections of the codes have been held to be a part thereof, but the rule is applied only when such heading is a part of the section at the time of its adoption as the law of the state. Bettencourt v. Sheehy, 157 Cal. 698, 701, 109 P. 89; see, also, In re Forthmann's Estate, 118 Cal.App. 332, 336, 5 P.2d 472.

[3, 4] Section 4075 of the Political Code, relied upon by appellants, is unavailing. The provisions of this section are general, and that the general must yield to the particular is a well-settled doctrine that requires no citation of authority. The trial court was correct in the conclusion that chapter 1167, Statutes of 1931, is controlling. Thompson v. County of Los Angeles et al., 140 Cal.App. 73, 77, 35 P.2d 185; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Strath v. City of Santa Rosa, 19 Cal.App.2d 382, 65 P.2d 894; Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516.

With regard to appellants' contention that the phraseology of the claim, to-wit, "on and after October 17, 1934", was sufficiently definite to include February 7, 1935, it is argued "that the object of requiring claims to be filed is to give timely notice to the county, and thus enable it to make investigation and, if possible, take action to arrest the progress of the injury, and thereby minimize the chances of any further damages". The argument is untenable. If such were the purpose of the claim, why wait the ninety-day period when the requirement of immediate notice would best serve such a purpose? Although it is unnecessary to account for the reasons that persuaded the legislature to fix the ninety-day limitation period, it is altogether likely that a consideration for the public welfare was influential. Timely notice of a claim under such circumstances affords an opportunity for investigation as to the merits thereof, which the progress of time might render futile.

[5-7] "It has long been held that there must be at least a substantial compliance with statutes of this nature, making certain steps essential before a suit may be filed." Cooper v. County of Butte, supra (page 518), quoting from Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320. Moreover, the provisions of chapter 1167 of the Statutes of 1931, page 2475 (Act 5149, Deering's Gen.Laws), have been held to be mandatory and no right of action accrues until the claim is presented under the provisions of the act. See Thompson v. County of Los Angeles, supra, at page 78, 35 P.2d 185. It is evident, therefore, that if appellants herein expected to recover damages from the County of Los Angeles resulting from an act or omission of the county by reason of an accident that occurred on February 7, 1935, the date, place, and extent of the injury or damage should have been specified in the claim. As to the form and substance of the claim herein under consideration, the use of the expression "and after" is not even a substantial compliance with the provisions of the act, when, by such expression, it is sought to include events occurring on a date otherwise unmentioned in said claim.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

28 Cal.App.2d 172

In re LEWIS' ESTATE.

LEWIS v. GUNTHER (LEWIS et al., Interveners).

Civ. 11874.

District Court of Appeal, Second District, Division 2, California.

Aug. 20, 1938.

Rehearing Denied Sept. 13, 1938.

Hearing Denied by Supreme Court Oct. 17, 1938.

1. Wills ⟹671

A will, giving income of realty to designated beneficiary for stated period and corpus to others, impresses it with trust, and beneficiary does not take life estate therein.

2. Wills ⟹671

No technical language is necessary to create a trust by will.

3. Wills ⟹671

To create a trust, a will need not appoint a trustee of the corpus.

4. Wills ⟹671

A will devising testator's realty to his stepdaughter and grandchildren and bequeathing income thereof to his widow until she remarried or died, whereupon property should be divided equally between such devisees, impressed trust on realty for payment of income to widow during her life or widowhood.

◆

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

In the matter of the estate of Marion A. Lewis, deceased. From a portion of a decree of distribution, declaring a trust in certain realty under deceased's will for payment of income to deceased's widow, Mary Anna Lewis, contestant, until her death or remarriage and distribution of property among Flossie F. Gunther, petitioner, and others, who intervened, contestant appeals.

Affirmed.

Charles De Le Fond, of Los Angeles, for appellant.

Paul E. Iverson, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal by the widow of Marion A. Lewis, deceased, has been transferred by the Supreme Court to this court for decision pursuant to the provisions of article 6, section 4, of the Constitution of the state of California. It is from the portion of a decree of distribution declaring a trust in certain real property hereinafter described after trial before the court without a jury.

The essential facts are:

In July, 1936, Marion A. Lewis married Mary Anna White, now Mary Anna Lewis, appellant. On November 17, 1936, Mr. Lewis died leaving a last will and testament which he had duly executed April 31, 1936, reading in part thus:

"I give, devise, and bequeath unto my beloved stepdaughter, Flossie Gunther, one half of my real estate property, which description is as follows: North 4 foot of Lot Section 158, Lot Section 159, Tract 2635 as per Book 64, Page 28 of Maps, Records of Los Angeles County, California; also known as 444 North Norton Avenue, Los Angeles, California.

"I give, devise, and bequeath unto my beloved grandchildren, Donovan Lewis, Paul Lewis, Jr., Marion Lewis, and Pauline Thelma Lewis, the children of my son, Paul H. Lewis, one half of my real estate property, which description is as follows: North 4 foot of Lot Section 158, Lot Section 159, Tract 2635 as per Book 64, Page 28 of Maps, Records of Los Angeles County, California; also known as 444 North Norton Avenue, Los Angeles, California.

* * * * * *

"I give, devise, and bequeath to my prospective wife, Mary Anna White, if she is my widow at the time of my decease, all the money in bank of joint account and all the income of my real estate described above until either she marries or until her decease. After, either her marriage, or decease then the said property as described above should be divided equally between my beloved step-daughter, Flossie Gunther and my beloved grandchildren as written above."

The real property described in the will is also known as the "Lewis Apartments."

December 16, 1937, the probate department of the superior court of Los Angeles county entered a decree of distribution reading in part thus:

"It is hereby ordered, adjudged, and decreed;

"I.

"That the Lewis Apartments, described as follows:

"North 4 feet of Lot 158, and all of Lot 159, Tract 2635, as per map recorded in Book 64 at page 28 of Maps. Records of Los Angeles County;

and the furniture, furnishings, and equipment therein, be and are hereby distributed to the Bank of America National Trust and Savings Association, a national banking association, as Trustee, to hold during the life of Mary Anna Lewis, or until she remarries, for the following purposes:

"(A) To control and manage the premises, and out of the gross income therefrom pay:

"(1) All expenses of the apartment, including upkeep, repairs, taxes, insurance, and replacements of furniture and furnishings when it deems such to be necessary;

"(2) Costs and expenses of said trust, and

"(B) Pay monthly the net income from said apartments to Mary Anna Lewis until her death or marriage;

"(C) That said apartments, their furniture, furnishings, and equipment, and the income therefrom, subject only to the trust above set forth, be and are hereby distributed as follows:

"(1) One-half to Flossie F. Gunther; and

"(2) One-half to Donovan Lewis, Paul Lewis, Jr., Marion Lewis, and Pauline Thelma Lewis, share and share alike.

That the interests of Flossie F. Gunther, Donovan Lewis, Paul Lewis, Jr., Marion Lewis and Pauline Thelma Lewis are absolute vested interests in all of the said property, subject only to the trust above set forth. That upon the death or marriage of Mary Anna Lewis said trust shall terminate."

The sole question for determination is: *Did the portions of decedent's will above set forth impress the real property described therein known as the Lewis Apartments with a trust, the income thereof to be paid to appellant during her lifetime or widowhood?*

[1] This question must be answered in the affirmative. Where the testator by his will gives the income of real property to a designated beneficiary for a stated period and by the same instrument disposes of the corpus of said real property to others, the real property is impressed with a trust and the beneficiary does not take a life estate in the real property. 3 Thompson's Commentaries on the Law of Real Property, (1924) 704, sec. 2569; Collier v. Grimesey, 1880, 36 Ohio St. 17, 21.

[2–4] Applying the foregoing rule to the facts in the instant case, since no technical language is necessary in order to create a trust (Colton v. Colton, 127 U.S. 300, 310, 8 S.Ct. 1164, 32 L.Ed. 138), nor is it essential that the will appoint a trustee (Estate of McCray, 204 Cal. 399, 403, 268 P. 647) of the corpus of the trust, it is evident from a reading of decedent's will that he intended to impress a trust on the real property described as the Lewis Apartments, "the income" of said property to be paid to his widow, appellant, during her lifetime or until she remarried and that, subject to said trust, the property should be distributed as designated in his will.

It thus appears that the decree of distribution correctly followed the intention of the testator as declared in his will.

For the foregoing reasons the decree is affirmed.

I concur: CRAIL, P. J.

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28 Cal.App.2d 151

PEOPLE v. SHERRAN.

Cr. 2028.

District Court of Appeal, First District, Division 2, California.

Aug. 16, 1938.

Criminal law 🔑**1182**

Where no appearance was made for appealing defendant when cause was called for hearing, no brief was filed in his behalf, and time for filing brief had expired, conviction would be affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

John E. Sherran was convicted of forgery, and he appeals.

Affirmed.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of the state of California in and for the county of Marin of a felony, namely, forgery.

The defendant plead guilty to the offense as charged in the information and judgment was entered April 18, 1938. Defendant gave notice of appeal. The transcript was filed in this court on May 9, 1938. The cause was regularly placed on the calendar for oral argument on August 15, 1938. No appearance was made for appellant at the time the cause was called for hearing. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

The motion of respondent for an affirmance of the judgment pursuant to the provisions of section 1253 of the Penal Code is granted and the judgment is affirmed.

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27 Cal.App.2d 758

STEURI v. JUNKIN et al.

Civ. 11817.

District Court of Appeal, Second District, Division 2, California.

July 26, 1938.

Hearing Denied by Supreme Court Sept. 21, 1938.

1. **Evidence** 🔑82

Where the record is silent on what was done in obtaining judgment, it will be presumed that what ought to have been done was rightly done; but, when record conclusively establishes what occurred, the contrary cannot be presumed.

2. **Judgment** 🔑278

Where what was done with respect to service of process is shown by the record and is insufficient as a matter of law to give the court jurisdiction, and remainder of the record is silent upon the question of service, appearance, and default of the party affected, the judgment is void on its face.

3. **Evidence** 🔑82

Legal presumptions do not come to the aid of the record except as respects acts or facts about which the record is silent.

4. **Evidence** 🔑82
Judgment 🔑17(2)

Where record showed that defendant's cross-complaint was served on additional party only by leaving a copy with such party's secretary, and did not show appearance or default by such party, default judgment against such party was void on its face and was not aided by any presumption that court acquired jurisdiction. Code Civ.Proc. § 442.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by E. E. Steuri against John R. Junkin, wherein judgment was entered on defendant's counterclaim against plaintiff and Frazier McIntosh. From an order setting aside the judgment against McIntosh, William H. Brawner, assignee of defendant Junkin, appeals.

Affirmed.

Caryl Warner, of Los Angeles, for appellant.

Irving B. Drachlis, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from an order setting aside a judgment against Frazier McIntosh upon the ground that said judgment was void upon its face.

Back in 1928 this action was started with Steuri as plaintiff and Junkin as defendant. Thereafter Junkin filed an answer and counterclaim in which he asked judgment against Frazier McIntosh. This latter was the first and only pleading wherein a claim was asserted against McIntosh, who was not theretofore at least, a party to the suit. Appellant now designates this counterclaim as a cross-complaint, but it is nowhere so designated in the record. No summons was ever issued upon this counterclaim, nor was personal service ever had upon McIntosh as a party or otherwise. The so-called cross-complaint was served by leaving a copy with McIntosh's secretary. Default was entered on this so-called cross-complaint against the plaintiff and judgment was entered against the plaintiff and also against McIntosh for the sum of $6,285. So far as the record shows, no default was taken against McIntosh. Neither did he appear in the action.

McIntosh filed an affidavit in support of his motion to vacate the judgment wherein he alleged that the levy of execution upon said judgment first called the existence of the judgment to his attention on or about the 29th day of December, 1937, and thereupon he promptly noticed a motion to vacate said judgment upon the ground that said judgment is void upon its face. Mr. Junkin had assigned said judgment to appellant on December 28, 1937.

It is the contention of the appellant that upon a collateral attack, it will be presumed that all the essential jurisdictional facts did in fact exist, and therefore it will be presumed that McIntosh did in fact voluntarily appear in the action, and that the trial court had jurisdiction over his person at the time it rendered judgment against him, and that there is nothing in the judgment roll which opposes the foregoing, citing 15 California Jurisprudence 59, section 145.

[1-3] Assuming that the alleged counterclaim was a cross-complaint, said pleading was not served upon him. The judgment does not recite service upon him, or his appearance, or default. But, on the contrary, the judgment roll shows that the service was upon the secretary of McIntosh, not upon him. When what occurred is conclusively established by the record, the contrary cannot be presumed. Where the record speaks as to what was done on the subject of service, it will not be presumed that something other, different or additional was done, and where what was done is insufficient as a matter of law to give the court jurisdiction, the judgment is void on its face where the remainder of the record is silent upon the question of service, appearance and default of the party affected. Hahn v. Kelly, 34 Cal. 391, 94 Am.Dec. 742. It is true that where the record is silent as to what was done it will be presumed that what ought to have been done was not only done but rightly done. But back of that rule is the rule that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. When the record states what was done, it will not be presumed that something different was done. Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635. In the case of Johnston v. Southern Pacific Company, 150 Cal. 535, 89 P. 348, 11 Ann.Cas. 841, it is stated (page 349): "Therefore, whenever the record states the evidence or makes an averment with reference to a jurisdictional fact it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than is averred." 15 Cal.Jur. 70, sec. 151.

[4] Section 442 of the Code of Civil Procedure provides with regard to the service of a cross-complaint. "The cross-complaint must be served upon the parties affected thereby. * * * If any of the parties affected by the cross-complaint have not appeared in the action, a summons on the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action." The judgment is void upon its face.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

ABBOTT v. LIMITED MUT. COMPENSATION INS. CO.*

Civ. 10532.

District Court of Appeal, First District,
Division 1, California.

July 29, 1938.

Rehearing Granted Aug. 27, 1938.

1. **Pleading** ⇨327

Where attorney's complaint charged two defendants with a joint and several debt for certain services, and bill of particulars segregated indebtedness as to each defendant, bill of particulars amplified complaint as if incorporated therein and limited attorney's recovery to the claims therein stated.

2. **Dismissal and nonsuit** ⇨25

In action on a contract when it appears from the pleadings or the evidence that any defendant is not liable or necessary to the determination of the controversy, he may be dismissed from the action at any time before submission of the case to the jury, provided a remaining defendant is not thereby prejudiced.

*For subsequent opinion see 85 P.2d 961.

3. Pleading ⇨229

Where an amendment to pleadings can be made in furtherance of justice without jeopardizing the rights of an adverse party, it should be allowed, since liberality in the allowance of an amendment to pleadings is the rule.

4. Pleading ⇨248(1)

The rule of liberality in the allowance of an amendment to a pleading assumes that neither the cause of action nor the issues involved therein will be radically changed by the proposed amendment.

5. Account, action on ⇨21
Parties ⇨65(1)

Where attorney's complaint charged two defendants with a joint and several debt for certain services which bill of particulars segregated as to each defendant, allowance of an amendment by which action was changed from an open book account to a mutual open and current account, and eliminating one of the codefendants as a party, was proper where effect was to charge remaining defendant with an individual debt instead of a joint and several obligation, and issues tendered were made by the amended complaint to conform to the bill of particulars.

6. Pleading ⇨327

Where attorney's original complaint charged two defendants with joint and several obligations for certain services, and bill of particulars segregated indebtedness as to each defendant, allowance of an amended complaint eliminating one defendant and charging remaining defendant with individual debt in conformance with the bill of particulars was not prejudicial as compelling defendant to defend against its own several obligation when original complaint charged joint and several debt, since bill of particulars gave advance notice of the true nature of attorney's claim.

7. Corporations ⇨448(1)

In attorney's action for services rendered corporation, corporation was not liable to attorney for services performed prior to incorporation at the request of the promoter of the corporation unless corporation adopted such contract after its incorporation.

8. Corporations ⇨448(2)

To prove that a corporation adopted promoter's contract engaging services of an attorney before corporation was incorporated, evidence must show some affirmative act by the corporation from which adoption may be inferred, and receipt of benefits from the performance of the contract without actual knowledge of its terms, or knowledge of a director directly interested in the contract, is insufficient to charge the corporation.

9. Corporations ⇨428(9)

Knowledge of a promoter who subsequently becomes a director cannot be imputed to a corporation to charge corporation with adoption of contract made by the promoter prior to incorporation of the corporation.

10. Corporations ⇨448(2)

Evidence of knowledge and acquiescence of corporation's directors of contract for attorney's services made by promoter prior to incorporation of corporation would not warrant imposition of liability on corporation for such attorney's services.

11. Attorney and client ⇨166(1)

Where attorney rendered services for two corporations having same directors, and constantly advised each as to legal matters in which each was interested but was unable to particularize specific items of such services rendered to corporation, attorney could not recover from one corporation for such services.

12. Attorney and client ⇨158

Where corporation admitted that there was certain sum due attorney for retainer and for unpaid director's fees, and attorney's contract was fully performed, and nothing remained but payment of fee, attorney could recover such sums due in action in assumpsit, as against contention that attorney's obligation arose from express contract.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by W. Lindley Abbott against the Limited Mutual Compensation Insurance Company, a corporation, for services as an attorney. From an adverse judgment, defendant appeals.

Modified, and as modified, affirmed.

Edgar C. Levey, of San Francisco, and Booth B. Goodman, of Oakland, for appellant.

Jesse H. Miller, of San Francisco, for respondent.

GRAY, Justice pro tem.

Limited Mutual Compensation Insurance Company, a corporation, appeals from the judgment, following the verdict, which awarded respondent the sum of $3,055 for legal services. Of the numerous grounds urged by appellant for a reversal, only such as are vital will be considered as the facts are unfolded.

The original complaint, in alternative counts of assumpsit, account stated and open book account, alleged that appellant and another defendant, Mutual Management Corporation, were indebted to respondent in the sum of $5,000 for work, labor and services performed by respondent for both defendants and each of them at the special instance and request of both and each of them. The bill of particulars, furnished by respondent, set forth the items of the indebtedness as follows:

"1. April-June 1932; To services rendered in organization of Limited Mutual Compensation Insurance Company before incorporation..	$1,000.00
"2. June 1932 to December 1932; To services rendered in actual incorporation matters, Limited Mutual Compensation Insurance Company...	$1,000.00
"3. April 1932-December 1935; To conferences, consultations and advice Limited Mutual Compensation Ins. Co.	$1,000.00
"4. August 1933 to May 1934; To services rendered in incorporation of Mutual Management Corp. including reorganization matters, stock issue, attending meetings as a director and otherwise...	$ 500.00
"5. November 1935; To services rendered in case of *Boardman* v. *Brown* and *Mutual Management Corp.*	$1,000.00
"6. May-November 1935; To services rendered Mutual Management Corp. in connection with 'Piver Loan'...	$ 150.00
"7. December 1935; To directors' fees unpaid and balance of retainer for December 1935, Limited Mutual Compensation Insurance Company	$ 55.00
Total	$4,705.00"

[1] The complaint charged both defendants with a joint and several debt of $5,000 but the bill of particulars, by segregating the items of the indebtedness as to each defendant, stated that appellant was only severally indebted in the sum of $3,055. The bill of particulars amplified the complaint, as if incorporated therein, and limited respondent's recovery to the claims therein stated. Millet v. Bradbury, 109 Cal. 170, 41 P. 865; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25.

[2-5] During the presentation of his evidence, respondent, by amendment, changed his third cause of action from an open book account to a mutual, open and current account. At the conclusion of his case, respondent, by leave of court, granted over appellant's objection, dismissed the action as to the co-defendant Mutual Management Corporation and filed an amended complaint, which alleged, in alternative counts of assumpsit and a mutual open and current account, that appellant was indebted in the sum of $3,055 for work, labor and services rendered to it at its special instance and request. In an action on a contract, when it appears from the pleadings or the evidence that any defendant is not liable or necessary to a determination of the controversy, he may be dismissed from the action, provided a remaining defendant is not thereby prejudiced. 18 Cal.Jur. 1164. Such dismissal may be allowed at any time before the submission of the case to the jury. Brown v. Harter, 18 Cal. 76. Liberality in the allowance of an amendment to a pleading is the rule rather than the exception; and in a case where such an amendment can be made in furtherance of justice without jeopardizing the rights of an adverse party, it should be allowed. This, of course, assumes that neither the cause of action nor the issues involved therein will be radically changed by the proposed amendment. Mackroth v. Sladky, 27 Cal.App. 112, 148 P. 978. The amended complaint differs from the original only, as previously amended, in the abandonment of the second cause of action upon an account stated, in the elimination of the codefendant as a party and in a decrease in the amount of appellant's indebtedness. In effect it charges appellant with an individual debt instead of a joint and several obligation. The issues tendered are made by the amended complaint to conform to the bill of particulars. Similar amendments have been held not to change the cause of action. United States Farm L. Co.

v. Bennett, 55 Cal.App. 299, 203 P. 794; Bryant v. Wellbanks, 88 Cal.App. 144, 263 P. 332.

[6] Appellant argues that the change of the issues by the amendment was prejudicial, because the original complaint compelled it to defend against a joint and several debt of itself and codefendant, whereas the amended complaint forced it to meet its own several obligation. But it could not have been so injured as the bill of particulars gave it advance notice of the true nature of respondent's claim. Ames v. Bell, 5 Cal.App. 1, 89 P. 619. The dismissal and amendment simplified the issues to its benefit. It further argues that respondent, prior to the amendment, so presented his evidence as the rendition of services to both defendants that it was impossible for the jury, in obedience to the court's order striking out the testimony as to the codefendant, to segregate from the whole such portion as affected it alone, and therefore it must have included in its verdict an allowance for services for which it was not liable. The verdict conforms exactly to the total of the first, second, third and seventh items of the bill of particulars, which are charged against appellant. Respondent's testimony as to the first, second and seventh items does not commingle or confuse services rendered to the respective defendants. As to the third item, there is some confusion as to which defendant services included therein were rendered.

[7-10] The first two items of the bill of particulars amounting to $2,000 are clearly for services rendered prior to appellant's coming into being by incorporation. The undisputed testimony shows that such services were performed at the request of a promoter of the corporation, and upon his promise, with the knowledge and acquiescence of another promoter, that the corporation, as soon as it was financially able so to do, would pay their reasonable value. These promoters, with respondent, subsequently became members of appellant's board of five directors. Appellant is not liable to respondent upon such promoters' contract unless it adopted such contract after its incorporation. Biggart v. Lewis, 183 Cal. 660, 192 P. 437. To prove such adoption, the evidence must show some affirmative act by the corporation from which it may be inferred. Receipt of benefits from the performance of the contract without actual knowledge of its terms is insufficient. Knowledge of a director directly interested in the contract is insufficient to charge the corporation. Rideout v. National Homestead Ass'n, 14 Cal.App. 349, 112 P. 192. Knowledge of a promoter, who subsequently becomes a director, cannot be imputed to the corporation. Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal.App. 37, 113 P. 691. Respondent did not seek to prove adoption of the contract by formal corporate action but by knowledge and acquiescence of its directors. The evidence, at most, discloses that at an informal meeting of the five directors respondent broached to the director, who, as promoter had hired him, the matter of his compensation, and such director replied that he would be paid as soon as the corporation's finances permitted. Although the testimony is equivocal as to whether another director, who had also been a promoter, assented, it may be conceded that he, by silence, acquiesced. Whether the other two directors heard the discussion does not appear but it is clear that they did not either actively or passively agree to adopt the contract. Being himself interested, respondent could not bind the corporation. The testimony, therefore, falls far short of showing any action by a majority of the directors by which it could be said that appellant adopted the contract.

[11] Approximately a year after appellant's incorporation the same promoters caused the incorporation of Mutual Management Corporation which, under contract, managed the affairs of the former. Both corporations had the same directors, shared the same offices and employed respondent as attorney. The latter had his offices in the corporation's building. The relation between the corporations necessarily caused their affairs to be inextricably interwoven. Respondent constantly advised each as to legal matters in which each was interested. The third item in the bill of particulars relates to legal services of such nature. Respondent was unable to particularize specific items of such services since it was made up of numerous instances of legal advice as to problems which daily arose in course of the corporations' business. But, more important, he was unable to segregate such services between the two corporations. It is clear that the evidence does not support the verdict as to such third item.

[12] Appellant admits that the evidence establishes that there is due respondent the sum of $30 for unpaid director's fees and the sum of $25 as balance on his monthly retainer, but it argues that, as these obliga-

tions arise from express contracts, they cannot be recovered in assumpsit. Since the contracts have been fully performed by respondent and nothing remains but payment of his fee, he need not declare on the contract but may recover in assumpsit. Castagnino v. Balletta, 82 Cal. 250, 23 P. 127.

It is ordered, therefore, that the judgment be modified by reducing the amount thereof $3,000, and as thus reduced it will stand affirmed. Appellant and respondent will bear their own costs.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

28 Cal.App.2d 98

HARTMAN v. BANK OF AMERICA OF CALIFORNIA et al.

Civ. 2079.

District Court of Appeal, Fourth District, California.

Aug. 10, 1938.

1. **Mortgages** 🔑338

Where trustor sought further postponement of sale under trust deed under 1937 Moratorium Act after postponement had already been granted under 1935 Act, mere allegations of supplemental petition for the further postponement, without proof thereof, were insufficient to authorize court to make an extension in view of requirement of the 1937 Act that such extension is authorized only after a hearing on notice and upon presentation of evidence showing that such extension would be just and equitable. St. 1935, p. 1208; St.1937, p. 460; p. 465, § 16.

2. **Mortgages** 🔑338

Under Moratorium Act which gives court power to make order postponing foreclosure sale only when, after hearing, it finds equitable grounds for such relief, a petitioner who seeks postponement is under duty to present evidence establishing such equitable grounds. St.1937, p. 465, § 16.

3. **Mortgages** 🔑338

The provision of the Moratorium Act that court should not order the payment by a trustor or mortgagor of a lesser sum than necessary to pay current taxes, delinquent taxes, and insurance premiums, was intended to preserve the status quo of the property. St.1937, p. 462, § 6.

4. **Mortgages** 🔑338

Under provision of Moratorium Act that court should not order the payment by the mortgagor of a lesser sum than necessary to pay current taxes, all delinquent taxes, and insurance premiums, court need only require the payment of a sum sufficient to take care of current taxes, taxes which are at that time actually delinquent and unpaid, and of insurance premiums which are then unpaid or which must be paid during the term of extension. St.1937, p. 462, § 6.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Petition by Anna L. Hartman against the Bank of America of California and others under the Mortgage and Trust Deed Moratorium Act of 1935, to postpone a sale under a deed of trust executed by petitioner in favor of one of the defendants. From an order of further postponement under the Act of 1937, defendant Bank of America National Trust & Savings Association appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for appellant.

Hugh S. MacKinnon, of Calexico, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order extending a previous order postponing a sale under a deed of trust.

The Bank of America National Trust and Savings Association held a trust deed on certain real property and on October 21, 1935, caused a notice of default to be recorded. On November 12, 1935, Anna L. Hartman, the owner of the property and payer of the note secured by the trust deed, filed a petition under the Mortgage and Trust Deed Moratorium Act of 1935. Stats.1935, ch. 348, p. 1208. A hearing was had on December 20, 1935, at which evidence was taken, and on January 7, 1936, the court made an order postponing the sale under this deed of trust until February 1, 1937, on certain terms and conditions. Thereafter the sale was postponed on substantially the same terms and conditions to July 1, 1937. On June 28, 1937, Anna L. Hartman filed a supplemental petition for a further postponement of the sale under the provisions of the Mortgage and Trust Deed Moratorium Act of 1937. Stats. 1937, ch. 167, p. 460. A hearing was had on July 30, 1937, and the court made and entered an order postponing the sale to July 1, 1939, from which order the bank has appealed. For convenience, the bank will be referred to as the appellant and Anna L. Hartman as the respondent.

The first point raised is that the order in question was erroneous because no evidence was introduced of the inability of the respondent to pay or of any fact tending to show that it was just and equitable to extend the previous order for the postponement of the sale. The only evidence introduced at the hearing on July 30, 1937, was certain testimony to the effect that the terms of the previous orders of the court had been substantially complied with and that some new tenants for the property had been obtained, with some statements showing what rentals had been received under the previous orders and how these had been disbursed. From these statements it appears that after the application of all moneys paid by the respondent under the previous orders the total debt to the appellant had increased to the extent of $1,526.76 during the period of the postponement.

The respondent does not contend that any evidence was received at the hearing on July 30, 1937, which would show that the desired extension was just and equitable but contends that facts showing this condition were set forth in her supplemental petition which led to that hearing, and that it must be presumed on this appeal that satisfactory evidence was given in support of those allegations. She further contends that she presented evidence of that nature at the hearing of her original petition on December 20, 1935. Not only is that evidence not before us, but her financial condition and the entire situation may have materially changed in the twenty months which intervened between that hearing and the one here in question, and the statute is particularly designed to cover any such change in conditions.

[1] The allegations of the supplemental petition were not sufficient in the absence of evidence, as section 16 of the act in question (Stats.1937, ch. 167, p. 465) authorizes the court to make the order extending the previous order only after a hearing on notice and "upon the presentation of evidence showing that the provisions of such order or decree should be * * * extended to make them just and equitable". A similar holding is to be found in the case of Boggs v. North American B. & M. Co., 20 Cal.App.2d 316, 66 P.2d 1253, where it is said (page 1254): "There is, however, no provision in the act which provides that the petition itself shall be deemed to constitute evidence of the facts or matters therein contained, nor in fact is it required that the petition be verified. * * * Inasmuch as the act places upon the court the power to make an order postponing a foreclosure sale only when, after a hearing, it finds equitable grounds for such relief, the burden of establishing the right of such relief obviously rests upon the petitioners under the familiar principle that he who has the affirmative of an issue has the burden of proof."

While the court was there considering section 5 of the 1935 act (Stats.1935, ch. 348), a similar requirement is contained in the extension provision of section 16 of the 1937 act with which we are here concerned.

[2] Not only does the statute specifically require the presentation of evidence in order to obtain such an extension, but it cannot be presumed that the allegations of this petition were sufficiently supported by evidence when it appears from the transcript of the hearing held on July 30, 1937, that such is not the fact and that no effort was there made to comply with this statutory provision. It was incumbent upon the respondent to present such evidence at this hearing, and there was an entire failure in this regard. In so far as disclosed by anything which took place at that hearing the respondent may have then been amply able to pay the debt in full, to mention only one of the possibilities.

The appellant raises the further point that the order appealed from was erroneous in that it failed to require, as a condition of the further postponement of the sale, that the respondent repay certain sums which the appellant had advanced for the payment of taxes and insurance premiums which had accrued and been paid long before the original petition for a postponement of the sale was filed on November 12, 1935. This contention is based upon that part of section 6 of the 1937 act, p. 462, reading as follows: "* * * but in no event shall the court order the payment by the trustor or mortgagor of a lesser sum than necessary to pay (a) current taxes, (b) all delinquent taxes, except that such taxes may be paid in installments as may be provided by law, and (c) any insurance premiums required to be paid by the debtor under the contract between the parties."

[3, 4] It is argued that under this provision the court was required, as a minimum, to order the payment of a sum sufficient to cover any taxes or insurance premiums which the holder of the trust deed has previously paid and which have not been repaid to him by the debtor. Such payments are usually made under a provision of the trust deed or mortgage permitting such advancements, and are in fact merely additional loans. In our opinion this provision of section 6 of this act was intended to preserve the status quo of the property and the only thing which the court must do thereunder is to require the payment of a sum sufficient to take care of current taxes, of taxes which are at that time actually delinquent and unpaid, and of insurance premiums which are then unpaid or which must be paid during the term of the extension.

For the reasons given the order appealed from is reversed.

I concur: MARKS, J.

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28 Cal.App.2d 766

Anna L. HARTMAN, Petitioner and Respondent, v. CORPORATION OF AMERICA, etc., et al., Respondents; Bank of America National Trust & Savings Association, Respondent and Appellant.

Civ. 2080.

District Court of Appeal, Fourth District, California.

Aug. 10, 1938.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for appellant.

Hugh S. MacKinnon, of Calexico, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order extending a previous order postponing a sale under a deed of trust.

All of the material facts in this case are similar to those in the case of Anna L. Hartman v. Bank of America, Cal.App., 82 P.2d 39, this day decided. The questions at law presented in the two cases are identical.

For the reasons given in the case referred to the order appealed from is reversed.

I concur: MARKS, J.

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28 Cal.App.2d 128

LEHMER et ux. v. SCOTT & BORDEN, Inc., et al.

Civ. 2112.

District Court of Appeal, Fourth District, California.

Aug. 11, 1938.

Hearing Denied by Supreme Court Oct. 10, 1938.

1. **Bankruptcy** 🔑38

The provisions of the Federal Bankruptcy Act subjecting an insolvent farmer filing petition seeking compositions or extensions of time to pay debt and all his property to exclusive jurisdiction of bankruptcy court and forbidding the institution by creditors of enumerated proceedings against farmer or his property, under rule expressio unius est exclusio alterius, would not prohibit farmer from taking steps in other courts for recovery of tangible property or debts owed him or for recovery of damages claimed by him. Bankr.Act § 75(n, o, p), 11 U.S.C.A. § 203 (n, o, p).

2. **Bankruptcy** 🔑38

The provision of the Federal Bankruptcy Act subjecting an insolvent farmer filing petition seeking compositions or extensions of time to pay debt and all his property to exclusive jurisdiction of bankruptcy court gives the bankruptcy court exclusive jurisdiction over the administration of the property over which action is invoked, but does not destroy the jurisdiction of other courts to entertain suits brought for the purpose of collecting the assets of bankrupt estates or enforcing obligations due to bankrupts. Bankr.Act §§ 23(a, b), 75(n), 11 U.S.C.A. §§ 46 (a, b), 203(n).

3. **Bankruptcy** 🔑38

Under the provisions of the Federal Bankruptcy Act, an insolvent farmer filing petition seeking compositions or extensions of time to pay debts, where bankruptcy court interposed no objection, could maintain an action in tort in state court. Bankr.Act § 75(n), 11 U.S.C.A. § 203(n).

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by D. F. Lehmer and wife against Scott & Borden, Inc., a corporation, and others for damages claimed to have been sustained through defendants' refusal to discharge of record a crop mortgage made to secure a note executed to them by plaintiffs and for returning without authority, unrecorded, a release of crop mortgage alleged to have been escrowed by plaintiffs with defendants. From a judgment dismissing action for want of jurisdiction, plaintiffs appeal.

Reversed.

R. L. Carlisle, of Los Angeles, for appellants.

Rutan, Mize & Kroese and Harvey & Harvey, all of Santa Ana, for respondents.

HAINES, Justice pro tem.

The complaint in this action is in two counts. In the first a cause of action is alleged against defendants and respondents other than the Abstract and Title Insurance Co., to which we will hereinafter refer as "the abstract company", for damages claimed to have been sustained through their failure and refusal to discharge of record a crop mortgage made to secure a note executed to them by plaintiffs and appellants after what is alleged to have been the full payment and satisfaction of the note. In the second count a cause of action is alleged against the abstract company for like damages for having, as is claimed without authority, returned to the obligees, unrecorded, a release of said crop mortgage alleged to have been escrowed by them with it.

On motion of the defendants and respondents other than the abstract company, and while there was pending before it a motion on the part of the abstract company for a stay of proceedings, the superior court entered judgment dismissing the action as to all parties thereto for want of jurisdiction on the ground that before it was commenced plaintiffs and appellants had subjected themselves and their property to the exclusive jurisdiction of the United States District Court for the Southern District of California by filing therein a proceeding under section 75 of the Federal Bankruptcy Act (U.S.C.A. Title 11, sec. 203.)

In our opinion the superior court erred in dismissing the action. It is very true that section 75 added to the Federal Bankruptcy Act authorizing the filing by insolvent farmers of petitions seeking compositions or extensions of time to pay their debts provides in subdivision "n", 11 U.S.C.A. § 203(n), that:

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

[1] There is, however, a wide difference between thus subjecting the farmer and his property to the exclusive administrative control of the bankruptcy court, and prohibiting him from taking steps in other courts either for the recovery of tangible property or debts owed him or for the recovery, as in the instant case, of damages claimed by him. We do not think that the provision quoted was intended to amount to the latter sort of in-

hibition. In this view we are confirmed by the further provisions of section 75 contained in the subdivisions "*o*" and "p" thereof, 11 U.S.C.A. § 203 (*o*, p). Subdivision "*o*" is as follows:

> "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:
>
> "(1) Proceedings for any demand, debt, or account, including any money demand;
>
> "(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;
>
> "(3) Proceedings to acquire title to land by virtue of any tax sale;
>
> "(4) Proceedings by way of execution, attachment, or garnishment;
>
> "(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and
>
> "(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

It will be observed that each and all of the proceedings thus forbidden are "against the farmer or his property", from which under the rule expressio unius est exclusio alterius it would appear that no such inhibition exists as against proceedings in appropriate courts by him or in his behalf. Subdivision "p" is to the effect that:

> "The prohibitions of subsection (*o*) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

It seems clear to us that what under this subsection apply to "all judicial or official proceedings in any court", are merely the prohibitions of subsection "*o*" and not prohibitions other and different from any expressed in subsection "*o*". So, also, it is the prohibitions expressed in subsection "*o*" and not other or different prohibitions which are by subsection "p" made to apply to all creditors, public or private, and to all the debtor's property wherever located. The further and concluding language of subdivision "p" does, so far as related to the present discussion, but further emphasize that the administrative control of the petitioning farmer and his assets is in the bankruptcy court and not otherwise.

There is nothing in Security-First National Bank of Los Angeles v. Superior Court of Imperial County, 12 Cal.App.2d 140, 55 P.2d 532, decided by this court, nor in Harris v. Pacific Mutual Life Insurance Company, 6 Cal.2d 384, 57 P.2d 1299, decided by our Supreme Court, nor in Irving Trust Company v. Fleming, 4 Cir., 73 F.2d 423, nor in In re Faour et al., 2 Cir., 72 F.2d 719, authorities cited by respondent, which at all militates against the view we have expressed. All four of these cases merely involve the vindication of the bankrupt court's administrative jurisdiction over the person and property of the debtor as against some attempt to exercise administrative control over all or some part of the debtor's estate by some other tribunal or to invoke the exercise by such other tribunal of such control. Thus in Security-First National Bank of Los Angeles v. Superior Court of Imperial County, supra, the pendency of a petition by a farmer debtor under section 75 of the Bankruptcy Act was held to exclude the jurisdiction of the state courts to proceed with a petition filed by such debtor under the state moratorium legislation. The same situation was involved in Harris v. Pacific Mutual Life Insurance Company, supra; Irving Trust Company v. Fleming, supra, and In re Faour, supra, both involved purely questions between federal and state courts respecting the custody of the estate of bankrupts.

Reference in this connection should doubtless be made to certain other authorities cited by this court in Security-First National Bank of Los Angeles v. Superior Court of Imperial County, supra. In re Duffy, D.C., 9 F.Supp. 166, was a case where the bankruptcy court in which a petition under section 75 of the act, 11 U.S.C.A. § 203, had been filed, disallowed a motion to permit a deed to be issued to a purchaser at a mortgage foreclosure sale had under a state court's decree rendered prior to the filing of the petition, the equity of redemption being treated as an asset of the debtor within the control of the bankruptcy court. The proceeding thus disallowed was one covered expressly by clause 2 of subdivision "*o*" of said section 75, 11 U.S.C.A. § 203(*o*) (2). So in Re Dickinson, D.C., 9 F.Supp. 227, the bankruptcy court in which the debtor's petition under section 75 of the Bankruptcy Act was pending, refused to allow a creditor who had in a state court purchased the debtor's property at a foreclosure sale, upon the expiration of the period allowed by the state law for redemption, to maintain in a justice court of the state an action in unlawful detainer to dispossess the debtor. This, again, was but the enforcement of an inhibition expressly made by clause 2 of subdivision "*o*" of said section 75. In re Houser, D.C., 9 F.Supp. 891, was, again, a case in which a farmer debtor having filed a petition under section 75 of the Bankruptcy Act, 11 U.S.C.A. § 203, the bankruptcy court refused to allow one who had sold him personal property under a conditional sales contract, to repossess himself of the property pending the disposition of the debtor's petition. This was merely an enforcement of the specific inhibition of clause 6 of subdivision "*o*" of said section 75 of the Bankruptcy Act, 11 U.S.C.A. § 203(*o*) (6). In Taylor v. Sternberg, 8 Cir., 71 F.2d 157, a state court in which a receivership had been pending prior to the filing of a bankruptcy proceeding against the debtor was held to have been, in consequence of such filing, divested of jurisdiction to make an order fixing the compensation of its receiver, who was thenceforth remitted to the bankruptcy court to obtain his compensation. In U. S. Fidelity, etc., Co. v. Bray, 225 U.S. 205, 32 S.Ct. 620, 56 L.Ed. 1055, there was involved a situation where a contractor engaged in government work having been adjudged bankrupt, trustees of its property were appointed by the bankruptcy court and took charge of its assets, and under the court's authority borrowed money on trustee's certificates to complete the work undertaken, in order to collect from the government the contract price. This having been done, but the contract having proved unprofitable and there being insufficient funds on hand to meet the labor and material claims, the contractor's bonding company, asserting that these were largely fraudulent, sought and obtained from the bankruptcy court leave to prosecute a bill in equity in the United States Circuit Court to modify the allowances made upon such claims by the referee in bankruptcy. The Circuit Court's decree in the suit thus brought was reversed by the Circuit Court of Appeals as having been entered without jurisdiction, and the action of the Circuit Court of Appeals was sustained by the Supreme Court of the United States, which said (page 218, 32 S.Ct. page 625):

> "A distinct purpose of the bankruptcy act is to subject the *administration*" (italics ours) "of estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant [the bonding company] and the indemnitor banks."

It was held that the bankruptcy court was without authority to divest itself of jurisdiction by the order permitting the action to be brought in the circuit court.

[2] It is apparent from the last case cited, the exclusive jurisdiction of the bankruptcy court over the *administration* of the property over which its action is invoked, is not confined to that effected by the recent additions to the act such as sections 74 and 75, 11 U.S.C.A. §§ 202, 203, but was just as applicable and no less exclusive in respect of the property of bankrupts under those provisions of the act which have been long in force. Such jurisdiction, though exclusive within its sphere, that is, the sphere of administration, as illustrated by all of the cases to which we have referred, has never been understood to destroy the jurisdiction of other courts to entertain suits brought for the purpose of collecting the assets of bankrupt estates or enforcing obligations due to bankrupts. On the contrary, section 23 of

the act (U.S.C.A., title 11, sec. 46) in subdivisions "a" and "b" provides:

> "(a) The United States district courts shall have jurisdiction in all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.
>
> "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant * * *," with certain exceptions not pertinent to the present discussion.

Even under the older provisions of the Bankruptcy Act it was held by the Supreme Court of the United States that between the date of the filing of the petition and that of the appointment of a trustee the bankrupt retained sufficient title to the property of which he had been the owner to "authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him". Johnson v. Collier, 222 U.S. 538, 32 S.Ct. 104, 56 L.Ed. 306; Danciger v. Smith, 276 U.S. 542, 48 S.Ct. 344, 72 L.Ed. 691. The same rule has been recognized in various federal and state courts. Rand v. Iowa Cent. R. Co., 186 N.Y. 58, 78 N.E. 574, 116 Am.St.Rep. 530, 9 Ann.Cas. 542; Danciger v. Smith, 116 Tex. 269, 289 S.W. 679; Maryland Casualty Co. v. John H. Parker Co., 51 App.D.C. 340, 279 F. 796; Wright v. Calhoun National Bank, 31 Ga.App. 434, 120 S.E. 795; Bedford v. Bernstein, 126 Me. 369, 138 A. 567.

[3] The provisions of section 75 of the Bankruptcy Act are much more limited in purpose than the older provisions of the act. Normally, they are intended to facilitate the composition, compromise, or extension of the debtor farmer's obligations in order to make rehabilitation possible. Neither a receiver nor a trustee is appointed unless the farmer is ultimately adjudicated a bankrupt which the machinery provided by the section is intended, if possible, to avoid. It is true that the conciliation commissioner has been referred to in some of the decisions as in some sort the substitute for a trustee. He takes, however, no title to the property. In fine, we see nothing in the circumstance that a farmer debtor's petition has been filed under section 75 to divest state courts of jurisdiction over causes of action in tort which the farmer debtor may claim to have and upon which he may there institute actions. We have no doubt that in its administrative capacity the bankruptcy court is invested with authority either to direct or forbid the maintenance of such actions as it may deem for the best interests of the farmer debtor and his creditors. There is, however, in this case no indication that the bankruptcy court has interposed any objection to the maintenance by the appellants in the superior court of Orange county of the action here involved.

The right of a trustee in bankruptcy, if ultimately appointed to be substituted herein and to prosecute this action, is not involved in the present appeal, nor need we discuss it.

The judgment of dismissal is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 140

WEISS et al. v. FIRST SAV. BANK OF COLUSA. *

Civ. 5759.

District Court of Appeal, Third District, California.

Aug. 13, 1938.

Hearing Denied by Supreme Court Oct. 10, 1938.

1. Bills and notes ⚿518(1)

Evidence warranted finding that note reciting that it was given for a valuable consideration was given in consideration of amount named in note. Code Civ.Proc. § 1963, subd. 21; Civ.Code, § 3105.

2. Bills and notes ⚿139(3)

Where note recited that it was given for a valuable consideration, claim that note was given in lieu of a former note for the same amount which was due from makers would not invalidate note, since former debt furnished adequate consideration for the new note. Civ.Code, § 3106.

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*Hearing denied by Supreme Court 83 P.2d 35.

3. Alteration of instruments 🔑27(1)

In suit to cancel note, burden of showing that note was fraudulently altered contrary to agreement after its execution by inserting acceleration clause providing for one per cent. interest after default of payments of principal or interest was upon plaintiffs.

4. Alteration of instruments 🔑20

The filling in of a blank space left in a note at the time of its execution without agreement with respect thereto does not render the instrument void, and, if the insertion of a figure specifying rate of interest is authorized, it will bind the maker, and, if not authorized by maker, note will bear legal rate of interest, but does not thereby become void.

5. Alteration of instruments 🔑29

Evidence warranted finding that note was not fraudulently altered contrary to agreement after execution by inserting clause accelerating interest after default of payments of principal, so as to render note void.

6. Bills and notes 🔑60

In the absence of an express agreement to the contrary, it must be presumed that maker of a note in which a blank space is left for rate of interest intends thereby to permit the holder to insert in vacant space a reasonable rate of interest.

7. Alteration of instruments 🔑20

Where note contained clause providing for acceleration of interest in event of default of payment of principal or interest, leaving blank a space designated for amount of interest, if accelerated rate of interest was inserted in note after execution by payee, note would not thereby be rendered void.

8. Trial 🔑139(1), 140(1)

The trial judge has exclusive right to determine the weight and sufficiency of the evidence and the credibility of witnesses.

9. Bills and notes 🔑493(1)

In suit to cancel certain notes, presumptions created by statute as to consideration were properly considered in determining whether there was sufficient consideration to support notes. Code Civ.Proc. § 1963, subd. 21; Civ.Code, §§ 3105, 3106.

10. Bills and notes 🔑493(1)

The statutory presumptions as to issuance of a negotiable instrument for valuable consideration may become controlling where evidence is conflicting. Code Civ.Proc. § 1963, subd. 21; Civ.Code, § 3105.

11. Customs and usages 🔑10

In suit against bank to cancel notes for alleged fraudulent alteration after execution, admission of bank cashier's testimony that it was usual custom of bank to insert in notes a rate of one per cent. per month as accelerated interest after default in payment of principal or interest was error, since the custom or usage of the bank could not determine validity of the note.

12. Appeal and error 🔑1054(1)

In suit against bank to cancel notes for alleged fraudulent alteration after execution, admission of testimony that it was usual custom of bank to insert in notes which it accepted a rate of one per cent. per month as accelerated interest after default in payment of principal or interest according to the terms of note was error, but harmless where cause was tried by court sitting without a jury.

13. Appeal and error 🔑1050(1)

In suit to cancel certain notes for alleged fraudulent alteration after execution, witness' answer that it was not necessarily true that note was actually signed on date which it bore in reply to question calling for self-evident fact was harmless.

14. Bills and notes 🔑503

In suit against bank to cancel certain notes for alleged fraudulent alteration after execution where bank cashier, who had testified to circumstances surrounding the making of the notes, was asked what his recollection regarding consideration for one of the notes was, admission of answer was competent.

15. Appeal and error 🔑204(1)

Where no objection was made to competency of evidence on trial, objection as to incompetency could not be made for the first time on appeal.

◆

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Suit to cancel two promissory notes by Louis Weiss and another against the First Savings Bank of Colusa, a corporation.

From an adverse judgment, plaintiffs appeal.

Affirmed.

Richard H. Fuidge, of San Francisco, for appellants.

Rutledge & Rutledge, of Colusa, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs brought suit to cancel two promissory notes executed and delivered to the defendant bank March 24, 1930, secured by a deed of trust on lot 6, block 27, of the town of Colusa. The first note was for the principal sum of $1,000 and the second one was for $800. It is alleged the plaintiffs received no consideration for the $800 note and that the $1,000 note was fraudulently altered by the defendant after its execution and delivery by inserting in a blank space left in the instrument the provision that the note should bear one per cent. interest per month after default in the payment of any instalment thereof. Findings were adopted and judgment was rendered in favor of the defendant to the effect that plaintiffs take nothing by their action. From that judgment this appeal was perfected.

The plaintiffs are husband and wife. They own lot 6, block 27, in the town of Colusa, where they reside. Mr. Weiss is a merchant in that community. For several years he has been a regular customer of the First Savings Bank of Colusa, where he always maintained an open current account. He frequently borrowed sums of money from that bank on his unsecured notes. For the purpose of paying to Mr. Rupert of Oakland the balance of the purchase price of their Colusa home, the plaintiffs negotiated with the bank a loan of $1,000 to be secured by a trust deed on their home property. At the same time they asked the bank for an additional loan of $800, with which to make repairs upon their home. These loans were obtained from Everett Bowes, who was then an officer of the bank. Both plaintiffs acknowledged the execution of the two notes and of the trust deed, each of which instruments is dated March 24, 1930. The promissory notes are drawn on printed forms which have been used by the bank for several years. Each note was made payable one year from the date thereof "without grace, *for value received*". Each note specifically provided for seven per cent. interest payable semi-annually, and contained the provision that upon default of any instalment of principal or interest when due the entire note, at the option of the holder thereof, would become due and collectible "and shall bear interest at rate of —— per cent per month from the date of the last paid interest until the whole principal and interest shall be paid". Both plaintiffs testified that the space for the designation of the rate of accelerated interest in case of default was left blank at the time they executed the notes, and that Mr. Bowes told them he would charge them only seven per cent. interest. At the bottom of the note for $800 there was printed the following language: "This note is secured by a," following which language there is written these words: "Deed of Trust, dated March 24, 1930." The plaintiffs testified that the last-quoted language was not on the $800 note when they signed it. The trust deed is drawn in the usual form. It creates a lien on lot 6, block 27, of the town of Colusa to secure the payment of the $1,000 note which is specifically mentioned therein. The trust deed provides that it is also executed to secure the payments of all other money loaned or advanced to the plaintiffs by the bank. That clause of the deed reads:

> "For the purpose of securing the payment * * * of all sums hereafter paid, laid out, expended or advanced by the said Beneficiary under the terms of this deed of trust together with interest thereon, *and for the purpose of securing payment of all sums which may be hereafter loaned, paid out, expended or advanced by the said Beneficiary to said Grantor.*"

The plaintiffs testified that they signed both notes and the trust deed, at the request of Mr. Bowes, *in their store;* that neither note then contained the insertion of the one per cent. accelerated interest clause, and that the $800 note did not contain the written statement that it was secured by the trust deed. In conflict with the preceding statements Mr. L. A. Mace, the cashier and secretary of the bank, testified that he went to the home of the plaintiffs where he procured the signature of Mrs. Weiss to the $1,000 note and upon the trust deed, and that he then took her acknowledgment to the latter document. He testified to the effect that the $1,000 note did contain the one per cent interest acceleration clause when Mrs. Weiss signed it. His evidence in that regard appears as follows:

"Now with respect to this thousand dollar note, do I understand that you say * * * that note * * * when it was signed by her, was in the form it is now? A. *I think so,* with the exception of the number [of the note]. * * *

"Q. Do you recall definitely that you had the deed of trust signed by her at the same time? A. I am quite satisfied, sir, in her own home.

"Q. Well, are you positive about it? A. Yes.

"Q. You are positive as to both incidents? A. Yes.

"Q. But you are not positive as to Louis Weiss? A. No, it may have been in his store and may have been in the Bank.

"Q. Are you sure it was not at the home? A. Quite sure, yes sir.

"Q. Why is it you are so sure about that; is it because the signature of Louis Weiss is written with a different pen than the signature of Gladys Weiss? A. No, it is because I went down to the residence to get her to sign."

Mr. Bowes, the bank officer with whom the plaintiffs personally negotiated the loans in question, testified at the trial regarding the $800 note:

"It seems to me that this note was made as an advance under the original [1,000] note. It was what we call an advance note, an advance of money. * * * I think it was just a matter of getting security on $800 that was in the commercial department that one note dated March 24th, 1930, in the amount of $800 was given in exchange for another 800-dollar note that he owed the bank. Well, the $800 was an advance, as I understood him. I considered that it was secured by a deed of trust. I first considered that it was secured by a deed of trust when it was made. I suppose I told Mr. Weiss at that time it was to be secured by a deed of trust. My recollection is I did it. * * * There is a paragraph in the deed of trust that I presume would cover [the reason] why the 800-dollar note wasn't mentioned in the deed of trust. The paragraph I have reference to is in regard to advances. Any advances made by the bank after the making of the deed of trust would be considered to be secured by this deed of trust."

Regarding the plaintiffs' claim that the one per cent. per month accelerated interest which appears in the two notes, after default of any payments, was not inserted when they were executed, Mr. Bowes did say that he had no distinct recollection of that fact. But he did testify in rebuttal of that charge, that:

"I think that the one thousand dollars was an actual payment out of the Bank at that time. *I have no recollection of at any time preparing any notes and having them signed by anybody before they were filled out completely. I know of no instance where, if I prepared a note it would not be completely filled in before the party executed it*—unless I overlooked something."

Corroborating the statement of Mr. Mace, who testified that he obtained the signature of Mrs. Weiss to the $1,000 note and trust deed at her home and not at the store, Mr. Bowes testified: "I can't remember bringing these papers over to Louis Weiss at his store, and having him and his wife sign the two papers right there, the two notes and deed of trust."

It is true that Mr. Bowes in giving his deposition which was taken some time before the trial occurred did acknowledge writing a letter to the attorney for the plaintiffs in which he stated that he was positive he agreed with Mr. Weiss to charge him "a straight 7% interest" and that "I have no remembrance of the 1% being on there before [the instrument was] signed". It is also true that Mr. Bowes said in that deposition that he did not recall that the $800 note contained the statement: "This note is secured by a deed of trust, dated March 24, 1930." The weight to be given to the entire testimony was a matter solely for the determination of the trial judge. It is evident the recollection of Mr. Bowes regarding the details of the transaction was not clear.

Corroborating the evidence given at the trial by Mr. Bowes to the effect that the plaintiffs did receive consideration in the form of a credit to their bank account, for the $800 note, the loose-leaf ledger containing the account of Mr. Weiss with the bank was received in evidence and clearly shows that on March 7, 1930, a few days after the date which the note bears, he was given credit for $800 according to this record of the bank. The looseleaf sheet of the bank's "Class E, loans" was also received in evidence, showing that, on March 25, 1930, the day following the date which the notes bear, L. Weiss was charged with a loan of $1,000, and on the following 7th day of April, L. Weiss was also charged with another loan of $800.

In addition to the evidence affirmatively adduced to the effect that the $800 note was executed and delivered for a sufficient consideration, the statute creates a disputable presumption to that effect. Section 1963, subdivision 21, of the Code of Civil Procedure provides that it is presumed: "That a promissory note or bill of exchange was given or indorsed for a sufficient consideration."

Upon the foregoing evidence the court found that both promissory notes were executed and delivered to the defendant in consideration of the respective amounts named therein; that each of the notes, at the time of its execution, contained in writing the provisions for the payment of one per cent. accelerated interest per annum after default in any payment of principal or interest as therein provided; that neither of the notes was altered fraudulently or otherwise after its execution, and that the $800 note represented an advancement of money paid or credited to the plaintiffs after the execution of the first $1,000 note, and that both notes were secured by the trust deed in question. Judgment was accordingly rendered against the plaintiffs to the effect that they take nothing by their action.

We are of the opinion the findings and judgment are adequately supported by the evidence in every essential respect. It is true that the plaintiffs claimed they solicited the $800 loan "to make improvements on their home", and that they subsequently informed the bank they had decided not to make the improvements and would not require that sum of money. Both of them admitted that they executed the notes. Neither of them claim they ever demanded the surrender of that $800 note. Nearly four years elapsed before they complained of a failure to give them credit for that amount. The officers of the bank had no recollection of the alleged statement that plaintiffs did not want the money represented by the $800 note. Mr. Bowes testified that the $800 note was given, not for the purpose of making improvements on the home, but, on the contrary, that it was executed in lieu of a former unsecured note for the same amount for the express purpose of securing that amount by the trust deed to satisfy the demands of the bank examiners.

[1] The $800 note itself declares that it was given for a valuable consideration. Section 3105 of the Civil Code expresses this presumption of a valuable consideration in the following language: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration."

[2] If, as Mr. Bowes suggests, the $800 note was given in lieu of a former note for the same amount which was due from the plaintiffs, the former debt furnished adequate consideration for the new note. Section 3106 of the Civil Code provides that: "An antecedent or pre-existing debt constitutes value."

[3] There is ample evidence to satisfactorily show that the plaintiffs did receive full consideration for the $800 note. The burden of showing that the $1,000 note was fraudulently altered contrary to agreement after its execution by inserting therein the acceleration clause providing for one per cent. interest after default of payments of principal or interest was upon the plaintiffs. They failed to sustain that burden.

[4] It has been held that the filling in of a blank space left in a promissory note at the time of its execution without any agreement with respect thereto does not render the instrument void. If the insertion of the figure specifying the rate of interest is authorized, it will bind the maker. If it is not authorized by the maker of the note it will bear the legal rate of interest, in the absence of an agreement to the contrary, but the note does not thereby become void. First National Bank of Oakland v. Wolff, 79 Cal. 69, 21 P. 551, 748; Visher v. Webster, 8 Cal. 109; 96 A.L.R. 1104, note. In 1 Randolph of Commercial Paper, (2d ed.), page 350, section 186, it is said in that regard:

> "The rate of interest also may be left blank and filled in by the holder, although the payee can recover in such case no higher rate than that agreed on by the maker."

[5-7] In the present case it is not a question of what rate of interest the holder of the $1,000 note is entitled to recover from the makers. The issue in this case is whether the $1,000 note was rendered void on account of the alleged fraudulent alteration thereof. The trial court specifically found that it was not altered after it was executed. That finding is controlling on this court under the circumstances of this case. Even though the accelerated

rate of interest was inserted in the note after its execution, there is no substantial evidence that it was fraudulently so done. In the absence of an express agreement to the contrary it must be presumed the maker of a note in which a blank space for the rate of interest has been left in the instrument intends thereby to permit the holder thereof to insert in that vacant space a reasonable rate of interest. Under the authorities above cited the note was not rendered void on that account.

[8-10] In addition to the affirmative evidence which was adduced in this case in support of the findings that the plaintiffs received adequate consideration for the $800 note, and that the $1,000 note was not fraudulently altered, the presumptions that the notes were supported by sufficient consideration and that the defendant is innocent of any fraud or wrong strongly tend to uphold the judgment. The trial judge has the exclusive right to determine the weight and sufficiency of the evidence and the credibility of witnesses. These presumptions which are invoked in the present case were properly considered by the court in determining the issues presented to him. Where there is such a conflict of evidence as exists in this case, these presumptions may become controlling. Keating v. Morrissey, 6 Cal.App. 163, 168, 91 P. 677; Volquards v. Myers, 23 Cal. App. 500, 504, 138 P. 963; California Trust Co. v. Cohn, 9 Cal.App.2d 33, 40, 48 P.2d 744.

[11, 12] Over the objection of the plaintiffs, the cashier of the bank was permitted to testify that it was the usual custom of the bank to insert in the notes which it accepted a rate of one per cent. per month as accelerated interest after default in the payment of principal or interest according to the terms thereof. It is immaterial what the custom of the bank was under such circumstances. The custom or usage of the bank in that regard may not determine the validity of the note. Durton D. Co. v. United States F. & G. Co., 136 Cal.App. 574, 29 P.2d 316. But that evidence was harmless, particularly since the cause was tried by the court sitting without a jury.

[13-15] There is no merit in plaintiffs' exceptions numbered 2, 3, 4 and 5. The answers of the witness with respect to these assigned errors are harmless. The second exception is covered by the preceding paragraph. The third one calls for a self-evident fact. The cashier was asked if it was *necessarily true* that the note was actually signed on the date which it bears. To this question he replied that it was not necessarily true that it was signed on that date. With relation to the fourth exception the witness was asked what his recollection was regarding the consideration for the $800 note. To this question he replied: "Well, my recollection was that there was an excess of notes in the commercial department and that [800 note] was taken to cover part of that." That answer is competent. The witness had already testified that the bank examiner had complained of an excess number of unsecured notes, and that it was his recollection the $800 note secured by the trust deed was required in lieu of another unsecured note of the plaintiffs for a similar amount. In the fifth exception the question was asked: "That matter of securing the notes in the commercial department was discussed with Mr. Weiss at that time?" To that question the witness replied: "I can't remember that, *but I imagine it was.*" It is asserted that answer is a mere conclusion. That is true. But the question did not call for a conclusion. The witness volunteered that statement. There was no motion to strike the answer from the record. The plaintiffs may therefore not complain of its incompetency for the first time on appeal. The assigned errors in the reception of evidence are without substantial merit.

The judgment is affirmed.

I concur: PULLEN, P. J.

28 Cal.App.2d 55

JOLLEY et al. v. CLEMENS.

Civ. 2057.

District Court of Appeal, Fourth District, California.

Aug. 8, 1938.

Rehearing Denied Sept. 8, 1938.

Hearing Denied by Supreme Court Oct. 7, 1938.

1. Appeal and error 🔑989, 1001(1)

In determining whether evidence was sufficient to support verdict for plaintiffs in negligence action, function of reviewing court was not to weigh evidence and, unless reviewing court could say that showing in support of verdict was so thoroughly deficient as to amount to no more than a scintilla of proof, court was bound to hold that it was the exclusive province of the trial court to determine whether or not on the whole, the verdict was warranted.

2. Automobiles 🔑244(2, 47)

Evidence *held* to justify judgment against motorist for death of motorcyclist who was killed when motorcycle struck horse when motorcyclist turned to his left to avoid collision with automobile which had stalled in path of motorcycle after automobile had been turned to motorist's left in unsuccessful effort to avoid striking horse, which was knocked down by automobile striking horse, on ground that motorist was guilty of negligence and that motorcyclist was not contributorily negligent.

3. Negligence 🔑72

A person suddenly and without his own fault confronted by an emergency is excusable for not taking every precaution that might have been expected of him in other circumstances.

4. Trial 🔑349(2)

In action against motorist for death of motorcyclist who was killed when motorcycle struck horse when motorcyclist turned to left to avoid automobile which had stalled in path of motorcycle after automobile had been turned to motorist's left in unsuccessful effort to avoid striking horse which was knocked down by automobile, wherein plaintiffs alleged that motorist was negligent in not maintaining proper lookout and evidence showed that motorist had been drinking prior to accident, refusal to submit special interrogatory as to whether motorist was under influence of liquor and, if so, whether or not that was the proximate cause of the accident was not abuse of discretion under evidence.

5. Trial 🔑349(2)

In a damage action, the question of the submission to a jury of special issues rests within the sound discretion of the court.

6. Automobiles 🔑243(1)

In action against motorist for death of motorcyclist who was killed when motorcycle struck horse when motorcycle was turned to left to avoid automobile which had stalled in path of motorcycle after automobile had been turned to motorist's left in unsuccessful effort to avoid striking horse which was knocked down by automobile, wherein plaintiffs alleged that motorist was guilty of negligence in failing to maintain proper lookout and evidence showed that motorist had been drinking prior to accident, the extent to which motorist had been drinking was circumstance that jury had right to consider in deciding whether proper lookout had been kept.

7. Negligence 🔑116

An averment in an answer, in a negligence action, that the accident involved was an "inevitable one so far as the defendant was concerned" although affirmative in form, is in substance a mere denial that there was any negligence on the defendant's part, proximately causing the accident.

8. Negligence 🔑116, 117

An averment in the answer, in a negligence action, that the accident was the "result of an unavoidable accident," amounts to no more than a denial that any negligence on defendant's part proximately caused the injury, plus a gratuitous averment, wholly unnecessary to the defense, to the effect that the injured person also was free from negligence proximately causing the collision.

9. Negligence 🔑116

As a matter of pleading, the claim that an accident was unavoidable is never legitimately an affirmative defense, but its whole purpose has been served if the denials in the answer adequately respond to the charges made.

10. Negligence 🔑119(2), 138(3)

The fact that unavoidable accident is not properly pleaded as affirmative defense does not preclude showing of unavoidable accident in evidence or inclusion of unavoidable accident as proper subject of instruction.

11. Negligence 🔑121(1)

In negligence action, burden of proving unavoidable accident pleaded in answer does not rest on the defendant.

12. Negligence 🔑4

"Negligence" is the failure to use ordinary care or skill in the management of one's property or person.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

13. Negligence 🔑6

A transgression of a statutory regulation is "negligence per se."

[Ed. Note.—For other definitions of "Negligence Per Se," see Words & Phrases.]

14. Automobiles 🔑159

Where, under the stress of an emergency, it appears to a person of ordinary prudence that to shift for the moment to the left side of a highway is the safest thing to do, the conduct of such person in driving to the left side of the highway is not "negligent."

[Ed. Note.—For other definitions of "Negligent," see Words & Phrases.]

15. Automobiles 🔑242(3)

Action of motorist in driving to left side of highway is presumptively negligent unless and until justification or excuse for such conduct appears.

16. Automobiles 🔑159

The statute narrowing the statutory exceptions theretofore existing to the obligation normally to drive on the right half of the roadway does not manifest legislative intent to affect situation where motorist shifts to left side of highway, when it appears that such action is the safest thing to do under the stress of an emergency or to apply statute to conduct of drivers when suddenly and without fault on their part confronted by emergency. St.1935, p. 181, § 525.

17. Automobiles 🔑242(3)

In action against motorist for death of motorcyclist who was killed when motorcycle struck horse when motorcycle was turned to left to avoid automobile which had stalled in path of motorcycle after automobile had been turned to motorist's left in unsuccessful effort to avoid striking horse which was knocked down by automobile, presence of automobile on wrong side of highway was prima facie evidence of negligence and called for explanation on part of motorist. St.1935, p. 181, § 525.

18. Evidence 🔑89

In the rebuttal of a presumption, it is unnecessary to produce preponderating evidence, but the presumption is overcome by evidence sufficient to balance it.

19. Automobiles 🔑242(3), 244(5)

In action against motorist for death of motorcyclist who was killed when motorcycle struck horse when motorcycle was turned to left of highway to avoid automobile which had stalled in path of motorcycle after it had been turned to motorist's left in unsuccessful effort to avoid striking horse which was knocked down by automobile, showing of presence of automobile on left side of highway threw on motorist the burden of introducing evidence to account for automobile's presence there and the burden of proof to the extent of an explanation sufficient to balance the presumption of negligence arising therefrom, but motorist was not required to establish his justification by the preponderance of the evidence.

20. Courts 🔑90(1)

A decision of a Court of Appeal was required to be deemed to be limited and controlled by later decision of same court in so far, if at all, as there was any inconsistency between the decisions.

21. Negligence 🔑134

In negligence action before a plaintiff can recover, he must make out his case by the preponderance of all the evidence before the court or jury regardless of the stage of the case at which it may have appeared or the particular party who introduced it.

22. Negligence 🔑134(1, 11)

To make out his case by the preponderance of all the evidence in a negligence action, the plaintiff must show that the defendant was negligent and that the negligence was the proximate cause of the injury complained of.

23. Appeal and error 🔑1064(1)

In action against motorist for death of motorcyclist, wherein motorist pleaded as affirmative defenses contributory negligence and that accident was inevitable accident, instructions placing on motorist burden of establishing his affirmative defenses and that burden rested on motorist to show accident to have been unavoidable by a preponderance of the evidence, and in another place correctly instructing the jury to the opposite effect, were prejudicially erroneous as leaving jury with no clear guidance on the subject of the burden of proof on the issue of inevitable accident.

24. Death ⚷41

Where decedent left neither surviving spouse nor any issue, parents of decedent would be his sole heirs at law and the proper and only necessary parties to action for his death. Probate Code, § 225; Code Civ. Proc. § 377.

25. Death ⚷42

Where decedent left no issue but left a spouse, the spouse would be an heir at law together with the decedent's parents and should be joined as plaintiff in action for death of decedent. Probate Code, § 223.

26. Death ⚷31(7)

Where decedent left issue, parents of decedent would not be his heirs and hence would not be entitled to maintain action for decedent's death. Probate Code, §§ 221, 222.

27. Death ⚷75

In parents' action for death of son, absence of testimony as to whether there was any issue of decedent's marriage or whether son ever had issue otherwise than by his marriage constituted defect in parents' proof going to question of whether or not they were heirs of son entitled to maintain action where allegation to effect that parents were heirs of son was denied in answer. Probate Code, §§ 221, 222, 225; Code Civ.Proc. § 377.

28. Death ⚷58(1)

In parents' action for death of son wherein answer joined issue on right of parents to maintain action as heirs of son, parents had burden to supply proof as to absence of issue of son. Probate Code, §§ 221, 222, 225; Code Civ.Proc. § 377.

29. Appeal and error ⚷891

Where, on appeal from judgment in favor of parents in action for death of son, it appeared that there was defect in parents' proof going to question of whether or not they were heirs of the son, in that there was no proof of absence of issue of son, request of parents that reviewing court permit further evidence to be taken on subject in form of deposition was denied where case was required to be retried because of error in instruction, since taking of evidence on such subject could more readily be done in superior court. Probate Code, §§ 221, 222, 225; Code Civ.Proc. § 377; Const. art. 6, § 4¾.

30. Death ⚷42

In parents' action for death of son, question whether or not there was surviving spouse of son did not go to parents' right to sue, but only to question of whether or not such spouse should have been joined in the suing. Probate Code, § 223.

31. Parties ⚷84(4)

In parents' action for death of son, nonjoinder of surviving spouse whose existence appears from complaint may be objected to by demurrer. Probate Code, § 223.

32. Parties ⚷84(3)

In parents' action for death of son, nonjoinder of surviving spouse whose existence is not mentioned in complaint may be objected to in answer. Probate Code, § 223.

33. Parties ⚷84(5)

In parents' action for death of son, defect of nonjoinder of surviving spouse is waived if objection is not raised by answer or demurrer. Probate Code, § 223.

34. Death ⚷55

In parents' action for death of son, wherein, before going to trial, answer challenged right of parents to maintain action as heirs of son but failed to allege existence of surviving spouse, defendant could entitle himself to litigate question of whether or not son left surviving spouse by amendment to his answer. Probate Code, § 223.

35. Death ⚷42

In parents' action for death of son, joinder or nonjoinder of surviving spouse would not affect litigation where subsequent to marriage wife had obtained annulment on ground that her marriage to son was illegal, since it would be difficult for wife to maintain that she was financially affected by son's death and hence, if parents secured judgment without joinder of surviving wife, defendant would not be in danger of being harassed by further litigation in her behalf. Probate Code, § 223.

MARKS, J., dissenting.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Alma Jolley and another against Wallace Clemens and another for the death of the plaintiffs' son who was killed when motorcycle on which he was riding struck horse while plaintiffs' son was attempting to avoid collision with defendants' automobile. Judgment for plaintiffs against the named defendant, and the named defendant appeals.

Reversed and remanded for retrial.

Wright, Monroe, Thomas & Glenn and Wright, Monroe & Harden, all of San Diego, for appellant.

Sloane & Steiner and John W. Holler, all of San Diego, for respondents.

HAINES, Justice pro tem.

Between 1 and 2 o'clock in the morning of February 10, 1937, defendant and appellant, Wallace Clemens, was driving an automobile at the rate of from 40 to 45 miles an hour in a northerly direction on his right side of what is known as Highway 101, which runs north and south between Tijuana, Mexico, and San Diego, California. In the region involved the highway is both itself level and straight and also at the approximate level of the surrounding country; that is, with neither fills nor cuts. The highway consists of a paved middle portion 36 feet wide, marked by a white line down the center of the asphalt and on either side a dirt shoulder 20 feet wide. Of the 36 feet of pavement, the middle portion constituting rather more than half of the whole is paved with asphalt, the rest constituting the outer portion on either side is oiled. Outside of this, on either side, are the dirt shoulders referred to. This makes, on either side of the center line, an aggregate of 18 feet as the combined width of the asphalt and oiled pavement plus the 20 feet of dirt shoulder. Clemens had with him three passengers; his wife, who sat at his right on the front seat, one Fern Rankin and one Don Housh, who sat behind them respectively on the rear seat. His brakes were in good condition and the range of his headlights was about 300 feet. One Joseph Melvin Jolley was, at the same time, proceeding southerly on his right side of the highway at about the same speed on a motorcycle, having behind him, as a passenger, one Smilie. It is necessary to depend largely, for an account of what occurred, upon the testimony of the appellant, Clemens, and the three others who were with him, who are the only surviving witnesses to the accident except Smilie. According to appellant the four had left his residence in San Diego between eight and nine in the evening and gone to a dance hall in Tijuana where they had a table, stayed an hour and danced. While there appellant had one "Tom Collins" (a concoction having a basis of gin). Then they went on to Rosarita Beach where more dancing occurred and appellant had, according to his own account two or three more "Tom Collins". On the way home the party stopped at the border and talked with the officers, including traffic officer Hoard, and then came on north. Just preceding the accident appellant says he suddenly saw a large 1600 pound stray horse of a dark brown color 25 to 50 feet ahead of him somewhere between the east edge of the pavement and its center line and that it appeared to be crossing the highway, that is, going west. He thinks its hind feet were probably a few inches off the pavement, and, though he applied his brakes and turned as sharply as practicable to his left in the effort to avoid the horse, he hit its head and "front shoulders". He says that the horse might have walked a step or so in the meantime, but he is not sure. In passing the horse he first saw the motorcycle, which was then 25 to 50 feet away from where he then was. Its headlight was lighted. His own engine had been killed by the impact with the horse and he says that he was unable to avoid going further to the left side of the road into the path of the motorcycle, but he managed, after continuing a short distance, to stop. Meanwhile, to avoid Clemens' car, Jolley deflected the course of his motorcycle to the east, and, though he did not hit the automobile, he did strike the horse and was killed in that collision. Appellant restarted his engine at once and turned his car around. He and the others with him assisted Smilie, who was injured, and appellant sent his wife on with his car to town to report the accident and get help. The horse, after the accident, was lying crippled about the middle of the highway with its head pointed east. The rear part of its stomach had been punctured by the motorcycle.

Respondent, Alma Jolley, the father of the deceased, testified to having had two conversations with appellant after the accident, one alone, in which he claims that appellant said that "he had a few drinks in him and maybe if he hadn't had a few drinks and he got a little closer to the horse he would have saw the horse". At the second conference with appellant, however, when Smilie also was present, he does not claim that any such admission was made. Appellant denies any recollection of making any such statement.

Hoard, the state traffic officer, testified to an examination of the highway after the accident and finding marks on the pavement and hair where apparently the horse had been hit. These were about 40 feet north of where the horse lay. He found the motorcycle at the edge of the pavement some 65 feet from the marks. He saw no evidence of intoxication on Clemens' part, either at Tijuana when the party passed through on their way home or at the scene of the accident, though he there particularly noticed Clemens' conduct because when he had met him at the border there was a slight odor on his breath. He considered Clemens unquestionably sober. All three of the other occupants of appellant's car testified at the trial but their testimony does not sufficiently vary from appellant's own to justify restating it in detail. All claim that appellant showed no indication that night of being under the influence of liquor.

Smilie was riding, as we noticed, behind the deceased, who was a larger man, and in consequence he was unable to see forward. He says that the motorcycle was being driven about 3 feet to its right side of the center line of the highway. He remembers a "left dip" (that is, a lurching of the motorcycle to the left to avoid something), a white flash and nothing further until he waked up later that night out of a dazed condition to find himself still partially dazed, getting into an automobile. He had suffered various injuries which we need not here detail.

The present action was brought by respondents, who are Jolley's parents and claim to be his heirs at law, to recover from appellant, Clemens, and one Inouye, the owner of the horse, pecuniary damages which respondents claim to have suffered from their son's death, which they allege to have been caused by the negligence of the defendants. A nonsuit was granted in Inouye's favor but the jury found a verdict for $4,000 against Clemens, in addition to which the court's conclusions were in respondents' favor upon certain issues which had by stipulation been submitted to it, in consequence of which judgment was entered for respondents upon the verdict, and Clemens appealed.

In appellant's behalf it is claimed as grounds for reversal, (a) that there is no evidence of any negligent act or omission on appellant's part that could reasonably be found to be the proximate cause of the accident; (b) that the evidence indicates contributory negligence; (c) that the trial court erred in refusing to submit to the jury a special interrogatory as to whether or not appellant was under the influence of liquor at the time of the accident; (d) that the trial court committed prejudicial error in its instructions; and (e) that there is no sufficient evidence that respondents were the heirs of the deceased and as such entitled to maintain the action. Each of these contentions is on behalf of respondents disputed.

The first question, then, which we have to consider is whether or not the record reveals any substantial evidence of negligence on appellant's part. Respondents claim that the jury was entitled to believe that he did not keep a proper lookout. The argument is, in brief, that his headlights penetrated the darkness for 300 feet and he is shown to have been driving along the middle of the 18-foot-wide pavement on his right side of the highway; that when he did see the horse it was directly in front of him; that, according to his own account, while he continued for the 25 to 50 feet that intervened before he reached and hit the horse, the latter in its westerly course across the road, had only taken a single step; that the horse, being a heavy one (and as Inouye, its owner, testifies, old and gentle), the jury was entitled to infer that before being actually seen it had, with equal deliberation, made its way across the 20-foot-wide dirt shoulder just east of the pavement, and that appellant ought to have seen it when at a distance of a hundred or more feet from the place where he hit it, which would have given him, if driving at a speed not greater than 45 miles per hour, ample time and space in which either to have stopped or have taken other means to avoid striking it. It is further claimed that had he been keeping a proper lookout appellant must have seen the headlight of the motorcycle long before he did see it. It is also claimed that it was the jury's right to believe, in the light of the evidence and his alleged admissions, that the liquor which he had taken while in Mexico, had in some degree impaired the sharpness of his observation and the soundness of his judgment.

[1-3] While we recognize that the instant case is an exceedingly close one, it is not our function to weigh evidence, and unless we can say that the showing in support of the jury's verdict is so thoroughly deficient as to amount to no more than a scintilla of proof, we are bound to hold that it was the exclusive province of the trial court to determine whether, on the whole, the verdict was warranted or not. We do not feel able to say, as a matter of law, that the conclusions reached were ones which reasonable men could not legitimately reach.

Neither can we say that in finding the appellant guilty of negligence the jury were bound, as a matter of law, also to find the deceased guilty of contributory negligence. The horse had not yet reached the side of the highway on which the motorcycle was, prior to the accident, running. Even if the deceased saw it the jury might reasonably conclude that he would have had plenty of room in the highway to pass in front of it but for the course taken by appellant's car. As to that, even though the deceased had seen it in time to have stopped or taken some other course than the one he did take, the jury was not bound to charge him with anticipating that appellant's engine would be stopped or that instead, after passing the horse, of returning to its own side of the highway, appellant's car would continue on so as to require the motorcycle to turn out of its path. In these circumstances it cannot be said that the jury could not legitimately have applied, in favor of the deceased the rule that one suddenly and without his own fault confronted by an emergency is excusable for not taking every precaution that might have been expected of him in other circumstances. We do not think Hickey v. Smith, 277 Mich. 123, 268 N.W. 833, relied on by appellant in this connection, to be in point. That was a case where a loose horse was observed on the *plaintiff's* side of the highway and the plaintiff turned to his left to avoid it and was hit by the defendant's automobile coming from the opposite direction. The Supreme Court of Michigan, in reversing the judgment of the trial court, held that if the defendant ought to have seen and appreciated the situation in time to have avoided the accident, the plaintiff, by the same token, ought to have done so. Had appellant in the instant case been the plaintiff and the fact been that the decedent's motorcycle, instead of colliding with the horse, had continued in its course and collided with appellant's car, the case would have been in point, but in point to the effect that appellant could not recover.

[4-6] Neither are we able to agree with appellant's next contention that the trial court abused its discretion in refusing to submit to the jury the question as to whether, at the time of the accident, appellant was under the influence of intoxicating liquor, and if so, whether or not that was a proximate cause of the accident. It is conceded that in a damage case the question of the submission to a jury of special issues rests within the sound discretion of the court. Appellant's argument here is that the testimony as to his drinking while in Mexico that night was materially prejudicial to him unless connected with some act of misconduct afterward. Granting that this is so, a failure, for example, to keep such reasonably proper lookout as would have enabled him to have avoided the accident, if the jury believed that there was such a failure, would, of course, have amounted to such misconduct. The extent to which appellant had been drinking was a circumstance that the jury had a right to consider in deciding whether a proper lookout had been kept. There is no claim here of appellant having been heavily intoxicated. If the liquor had any effect on the attention which he gave to the condition of the road in front of him, or upon the keenness with which he observed it, then the fact that he had taken the drinks was still but one ingredient, among other ingredients, such, for example as the natural weariness of a person who had been without sleep until that hour in the morning, that the jury may have believed to have affected the clarity of his observation and the keenness of his judgment at the time of the accident. We do not think then, that the element of appellant's drinking stood out so prominently above the rest as necessarily to have required the emphasis of a special interrogatory.

We come then to what is, in our judgment, a more serious question. Appellant sets out in his answer as in form an affirmative defense:

"That at the time and place in said complaint alleged Joseph Melvin Jolley, deceased, was driving and operating a motorcycle in a southerly direction on said Highway 101; that a result of an unavoidable accident Joseph Melvin Jolley, deceased, collided with a horse owned by defendant, Eijiro Inouye, which was then and there on said highway; that the damages and injuries sustained by deceased and plaintiffs as the result thereof were due solely to said unavoidable accident."

As bearing upon this defense appellant requested an instruction which, in so far as we need consider it, was as follows:

> "In this connection you are instructed that although the defendants have presented as a defense that the death of the decedent was the result of an unavoidable accident, it does not follow that the burden rests upon either of the defendants to establish such fact by a preponderance of the evidence. To the contrary, the law presumes that the death was the result of accident until it has been established by a preponderance of the evidence that one or both of the defendants were guilty of some negligent act or omission which proximately caused the death. Unless it has been so proven, it is your duty to find that the death resulted from accident and to return a verdict for the defendants."

The court has endorsed this instruction as "given as modified" but we do not find it in the instructions given in anything like the form in which it was proposed. The court did, however, include in its instructions the following:

> "The burden rests upon the defendants to establish their affirmative defenses by a preponderance of the evidence in this case. However, such defenses may be established as the result of plaintiff's own evidence and in such case it would be unnecessary for the defendants to furnish any further proof."

Also:

> "When a party seeks to attribute injury of another to unavoidable accident, then the burden is on such party to make such showing by a preponderance of the evidence. No accident can be said to be unavoidable where, by the exercise of ordinary care, it could have been avoided."

On the other hand, the court elsewhere stated:

> "It is not every accident that gives rise to liability and the law recognizes that unavoidable accidents do occur and recognizes further that accidents occur under such circumstances where neither party is liable to the other. Negligence, in a case of this character, is never presumed but must be established by the plaintiffs by a preponderance of the evidence."

[7-10] The defense that an accident was unavoidable has been frequently alluded to in the decisions of courts of appellate jurisdiction in this state but has generally been somewhat incidentally dealt with, and, in these circumstances, we think it in order to state our view of its nature and bearing. Our view, in brief, is that it has no real place at all in a pleading as an affirmative defense. Sometimes what is said in an answer is that the accident involved was an "inevitable one so far as the defendant was concerned." We think it entirely clear that such an averment, though affirmative in form is in substance a mere denial that there was any negligence on the defendant's part, proximately causing the accident; that is, either a denial that the defendant was negligent, or else, a denial that any negligence of which he might have been guilty entered into the proximate cause of the accident. Generally, however, the supposed affirmative defense is more broadly stated, as in the instant case, where it is set up that decedent's collision with the horse was the "result of an unavoidable accident." This amounts, in our opinion, to no more than a denial that any negligence on appellant's part proximately caused the injury, and either to a denial that he was negligent, or else that, if he was, such negligence on his part was any part of the proximate cause of the collision, *plus* a gratuitous averment, wholly necessary to the defense, to the effect that the deceased also was free from negligence proximately causing the collision. Since we can hardly conceive of the defense of an unavoidable accident otherwise than in one or the other of the two forms mentioned, we think that we are not going too far in saying that, as a matter of pleading, the claim that an accident was unavoidable is never legitimately an affirmative defense at all; that its whole purpose has already been served if the denials in the answer adequately respond to the charges made. As respects unavoidable accidents the circumstance that it is logically indefensible to plead them as affirmative matter does not, of course, mean that they may not be shown in evidence; neither does it mean that they may not form a proper subject of instruction. It means merely that as a matter of pleading they are necessarily and sufficiently put in issue by a complaint on the one hand asserting an injury to have been proximately caused by something alleged to have been negli-

gently done or omitted by the defendant and, on the other hand, an answer denying these averments. This situation has heretofore received notice in this state. Thus in Pearce v. Elbe, 98 Cal.App. 101, 105, 276 P. 389, 391 (hearing denied by the Supreme Court), it was said:

"It was not error for the court to instruct on unavoidable accident at the request of the defendant. Metcalfe v. Pacific Electric Ry. Co., 63 Cal.App. 331, 218 P. 486, is not authority for appellant's contention that unavoidable accident must be specially pleaded by defendant. The appellant was plaintiff in that case. He was claiming error in the refusal of the court to give his requested instruction, and to meet respondent's reply, he had to contend that the point was material in the case by reason of either the evidence or special pleading. The court holds that it was neither in the evidence nor specially pleaded and so the instruction could properly be refused. That is to say, so long as defendant did not claim that defense, plaintiff was not entitled to have the jury instructed upon it. This is not a holding that this defense must be specially pleaded to be available to the defendant. Because it was not error to refuse it in that case at the request of the plaintiff does not mean that it was error to give it in this case at request of defendant. Here negligence is pleaded in general terms in the complaint. The answer denies it in general terms. The general denial of the general allegation of negligence permits the defendant to rely upon the defense of unavoidable accident. Lehnerts v. Otis Elevator Co. (Mo.Sup.) 256 S.W. 819, 822; 45 C.J. 1141, note 52. The instruction was given by request of defendant, and we cannot see how it could be harmful to the plaintiff, who in any event had the burden of proving that the collision was occasioned solely by the negligence of the plaintiff [evidently meaning defendant] which, of course, would exclude unavoidable accident."

[11] We are unable to reconcile these principles with the view that when an unavoidable accident is pleaded in the answer the burden of proving it rests in the defendant. To so hold would be to regard the mere form of his pleading rather than its substance.

[12, 13] Negligence is, by definition, the failure to use ordinary care or skill in the management of one's property or person. It has often been laid down in decisions that a transgression of a statutory regulation, such, for example, as the injunction to drive on the right side of a highway is negligence per se. This statement is accurate enough for most purposes. However, the Supreme Court in Cragg v. Los Angeles Trust Co., 154 Cal. 663, 667, 98 P. 1063, 1065, 16 Ann.Cas. 1061, thus expressed itself:

"The general rule, which is the one adopted in California, is thus stated in 1 Shearman & Redfield on Negligence, section 13: 'The violation of any statutory or valid municipal regulation, established for the benefit of private persons, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence brought by a person belonging to the protected class if the other elements of actionable negligence concur.' It is further said in the same section that it is the opinion of the writers that the true rule is that the violation of such a statute or ordinance is presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive, and, as an example of what is meant by the expression as to excusing evidence, it is said that, under special circumstances, a jury might excuse an omission to give signals required by a statute, as prudent under those circumstances. No attempt was made in this case to show anything in the way of excuse for failure to comply with the ordinance, and we need not consider that branch of the rule. As said above, the quotation from Shearman & Redfield states the rule adopted in this state."

[14, 15] Non constat, however, that under the stress of an emergency it may not appear to one of ordinary prudence that to shift for the moment to the left side of the highway is the safest thing to do. In such circumstances, from the very definition of negligence the conduct of the person involved is not negligent. But unless and until justification or excuse for such conduct appear it is presumptively negligent. If no justification or excuse appear the general rule applies and it must be treated as negligence per se. But if it do adequately appear the driver's conduct is not negligence at all. Thus in Uhl v. Fertig, 56 Cal. App. 718, 724, 206 P. 467, 469, it was said:

"As a matter of law, his act in swerving toward the left when it appeared to him that a collision was imminent, instead of continuing on the right-hand side of the road, was not in itself negligence. * * * There are many cases, several of which are cited by appellant in his brief, which declare the familiar rule that, where a person discovers himself in sudden peril, without sufficient time to weigh all of the surrounding circumstances, that the act which he may then do is not a negligent one, even though it may appear, upon reasoned consideration, that his choice was unwise. 'The rule, judicially stated, is that one who in a sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence.' 20 Ruling Case Law, p. 29."

[16] We do not think that the legislative narrowing in 1935 by the enactment of section 525 of the Vehicle Code, St.1935, p. 181, of the statutory exceptions theretofore existing to the obligation normally to drive upon the right half of the roadway, was intended to affect this situation or to apply to the conduct of drivers when suddenly and without fault on their part confronted by emergencies.

[17, 18] It is true that, in the instant case, the presence of appellant's car on the wrong side of the highway was in itself prima facie evidence of negligence and called for an explanation on his part. In that respect the situation was similar to that presented in Parker v. Auschwitz, 7 Cal.App.2d 693, 696, 47 P.2d 341, 343, where it was held that the mere presence of a truck on the left or wrong side of a road, being of itself a violation of section 122 of the California Vehicle Act, St.1931, p. 2124, providing that the driver of a vehicle upon a highway of sufficient width shall drive on the right half of the highway, the burden rested on the driver to excuse or justify the presence of his truck. "This," the court said, "he attempted to do by showing the truck skidded, and while the mere skidding of an automobile is not necessarily negligence (Smith v. Hollander, 85 Cal. App. 535, 259 P. 958, 58 L.R.A. 268; Lambert v. Eastern Massachusetts, etc., Co., 240 Mass. 495, 134 N.E. 340, 22 A.L.R. 1291), the burden of establishing justification is on appellant." That, it should be said, was a case tried by the court and therefore involved no question of instructions. The burden referred to is that of meeting the rebuttable presumption of negligence arising from the apparent violation of a statute. "In the rebuttal of a presumption it is not necessary to produce preponderating evidence. A presumption is overcome by evidence sufficient to balance it." 10 Cal. Jur. 752 and cases cited.

[19] Undoubtedly, then, in the instant case the presence where it was, of the appellant's automobile threw upon him the onus procedendi, that is, the burden of introducing evidence to account for its presence there, and also the onus probandi to the extent, but to the extent only, of an explanation sufficient to balance the presumption. This, however, is not the same thing as to require him to establish his justification by the preponderance of the evidence.

We do not think that what we have stated is necessarily inconsistent with the comment made in State Compensation Ins. Fund v. Lamb, 96 Cal.App. 236, 240, 273 P. 1080, 1082, where it was said:

"The defendants complain of an instruction given by the trial court, No. 46. That instruction was addressed to the question as to who should prove an inevitable accident. It is difficult, under the issues made by the pleadings, to see just what was the pertinency of the subject-matter. Be that as it may, the defendants introduced it in the opening statement made by their attorney and thereafter followed up the subject and introduced proof thereon. There is nothing in the case showing that there was any duty on the part of the plaintiffs to introduce evidence in support of the existence of the theory of inevitable accident, and, if the subject-matter be asserted as an affirmative defense, then the burden was on the defendants to make the showing."

[20] We gather from this passage that what was involved was not any attempt to *plead* an inevitable accident, but merely an attempt to rebut a prima facie case made by the plaintiff on the theory that the accident was inevitable. If the plaintiff's proof did not show it to be inevitable, manifestly the onus procedendi to make such showing rested on the defendants. We think, however, that the characterization of such a situation as the making of "an affirmative defense" is not altogether accurate. We do not have before us the terms of the instruction referred to in the court's language which we have just quoted, but there is nothing in the language itself to indicate that the instruction actually placed any further burden on the defendants than that which we have suggested was theirs. In any event, State Compensation Ins. Fund

v. Lamb did not reach the Supreme Court and moreover was decided by the same division of the District Court of Appeal for the First District which later decided Pearce v. Elbe, supra, and must, therefore, be deemed to be limited and controlled by that case in so far, if at all, as there is any inconsistency between them. The principles laid down in Pearce v. Elbe were reiterated in Creamer v. Cerrato (hearing denied by the Supreme Court), 1 Cal.App.2d 441, 444, 445, 36 P.2d 1094, 1095, where it was said:

"Appellant complains of three instructions stating, in abstract terms, the rule as to the amount of care required, when acting in a sudden emergency or peril, claiming that the first placed upon her the burden of proving that the operation of the truck on its wrong side was inexcusable and the other two denied the jury the right of considering whether the driver's failure to have his truck under control was the proximate cause of the collision. * * *

"At respondents' request, the jury was instructed that appellant could not recover for damages, caused by an unavoidable accident, which was defined as one which occurs despite the exercise of reasonable care upon the part of all concerned to avoid it. Appellant argues that, since the evidence presented the sole issue of respondents' negligence and not of an unavoidable accident, this instruction erroneously invited the jury to speculate upon matters not in issue. But, since appellant requested an instruction, which was given, stating the converse, she did, at the trial, consider this issue raised by the evidence. The driver's testimony, which, if believed, excused his acts, negligent under ordinary conditions, because of the sudden peril, raised this issue, for, if he was not negligent, the accident was unavoidable. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Leslie v. Catanzaro, 272 Pa. 419, 116 A. 504. The instruction could not have been harmful to appellant, for she had the burden of proving that the collision was occasioned by the negligence of respondents, which would exclude an unavoidable accident. Pearce v. Elbe, 98 Cal.App. 101, 276 P. 389. The general denial, in the answer, of the general allegation of negligence, in the complaint, permitted respondents to rely upon the defense of unavoidable accident. Pearce v. Elbe, supra. Since the issue was raised by respondents' pleading and evidence they were entitled to this instruction. Graham v. Consolidated Motor Transport Co., 112 Cal. App. 648, 297 P. 617."

In Sitkei v. Ralphs Grocery Company, Cal.App., 77 P.2d 311, it was said (page 313):

"The law is settled that under a general denial by defendant of a general allegation of negligence defendant may rely upon the defense of unavoidable accident and does not waive such defense by failing to specifically plead it (Pearce v. Elbe, 98 Cal. App. 101, 106, 276 P. 389), and it is proper in such a case for the court upon request to instruct the jury on the doctrine of unavoidable accident. Pearce v. Elbe, 98 Cal. App. 101, 105, 276 P. 389."

A very well reasoned case with respect to the true nature of a claim that an accident was inevitable is Rosenthal Dry Goods Co. v. Hillebrandt, Tex.Com.App., 7 S.W.2d 521. There Eliza Hillebrandt sued Rosenthal Dry Goods Company to recover damages for personal injuries received through the alleged negligence of the defendant's truck driver causing a collision with a buggy in which she was riding. She obtained a verdict and judgment was entered thereon by the trial court and affirmed by the Court of Civil Appeals, 299 S.W. 665, but on the case being carried up to the Commission of Appeals the latter recommended to the Supreme Court a reversal of the judgment which was reversed accordingly. We excerpt the following from the commission's opinion (page 523 of 7 S.W.2d):

"Plaintiff in error next attacks the judgment of the Court of Civil Appeals for its holding that the issue of unavoidable accident was not raised by the evidence and for holding harmless the admitted error of the trial court in the matter of the submission of that issue. The issue was thus submitted:

"'Do you find from a preponderance of the evidence in this case that the collision of the two vehicles in this case was the result of an unavoidable accident?'

"The jury answered 'no.'

"The Court of Civil Appeals held that this charge was error, in that it put the burden of proof upon appellant, citing Galveston, H. & S. A. Railway Co. v. Washington, 94 Tex. 510, 63 S.W. 534, but further held that the error was not reversible because the issue was not in the case. Our examination of the evidence convinces us that the issue was raised and, moreover, having been actually submitted without objections by either party, neither party can raise the question there is no evidence to authorize the submission. * * *

"We agree with the conclusion of the Court of Civil Appeals that the charge was erroneous in form and subject to the objections timely made by the defendant below. It was indispensable to the plaintiff's case, and the burden was upon her to that extent, to prove that her injuries resulted from the alleged negligence of the defendant. It was not necessary that the defendant plead specially that the injuries were the result of an unavoidable accident. This was put in issue by the general denial and imposed upon the plaintiff the necessity of proving that the happening was not an unavoidable accident. This necessarily was a part of her case. While this requires the proving of a negative, nevertheless it is in keeping with sound reasoning.

" 'Whenever the establishment of an affirmative case requires proof of a material negative allegation, the party who makes such allegation has the burden of proving it, especially where the most appropriate mode of proof is by establishing the affirmative opposite of the allegation.' 22 C.J., p. 70, § 15. * * *

"For the error of the Court of Civil Appeals in holding that the manner of the submission of the issue of unavoidable accident was harmless, we recommend that the judgment of that court be reversed and that judgment be here rendered reversing the judgment of the district court and remanding the cause for another trial."

[21, 22] The dominating consideration in dealing with the whole subject of inevitable accident, as we see the matter, is the elementary requirement that before a plaintiff can recover he must make out his case by the preponderance of all the evidence before the court or jury regardless of the stage of the case at which it may have appeared or the particular party who introduced it. To do this in a negligence case he must show that the defendant was negligent and the negligence was the proximate cause of the injury complained of. But if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof.

[23] Returning then to the three passages from the instructions in fact given by the trial court in the instant case, which we have heretofore set out, it will be noted that the first places on the defendant the burden of establishing not his affirmative defense but his affirmative defenses. Thus the court adopted the view that there are two such defenses which would mean not only that of contributory negligence which is actually a defense of an affirmative nature, but also that of an inevitable accident which is essentially nothing of the sort. The second passage definitely and erroneously instructs the jury that the burden rests on the defendant to show the accident to have been unavoidable "by a preponderance of the evidence", while the third passage correctly enough instructs the jury to the opposite effect. The net result is to leave the jury with no clear guidance on the subject. If the plaintiffs had made out an overwhelmingly clear case on the evidence we might regard the erroneous instructions referred to as, in the circumstances, harmless, but in a case which, on the issue of defendant's negligence, is as close as this case is, we cannot treat them as otherwise than prejudicial.

[24-26] It remains to mention the further defense relied on, that the respondents have not shown themselves to be the decedent's heirs. It appears that the decedent was on February 21, 1936, married in San Diego county, California, to one Helen Boyer, who was his first cousin. The laws of California interpose no obstacle to such a marriage. The marriage of first cousins is however, unlawful in Utah. On May 30, 1936, the said Helen Boyer, under her married name, Helen Jolley, commenced an action in the District Court of the Fourth Judicial District of the State of Utah, in which she alleged the fact of her marriage at the time when it actually occurred but made no statement either with respect to where the marriage had taken place nor as to the place of residence at the time it occurred or either of the parties to it, but sought a decree of annulment on the ground that it was inhibited by Utah law. The decedent in California signed a receipt for a copy of the summons and made affidavit that he waived time in which to plead to the complaint and consented that his default might be entered and the cause at any time heard without notice to him. On June 20, 1936, the Utah court made findings to the effect that the plaintiff in the case before it had been a bona fide resident of Utah for a year prior to the filing of her com-

plaint, that the marriage was void for relationship of the parties, and entered its decree accordingly. Defendant in the instant case now contends that the Utah court was manifestly imposed upon. The evidence is to the effect that the decedent had resided in San Diego county for some six years prior to his death, and that after his marriage here he and his wife lived together for something like two months. There is no testimony as to whether there was any issue of the marriage or not, nor whether or not the decedent ever had issue otherwise than by this marriage. By stipulation in the instant case the jury was permitted to render its verdict as though no question existed with respect to whether or not the respondents were the proper parties plaintiff and that question was in the event of a verdict in their favor to be determined by the trial court. After its submission to that court the latter, though it made no express finding on the subject, directed the verdict to be entered, so that we shall assume that it determined that respondents were, as the decedent's heirs, entitled to maintain the action. The situation is, of course, that if the decedent left neither surviving spouse nor any issue, then his parents, the present respondents, are his sole heirs at law, and the proper and only necessary parties to this action. Probate Code, § 225; Code Civ. Proc., § 377. If he left no issue but did leave a spouse, such spouse was an heir at law together with his parents and so should have been joined as a plaintiff (Probate Code, § 223), while, if he left issue, respondents as his parents would not be his heirs at all (Probate Code, §§ 221, 222) and therefore not entitled to maintain this action at all.

[27-29] We think it true that there was a defect in respondents' proof going to the question of whether or not they were heirs of the decedent at all, the absence of issue being a necessary ingredient of proof that they are heirs and their allegation to the effect that they are such heirs having been denied in appellant's answer. Since the answer joins issue on the subject it was respondents' burden to supply the proof and this they have not done. Respondents have requested that under Article 6, section 4¾ of the Constitution, if this court deems proof that the decedent left no issue necessary to support the judgment it permit further evidence in the form of a deposition to be taken on the subject. Since, however, the case will in any event, have to be retried, this can more readily be done in the Superior Court.

[30-35] For such aid as it may afford to the trial court when further proceedings are had it may be proper that we indicate our views concerning appellant's contention that there is a defect of parties plaintiff for failure to join a surviving spouse. The situation in this connection is not the same as with respect to the absence of issue. Respondents were bound to show the absence of issue as part of the proof that they are heirs at law at all. They would, however, still be heirs at law even if there were a surviving spouse. The question whether or not there is one, does not, therefore, go to respondents' right to sue, but only to the question of whether or not such spouse ought to be joined with them in suing. In these circumstances the rule is that if her existence appears from the complaint her nonjoinder may be objected to by demurrer; that if there be such spouse but she is not mentioned in the complaint her nonjoinder may be objected to in the answer, but that if neither of these methods of objection is employed the defect is waived and is no ground for defeating a recovery. Knott v. McGilvray, 124 Cal. 128, 56 P. 789; Salmon v. Rathjens, 152 Cal. 290, 92 P. 733; Robinson v. Western States Gas & Electric Co., 184 Cal. 401, 194 P. 39. In the instant case, therefore, we are of the opinion that appellant can only entitle himself to litigate the question of whether or not the decedent left a surviving spouse by an amendment to his answer. We confess, however, that we do not see wherein he could gain anything by so doing, nor do we think that the situation justifies us in entering upon a discussion of the validity or invalidity of the Utah annulment decree. If the decedent did leave a surviving spouse she could either join as a plaintiff, or in case of her refusal to do so, be made a defendant. But the circumstances here shown render it highly improbable that in this case her presence would have any particular effect on the result of the litigation for her attitude as reflected in her annulment suit would presumably make it difficult for her to maintain that she was in any way financially affected by decedent's death. Should the present respondents ultimately secure a judgment without her having been present as a party, appellant would be in no danger of being harassed by further litigation in her behalf. Daubert v. West-

ern Meat Co., 139 Cal. 480, 69 P. 297, 73 P. 244, 96 Am.St.Rep. 154; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077.

By reason of the errors referred to in the instructions given, the judgment must be and it is reversed and the cause remanded to the Superior Court for retrial.

I concur: BARNARD, P. J.

MARKS, Justice (dissenting.)

I dissent. I cannot agree with my associates in their discussion of and conclusions reached on the instruction given on unavoidable accident. This disagreement starts with the premise on which their argument is based. They ground their argument upon the assertion that the defense of unavoidable accident is not really an affirmative defense as it purports to be, but is merely a denial of negligence, contributory negligence and proximate cause and as such is not an affirmative defense at all. There might be a case in which this premise might be correct. However, under the pleadings and facts of the instant case it is my conclusion that the defense of unavoidable accident is not merely a denial of the allegations of the complaint but is an independent affirmative defense and that the burden of proving it rested on defendant.

The question thus presented has been mentioned in California cases but I can find none in which it has been thoroughly discussed. In Metcalfe v. Pacific Electric Ry., 63 Cal.App. 331, 218 P. 486, the trial court refused to give instructions on the question of unavoidable accident. The District Court of Appeal analyzed the answer and held that it did not set up the defense of unavoidable accident and affirmed the judgment. If this case is of any value here it is only because of an inference that such defense should be pleaded. In Pearce v. Elbe, 98 Cal.App. 101, 276 P. 389, the court said that the Metcalfe Case was not authority for holding that unavoidable accident must be specially pleaded. In the Pearce Case the court remarked that a defendant could prove unavoidable accident under denials of negligence in its answer and approved the giving of instructions on that question. Smith v. Hale, 3 Cal.App.2d 277, 39 P.2d 445, is to the same effect. It is obvious that these cases only hint at the question here presented and are not decisive of it.

It is the law in California that "the party holding the affirmative of the issue must produce the evidence to prove it * * *." Sec. 1981, Code Civ.Proc. In Wilson v. California C. R. R. Co., 94 Cal. 166, 29 P. 861, 17 L.R.A. 685, it was said (page 864):

"As a general rule, the burden is on the defendant to prove new matter alleged as a defense (Osborn v. Hendrickson, 8 Cal. 31; Piercy v. Sabin, 10 Cal. 22 [70 Am. Dec. 692]; Kuhland v. Sedgwick, 17 Cal. 123, 124; Bryan v. Maume, 28 Cal. 238, 244; Mulford v. Estudillo, 32 Cal. 131, 136), even though it requires the proof of a negative. 'It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that, whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof be offered on either side, has on him, whether he be plaintiff or defendant the burden of proof, which he must satisfactorily sustain. If there is a case made out against a defendant, on which, if the plaintiff should close, a judgment would be entered against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated." See also, Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Bernesen v. Fish, 135 Cal.App. 588, 28 P.2d 67.

Section 122 of the California Vehicle Act and its amendments, and section 525 of the Vehicle Code, St.1935, p. 181, are illuminative. I will consider only those portions of the enactments applicable to the facts of this case. Section 122 of the California Vehicle Act (Stats.1923, p. 517) provided that a motor vehicle must be driven on the right half of a public highway "unless it is impracticable to travel on such side of the highway." This section was amended in 1929 (Stats.1929, p. 540) but the same provision concerning the impracticability of a vehicle traveling on its right hand side of the highway was retained. The section was again amended in 1931 (Stats.1931, p. 2124). Its pertinent provisions were as follows: "Upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive the same upon the right half of the highway, except when the right half is out of repair and for such reason impassable * * *." The Vehicle Code was adopted in 1935 (Stats.1935, Ch. 27, p. 93). Section 525 of that code supplanted section 122 of the California Vehicle Act. The code section as then adopted contained the following: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows: * * * (c) When the right half of a roadway is closed to traffic while under construction or repair." This code section was in effect at the time of the accident in the instant case.

From the foregoing enactments it is clear that a driver's right to pass onto his left hand side of a road has been progressively restricted. If the 1935 enactment be given its literal interpretation, a driver could not pass to his left of the center line, unless his right half of the road in front of him were "closed to traffic while under construction or repair," without being guilty of negligence per se and of being liable for consequent damages proximately caused by his violation of law. I do not believe that the legislature intended to impose any such drastic consequence on the language it used in the section. A reasonable exception to the rule of the section should be found to permit the operation of motor vehicles where the right half of a highway is closed or impassable but not by reason of "construction or repair." Such exception to a city ordinance was found by the Supreme Court in Umemoto v. McDonald, 6 Cal.2d 587, 58 P.2d 1274, where, in considering contributory negligence, it was said (page 1275):

> "This exception is recognized in Morris v. Purity Sausage Co., 2 Cal.App.2d 536, 38 P.2d 193 (also relied upon by appellant), which decision states that while the violation of a statute or ordinance as a general rule constitutes negligence, which will bar a recovery if such violation proximately contributes to the injury (19 Cal.Jur., pp. 632, 636), it may happen that prudence and safety of life or limb require the doing of an act which would otherwise be a violation of law, and liability therefor may be avoided by showing that under the circumstances of the particular case the violation was justifiable or excusable."

In construing legislative enactments courts must give effect, where possible, to the language used, and must carry out the intention of the legislature where it can reasonably be done. From the language of the various enactments from which I have quoted, it would seem clear that up to at least August 14, 1931, the legislature gave considerable latitude to motorists who, for various causes, desired to turn onto their left hand side of the highway. They were permitted to do so when continuing on their right hand side was "impracticable." Impracticability included numerous causes. By at least 1935, this privilege was greatly restricted. By the language of the statute it was confined to cases where the right half of the road was "closed to traffic while under construction or repair." This has been extended by judicial decision to include cases where the turn was necessary to save life or limb. Umemoto v. McDonald, supra.

It has long been the settled law in California that violation of the provisions of a statute constitutes negligence per se and that if such a violation proximately caused injury to one of the class which the statute was intended to protect a complete cause of action for negligence was made out when the violation of the statute and consequent injury and damage were proved. In Lahti v. McMenamin, 204 Cal. 415, 268 P. 644, it was said (page 645):

> "In view of the finding of the jury just referred to, and this admission, it is apparent that defendant was traveling from a westerly direction on the wrong side of the street at the time his machine collided with plaintiff. Under these facts there can be no question as to defendant's negligence."

In Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.2d 553, the Supreme Court was considering the contributory negligence of a pedestrian who crossed a street at a point prohibited by a local ordinance. It was there said (page 554):

> "If ordinance No. 7691 is a valid enactment, it follows that at the place where he was injured the plaintiff was there in violation of the terms of the ordinance and that he was guilty of contributory negligence as a matter of law."

It would seem unnecessary to cite further authority in support of these firmly established principles of law. However, in view of the restriction attempted to be placed on the application of these rules by my associates in arguing that where a violation of law is proved, that under some circumstances "the person involved is not negligent," and that his conduct may not be negligence at all, it would seem advisable to do so. The following cases selected from a vast number of similar import support the rules announced in the two cases already cited: Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922; Umemoto v. McDonald, supra; Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 54 P.2d 49; Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368; Coffey v. Slingerland, 9 Cal.App.2d 731, 50 P.2d 830.

From the foregoing authorities it would seem clear that violation of a statute is negligence as a matter of law; that proof of such violation establishes negligence in fact; that upon proof of such violation, negligence is established as a fact in the case. Whether or not such negligence was a proximate cause of an accident, was excused by another fact, or that liability from it was avoided by contributory negligence, cannot change the rule that violation of law is negligence and that proof of such violation establishes negligence in fact and as a fact. The statute establishes the standard of due care required and violation of the statute establishes the fact of failure to exercise due care which in itself is negligence.

Of course, after proof of such negligence per se on the part of a defendant, a plaintiff's recovery may be defeated by proof of his contributory negligence. (Hopkins v. Galland Mercantile Laundry Co., supra), or by some legal excuse for the negligence per se of defendant. Umemoto v. McDonald, supra. This is all that the language quoted by my associates from the case of Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061, means. In my opinion no other construction can be placed upon it, especially in view of the fact that the Cragg Case and the others cited by my associates on this question were decided long before the present drastic provisions of the Vehicle Code were enacted.

Under the rule announced by the Supreme Court in the case of Wilson v. California C. R. R. Co., supra, I must proceed to analyze the evidence to determine if that introduced by plaintiffs made out a case against defendant on which a judgment would have been entered, for if such a case were made out against him then defendant had placed on him the burden of proving a case by which plaintiff's case would have been defeated.

Plaintiffs were only required to prove negligence on the part of defendant, the proximate cause of the accident and consequent injuries, the extent of their damages, and heirship. This they did. Their evidence was clear, convincing and satisfactory on all the necessary elements except, perhaps, heirship. Negligence of the defendant was clearly and satisfactorily established when it was proved that defendant drove onto his left hand side of the highway when the right half in front of him was not "closed to traffic while under construction or repair." Sec. 525, Vehicle Code. The evidence of this negligence per se is clear and convincing and its truth is admitted by defendant. There was also the further proof of lack of due care on the part of defendant in failing to observe an object on the road in front of him when that object should have been made visible by his headlights when he was almost three hundred feet distant from it and when he could have stopped and avoided turning onto his left hand side of the highway. Sec. 670, Vehicle Code. The question of proximate cause was settled by the verdict of the jury. There is ample evidence to support this implied finding. Damages were also proved and their amount fixed by the jury. There is no complaint of the amount of the damages awarded.

Upon such proof plaintiffs could have rested their case and could have confidently expected a verdict and judgment in their favor. It is true that it was in the evidence of plaintiffs that the fact of a horse being on the highway was first developed. That did not change the evidentiary facts necessary to be established to support plaintiffs' case. It injected into the case, out of order, a fact essential to defendant's case. This merely involves a question of order of proof which is not important here.

In order to escape the effect of plaintiff's proof and escape a judgment against him, it was necessary for defendant to prove either that defendant's admitted negligence was not the proximate cause of the accident or that the deceased was guilty of contributory negligence, or some fact relieving him from the results of his admitted negligence.

Thus we see that upon the plaintiffs rested the burden of proving negligence, proximate cause and damages. This they did, and, had the case been then closed, judgment should have gone for them. Upon the defendant rested the burden of proving excuse for his admitted negligence under the settled rule that the party having the affirmative of an issue must prove it. This burden he attempted to meet by proving the separate affirmative defense of unavoidable accident which he had set up in his pleadings. Instead of simply denying negligence under this defense, defendant in his own testimony admitted that he had violated the provisions of section 525 of the Vehicle Code by driving on his left side of the highway when his half was not "closed to traffic while under construction or repair." Thus he admitted negligence per se. He sought to justify this maneuver and excuse his violation of law with evidence that it was necessary to save life or limb. It seems to me that under the evidence of this case this defense of unavoidable accident was just as much of an independent affirmative defense as that of contributory negligence which must be supported by a preponderance of the evidence.

On the question of what constitutes an affirmative defense, the case of Shropshire v. Pickwick Stages, 85 Cal.App. 216, 258 P. 1107 (hearing denied), is persuasive. It is there said (page 1109):

"Measuring the answer by these rules, it seems clear that the defendants, in addition to a special denial of any negligence on their part, have further alleged that the accident and resulting injuries to plaintiff were caused *solely and alone* by the carelessness and negligence of the operator of the Ford car, which brings into the case new matter not raised by the complaint, which constitutes an affirmative defense.

"The law in this state is well settled that the burden is on the defendants to prove new matter alleged as an affirmative defense. Sections 1869 and 1981, Code Civ. Proc.; Valente v. Sierra Ry. Co., 151 Cal. 534, 91 P. 481; Wilson v. California C. R. R. Co., 94 Cal. [166], 172, 29 P. 861, 17 L.R.A. 685; 10 Cal.Jur. 786, 787, and cases there cited.

"The instruction complained of reads as follows: 'The defendant states in its defense that the accident was due solely to the negligence and carelessness of the driver of the Ford car, the car of Grove, and the burden is upon the defendant to prove that. That is an affirmative issue, and the burden is upon the defendant to prove that defense by a preponderance of the evidence in the whole case. Unless you find from a preponderance of the evidence on the whole case that this defense is made out, or if you find that the evidence is equally balanced, you will find against the defendant on that issue.'

"The appellant contends that this instruction is erroneous, for the reason that it imposes the burden upon the defendants of proving by a preponderance of the evidence that the accident was due solely to the negligence of the driver of the Ford car, thereby in effect requiring the defendants to prove that it was in no way responsible for the accident, and wholly ignored the well-settled rules in this state that the burden of proof is always upon the plaintiff throughout the trial of the case to prove the negligence of the defendants, and that such negligence was the proximate cause of the injury. With this contention we cannot agree. This instruction refers solely to the affirmative defense raised by the defendants in their answer, as it concludes, 'unless you find from preponderance of the evidence on the whole case that this defense is made out, or if you find that the evidence is equally balanced, you will find against the defendant on that issue,' meaning obviously the issue raised by the affirmative defense in the answer that the operator of the Ford car was alone responsible for the accident, and had no reference to the negligence of the defendants. It is further evident that the instruction complained of related to the affirmative issue raised by the answer, by the fact that the court gave a number of instructions relative to the burden of proof and the preponderance of evidence as between the plaintiff and the defendants."

By an affirmance of the judgment in favor of the plaintiff the quoted instruction was approved.

In speaking of the defense of inevitable accident in State Compensation Ins. Fund v. Lamb, 96 Cal.App. 236, 273 P. 1080, the court said (page 1082):

"The defendants complain of an instruction given by the trial court, No. 46. That instruction was addressed to the question as to who should prove an inevitable accident. It is difficult, under the issues made by the pleadings, to see just what was the pertinency of the subject-matter. Be that as it may, the defendants introduced it in the opening statement made by their attorney, and thereafter followed up the subject and introduced proof thereon. There is nothing in the case showing that there was any duty on the part of the plaintiffs to introduce evidence in support of the existence of the theory of inevitable accident, and, if the subject-matter be asserted as an affirmative defense, then the burden was on the defendants to make the showing."

I cannot distinguish the instant case from the case of Parker v. Auschwitz, 7 Cal.App.2d 693, 47 P.2d 341. That was a case of damages for injuries following a collision of two motor vehicles. The proved negligence of Auschwitz was in having his truck on his left hand side of the road. The driver of the car in which plaintiffs were riding went to its left hand side of the road in an attempt to avoid the collision. The defendant attempted to excuse his negligence in violating the law by testifying that his truck skidded on ice and over onto its left hand side of the road without his fault. In commenting on this defense the court said (page 343):

> "The burden therefore rested upon appellant to excuse or justify his position upon the highway. This he attempted to do by showing the truck skidded, and while the mere skidding of an automobile is not necessarily negligence (Smith v. Hollander, 85 Cal.App. 535, 259 P. 958, 58 A.L.R. 268; Lambert v. Eastern Massachusetts etc. Co., 240 Mass. 495, 134 N.E. 340, 22 A.L.R. 1291), the burden of establishing justification is on appellant." (Defendant)

My associates attempt to distinguish the Parker Case from the instant case by saying that the Parker Case was tried by the court and that no instruction to a jury was involved. That does not seem to me to be adequate. A trial judge is required to instruct a jury on the law applicable to the facts of the case. Where there is no jury he is required to decide the case according to the same law. Because there was no jury and consequently no instructions does not change the law. If the burden of proving an excuse for being on the left hand side of the road rests on a defendant in a case tried by the court the same burden should rest upon him in a case where there is a jury.

I am not unmindful of the rule that the phrase, "burden of proof," is used in varying senses and in some cases without due regard to clear distinction in meaning. It sometimes means the burden of meeting a prima facie case made by the opposing party, and sometimes means the burden of producing a preponderance of the evidence on a material question in controversy. 10 Cal.Jur. 782. Where it is used in the sense of meeting a prima facie case of an adversary it does not require the production of a preponderance of the evidence. When it is used in the sense of establishing an independent affirmative defense which is more than a denial of the allegations of the other party a preponderance of the evidence is required. The real test is an answer to the question: Which side would be successful on the issue if no evidence were introduced in support of it? Scott v. Wood, 81 Cal. 398, 22 P. 871. The answer to this question, under the facts here, seems obvious, for without evidence excusing defendant from the consequences of his admitted negligence, judgment should, and undoubtedly would have gone against him. Therefore the burden of proving an excuse for his admitted negligence by a preponderance of the evidence rested upon him.

If the burden of proving the defense of contributory negligence by a preponderance of all of the evidence rests on a defendant, as it does (19 Cal.Jur. 697), and if the burden of proving by a preponderance of the evidence that an accident was caused by the negligence of a third party, rests on a defendant, as has been held (Shropshire v. Pickwick Stages, supra), then I am unable to see how the burden of proving an excuse for admitted negligence, by a preponderance of the evidence, should not also rest upon a defendant. He should have the burden of proving such a defense where, as here, it is much more than a denial of plaintiffs' allegations of defendant's negligence.

If it be true that my associates have correctly argued that defendant's driving onto his left hand side of the road was not negligence at all because of the necessity for that maneuver to save life ad limb, still it would not follow that the burden of justifying it by a preponderance of the evidence was not on defendant. It was no part of plaintiffs' case to prove unavoidable accident. State Compensation Ins. Fund v. Lamb, supra. Plaintiffs would have been successful on that issue if no evidence had been introduced to support that plea. As that issue was no part of plaintiffs' case (it was new matter injected into the case by defendant) and as defendant would have had judgment against him on that issue if it were not supported by evidence, it follows that the burden of proving such defense by a preponderance of the evidence lay upon him. Scott v. Wood, supra.

In my opinion the instruction on unavoidable accident given by the trial judge was not prejudicially erroneous under the allegations of the pleadings in this case and the evidence introduced in support of them.

If I correctly understand the portion of the main opinion dealing with the sufficiency of the proof of heirship, nothing is there decided, although it is strongly intimated that plaintiffs' proof of heirship was insufficient.

There is in the record an exemplified copy of the judgment roll in the case of Helen Jolley v. Joseph M. Jolley, decided by the District Court of the Fourth Judicial District of the State of Utah. The complaint in that action alleged "That there is no issue of said marriage" of Helen and Joseph M. Jolley. This allegation was found by the court to be true. It was also found that for more than a year prior to the filing of her complaint plaintiff "was, and now is, a bona fide resident of Utah County, Utah." The judgment annulled the marriage. On its face it is a valid, final judgment by a court of competent jurisdiction. In my opinion this record completes at least prima facie proof of heirship sufficient to support the judgment. Rabe v. Western Union Tel. Co., supra.

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28 Cal.App.2d 116

WORCESTER v. THEATRICAL ENTERPRISES CORPORATION.

Civ. 2039.

District Court of Appeal, Fourth District, California.

Aug. 11, 1938.

Hearing Denied by Supreme Court Oct. 10, 1938.

1. Theaters and shows 🔑6

Theater company operating picture show owed to patron a reasonable degree of care to see that she was not injured on the premises, but was not an insurer of patron's safety and could be held liable only where it knew, or should have known, of existing danger.

2. Theaters and shows 🔑6

In suit against theater company for injuries which plaintiff sustained by being kicked in the back by an intoxicated patron, while plaintiff was attending a picture show in company's theater, evidence was insufficient to warrant conclusion that company, in exercise of ordinary care, should have discovered intoxicated condition of patron.

3. Negligence 🔑134(1)

In suit based on negligence, there must be more evidence than mere surmise or conjecture, from which an inference of negligence can be drawn.

4. Theaters and shows 🔑6

The fact that patron goes to sleep in a theater does not, of itself, indicate intoxication, so as to impose duty on management to determine if sleeping patron is intoxicated and, if so, to expel him in order to be free from liability for injuries which that patron may, because of his intoxication, inflict on other patrons.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Suit by Daisy L. Worcester against Theatrical Enterprises Corporation, for injuries which plaintiff sustained by being kicked in the back by an intoxicated patron, while plaintiff was attending a picture show in defendant's theater. From a judgment notwithstanding the verdict, after verdict had been rendered in favor of plaintiff, the plaintiff appeals.

Judgment affirmed.

Robert B. Burch, of San Diego, for appellant.

Stearns, Luce, Forward & Swing and Fred Kunzel, all of San Diego, for respondent.

GORDON THOMPSON, Justice pro tem.

This is an appeal from a judgment notwithstanding the verdict, after verdict had been rendered in favor of plaintiff in a suit against the defendant theatre for injuries which plaintiff sustained by being kicked in the back by an intoxicated pa-

tron, while plaintiff was attending a motion picture show in defendant's theatre.

The facts are not in serious dispute. The plaintiff entered the theatre after purchasing a ticket, and was ushered to a seat. After being seated for some time, the usher was called and, because of annoyance by people in the rear eating popcorn, plaintiff was ushered to a seat directly in front of one Hahn. At that time, Hahn was slumped down in his seat, apparently asleep. After approximately one-half hour had elapsed, a large foot came down suddenly on top of plaintiff's shoulder, causing injury to her. After the occurrence, Hahn, whose foot had come down upon her shoulder, was found to be intoxicated. A trial was had before a jury and at the conclusion of the case, after a verdict for plaintiff in the sum of $1,000, defendant moved for a judgment notwithstanding the verdict, which motion was by the court granted.

Appellant contends: (1) That there was evidence from which the jury in rendering its verdict for the plaintiff could have found the defendant negligent; and (2) that the violation by the employees of defendant of defendant's operating rules was some evidence of negligence and a circumstance to be considered by the jury in determining whether the defendant was negligent.

As to the first contention of appellant, reliance is placed upon the testimony of the managing director of respondent as to the policy of the theatre with respect to intoxicated persons in the theatre. The managing director testified to a definite policy, in that the cashiers, door men and all ushers were instructed to observe as carefully as possible, the conduct and demeanor of people as they bought tickets, and where they suspected or had any reason to believe that the person attempting to buy a ticket might be intoxicated and might not conduct himself properly inside, the instructions are not to sell that person a ticket. That when the door man is not absolutely certain on the question of intoxication, he always finds the aisle in which the particular party is going and he tells the usher to keep an eye on the patron suspected. In any case of disturbance, the usher is instructed to eject such persons from the theatre. There is also a definite policy as to sleeping patrons, in that no person is permitted to sleep in the theatre, and, if found to be sleeping because of intoxication, he is asked to leave.

The same witness testified that occasionally a person had come into the theatre perfectly sober and during the performance, had taken a few drinks from a bottle in his pocket. Everything was done to discourage this. The policy was to discover the intoxicated person before he entered and to prevent his enry, and to eject him if he became objectionable. Upon entering a theatre, a person passes five employees, all charged to be on the alert for intoxicated persons. When a patron is taken to his seat, an usher walks down the aisle with him.

Appellant testified that an usher took her and her husband to a seat and later returned and asked them to sit in another seat in front of a man in a sailor's uniform, slumped down in his seat asleep, "when suddenly a large foot came down on my left shoulder, right in front of my face. It was quite a shock. I moved down, bent forward and moved, attempting to push the foot off and, as I leaned forward, I was kicked in the back with the other foot, three very hard blows."

The intoxicated person was removed by two police officers who testified that the sailor was "exceptionally drunk"; that each officer took hold of an arm and escorted him downstairs in that manner.

[1-3] There is no doubt that the respondent owed to the appellant a reasonable degree of care to see that she was not injured on the premises. However, the respondent was not an insurer of appellant's safety and could be held liable only where it knew, or should have known, of existing danger. There is no evidence of any actual knowledge on the part of respondent of the sailor's condition prior to the accident. Appellant relies upon the theory of constructive notice, in that the sailor was asleep prior to the accident and found to be intoxicated subsequent to the accident. Nothing in the record shows that any employee of the theatre saw the sailor asleep, although he was seen by appellant and her husband; nor is there any evidence to warrant the conclusion that in the exercise of ordinary care, respondent should have discovered the intoxicated condition of the sailor. There must be more evidence than mere surmise or conjecture, from which an inference of negligence can be drawn. Curry v. Williams, 109 Cal.App. 649, 293 P. 623.

Appellant contends that the case of Ratcliff v. San Diego Baseball Club, Cal.App., 81 P.2d 625, is decisive of the case at bar. In that case, however, this court said: "The respondent having purchased a ticket which entitled her to a seat in the protected section of this grandstand was proceeding thereto along the passageway which had been provided for that purpose by the appellant. While the appellant was required to exercise only ordinary care in protecting the respondent from such an injury as this while she was proceeding along the passageway thus provided, that duty was not performed if such on occurrence as this should have been reasonably anticipated by the appellant. Under the circumstances here appearing it cannot be said, as a matter of law, that such a happening as here occurred could or should not have been anticipated. There is ample evidence that bats rather frequently slip from the hands of batters and that such occurrences are not unusual, although they may not occur in every game."

In that case, there was evidence disclosing a condition sufficient to require the appellant baseball club to exercise ordinary care to protect their patrons from injury. This was not done and the baseball club had knowledge which required it to take precautions to further protect its patrons under the circumstances there existing.

In this present appeal there is no evidence of a similar occurrence of an intoxicated patron kicking another patron in the back, nor is there any evidence of any knowledge on the part of the respondent that a similiar occurrence had taken place.

[4] As a second ground of appeal, appellant contends that there was a violation of the operating rule made by respondent, "that the cashier, ticket taker and usher had strict instructions not to admit intoxicated persons, to eject persons found to be intoxicated, to not permit drinking in the theatre and to awaken sleeping patrons to ascertain whether they were intoxicated". It is urged that, while not negligence per se, yet it is sufficient evidence of negligence. There is no merit to this contention, as there is nothing in the record to show that there was a violation of this rule. Appellant did not call the usher's attention to the sleeping patron, nor is there any evidence that the usher knew of this sleeping patron, which would put him on notice to inquire whether said patron was asleep or intoxicated. The fact that one goes to sleep in a theatre does not, if itself, indicate intoxication.

The trial court did not err in granting the motion for judgment notwithstanding the verdict.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 188

ZAFERIS v. BRADLEY et al.

Civ. 11884.

District Court of Appeal, Second District, Division 2, California.

Aug. 20, 1938.

1. Damages 🔑171, 181

In personal injury action, jury could not consider financial circumstances of either party in arriving at a verdict.

2. Negligence 🔑63

An "unavoidable accident" is one which occurs while all parties are exercising ordinary care.

[Ed. Note.—For other definitions of "Unavoidable Accident," see Words & Phrases.]

3. Automobiles 🔑201(10)

Damages cannot be recovered for injuries sustained in automobile collision which was the result of an unavoidable accident.

4. Automobiles 🔑201(9)

In action for injuries sustained in automobile collision which was caused by plaintiff's foot slipping from brake and becoming stuck on the accelerator, instruction that whether defendant signaled for a turn or not was immaterial, since giving of signal had no relationship to happening of the accident, was proper. St.1935, p. 185, § 544.

5. Automobiles 🔑246(57)

In action for injuries sustained in automobile collision which was caused by plaintiff's foot slipping from brake and becoming stuck on the accelerator, court properly refused plaintiff's requested instructions concerning the giving of signals by a motorist when stopping or turning, since the giving of a signal had nothing to do with the happening of the accident. St.1935, p. 185, § 544.

6. **Appeal and error** ⇨933(4)

In action for injuries sustained in automobile collision, record did not show that judge in refusing a new trial did not weigh evidence to determine whether verdict was supported by substantial evidence.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Pete Zaferis against Jack Bradley and another to recover for injuries allegedly sustained in an automobile collision. Judgment for defendants, and plaintiff appeals.

Affirmed.

Dempster & Dempster and J. H. Creighton, all of Los Angeles, for appellant.

Hugh B. Rotchford, of Los Angeles, for respondents.

McCOMB, Justice.

This is a motion to affirm a judgment in favor of respondents after trial before a jury in an action to recover damages for personal injuries.

The motion is made in accordance with the provisions of rule V, section 3, Rules for the Supreme Court and District Courts of Appeal (213 Cal. xliii), which reads in part as follows:

"At any time after the filing of the opening brief of an appellant in a civil action, the respondent may, upon due notice, move for a dismissal of the appeal or an affirmance of the judgment or order on the ground that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. * * *"

Viewing the evidence most favorable to appellant, the material facts are:

June 19, 1936, respondent Bradley was driving an automobile owned by respondent Maryland Casualty Company in a westerly direction on Wilshire Boulevard approaching McCadden Place in the city of Los Angeles. Just prior to the time of the accident hereinafter described he was approximately 25 feet east of the latter street and appellant's automobile, also traveling west on Wilshire Boulevard, was about 25 feet to the rear of the car being operated by respondent Bradley. Respondent Bradley started to make a turn to the north onto McCadden Place, whereupon appellant jammed his foot on the brake of his car and turned sharply to the right. His foot slipped from the brake and caught between the accelerator and brake pedal. The two automobiles then collided, no damage being done to either car.

Appellant claims that as a result of the accident his knee was injured.

Appellant relies for reversal of the judgment on these propositions:

First: The trial judge committed prejudicial error in instructing the jury as follows:

(1) "You are instructed that in arriving at your verdict you are not to consider the financial circumstances of the plaintiff or defendant whether they may be rich or poor. This is a matter of no concern to you and should not be considered in your deliberation. The fact that Maryland Casualty Company, one of the defendants in this case, is an insurance company should in no way influence you in reaching your verdict. Your verdict in order that it may be a true verdict must be based solely upon the evidence in this case and upon the instructions of the Court and not on passion, prejudice, pity or sympathy."

(2) "You are instructed that an unavoidable accident is one that occurs while all parties are exercising ordinary care and if you shall find from the evidence that both plaintiff and defendant Jack Bradley were exercising ordinary care at the time of the accident, you shall find that the accident was unavoidable and render your verdict in favor of the defendants Jack Bradley and Maryland Casualty Company."

(3) "You are instructed that it is entirely immaterial in this case whether defendant Bradley signaled for a right-hand turn or not, as under the evidence in this case there would be no relationship between his signalling or failing to signal and the happening of the accident."

Second: The trial judge committed prejudicial error in refusing to instruct the jury as follows:

(1) "When Signal Required.

(a) No person shall turn a vehicle unless and until such movement can be made

with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein, in the event that other vehicles may be affected by such movement.

(b) Any signal of intention to turn right or left shall be given continuously during the last fifty feet traveled by the vehicle before turning.

(c) No person shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal."

(2) "If you find from the evidence that the defendant Bradley, before attempting to make a right turn at the scene of this accident, failed to indicate his intention so to do by any sign that he intended to make a right turn, then, if you find that he did not give the sign continuously for fifty feet before starting to make the turn, I instruct you that the defendant would be guilty of negligence, and if such negligence proximately caused the accident without negligence on the part of the plaintiff, then I instruct that the plaintiff is entitled to damage from the defendants for whatever damage he has received by reason of said accident."

Third: In denying appellant's motion for a new trial the trial judge did not use his independent judgment as to whether or not the verdict was supported by substantial evidence.

[1] The first and second propositions are untenable. The instruction set forth in paragraph (1) of appellant's first proposition was a correct and accurate statement of the principle of law therein contained. Green v. So. Pac. Co., 122 Cal. 563, 564, 55 P. 577; Mahoney v. San Francisco, etc., Ry. Co., 110 Cal. 471, 476, 42 P. 968, 43 P. 518; Ensign v. So. Pac. Co., 193 Cal. 311, 321, 223 P. 953; Story v. Green, 164 Cal. 768, 770, 130 P. 870, Ann. Cas.1914B, 961; Johnston v. Beadle, 6 Cal. App. 251, 253, 91 P. 1011.

[2, 3] The instruction set forth in paragraph (2) of appellant's first proposition was likewise a correct and accurate statement of the rule of law set forth therein. Sitkei v. Ralphs Grocery Co., Cal.App., 77 P.2d 311.

[4] The instruction set forth in paragraph (3) of appellant's first proposition was correct. From the uncontradicted testimony of appellant (plaintiff) the accident was caused by his foot slipping from the brake and becoming stuck on the accelerator of the car which he was driving. Therefore, it is evident that, whether or not defendant gave the signal as required by section 544 of the Vehicle Code, St. 1935, p. 185, it was entirely immaterial when applied to the facts of the instant case, since it was not a proximate cause of the accident.

[5] For the reason just set forth the trial judge properly refused the instructions set forth in appellant's second proposition.

[6] Appellant's final contention is entirely without merit. There is nothing in the record, including the trial judge's memorandum decision [1] on denying the motion for a new trial, to indicate that he did not perform his duty by weighing the evidence to determine whether the verdict of the jury was or was not supported by substantial evidence.

Our examination of the record discloses that the questions raised on this appeal are so unsubstantial as not to require further argument. Therefore, in conformity with the provisions of rule V, section 3, Rules for the Supreme Court and District Courts of Appeal supra (Combes v. Bond, 1 Cal.App.2d 743, 37 P.2d 195; Bradford v. Maullin, Cal.App., 76 P.2d 162) the motion to affirm the judgment is granted.

The judgment is affirmed.

I concur: CRAIL, P. J.

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[1] "Memo of Decision on Motion for a New Trial.

"I cannot think that the jury found that the plaintiff was not negligent, but am of the opinion that they found negligence on the part of both plaintiff and defendant, and I cannot say that the evidence does not support such findings. So far as the injuries were concerned, they might well have decided that the injuries were not the result of the accident, but that the injury to plaintiff's knee occurred when he stepped down from the car when he reached the cafe, at which time his knee locked. The cook who spoke to him there testified that plaintiff told him that he didn't know whether he hurt it when he got out of the car or at the accident.

"The motion for a new trial is denied.

"January 7, 1938.

"Harry R. Archbald,
"Judge."

28 Cal.App.2d 139

In re BATCHELDER'S ESTATE.

BATCHELDER v. MacKAY et al.

Civ. 2100.

District Court of Appeal, Fourth District, California.

Aug. 12, 1938.

Appeal and error 🔑627(2)

Where transcript was not filed because of failure to pay for preparation thereof, proceedings for procurement of transcript were terminated, and appellant did not appear in response to notice of motion to dismiss appeal, appeal would be dismissed.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding in the matter of the estate of William J. Batchelder, deceased, wherein Maude Batchelder contested probate of the will, opposed by Catharine MacKay, executrix of the estate of William J. Batchelder, deceased, and others. From an adverse judgment, the contestant appeals. On motion to dismiss the appeal.

Appeal dismissed.

J. A. Donnelly, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal on the ground that no transcript has been filed.

It appears from the certificate of the county clerk that judgment was entered on March 8, 1938; that notice of appeal was filed on March 17, 1938; that a request for a transcript was filed with the clerk on March 31, 1938, and communicated to the court reporter; that on June 28, 1938, the respondents filed notice of motion for an order terminating the proceedings for the procurement of a transcript; that after notice and hearing an order was made on July 11, 1938, terminating the proceedings for the procuring of a transcript; and that no proceeding for a bill of exceptions or a transcript is pending in the trial court.

It further appears, by affidavit, that a transcript was prepared at the request of the attorney for the appellant, with the agreement that it should be paid for when completed; that the transcript was completed in March, 1938, and the attorney for appellant was so notified and informed as to the amount due; that payment has not been made; and that the court reporter has refused to file the transcript until he is paid for its preparation.

No transcript has been filed here and no appearance has been made by the appellant in response to notice of this motion. The motion must, therefore, be granted. Olinger v. Pacific Greyhound Lines, 18 Cal.App.2d 104, 62 P.2d 1406; Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468.

The appeal is dismissed.

I concur: MARKS, J.

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28 Cal.App.2d 206

PEOPLE v. TUCKER.

Cr. 3126.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1938.

1. Criminal law 🔑1173(2)

In burglary and robbery prosecution, court's refusal to give statutory instruction that evidence of oral admissions of a party should be viewed with caution, under statute, was not prejudicial error where statute had been held unconstitutional. Code Civ.Proc. § 2061, subd. 4.

2. Criminal law 🔑1173(2)

In burglary and robbery prosecution, error, if any, in court's refusal to give statutory instruction that jury's power of adjudging effect of evidence, is not arbitrary, but is to be exercised with legal discretion, and in subordination to rules of evidence, and that jury is not bound to decide in conformity with declarations of any number of witnesses, which did not produce conviction in jury's minds, against a less number or against a presumption or other evidence satisfying jury's minds, was not prejudicial error, where instructions in all other respects were complete and fair and effectively removed likelihood that unwarranted verdict resulted from refusal of instruction. Code Civ.Proc. § 2061, subds. 1, 2

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Louis Tucker was convicted of burglary and robbery, and he appeals.

Judgment affirmed.

Allan L. Leonard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was charged in an information with the crimes of burglary and robbery, was found guilty of both offenses by a jury. The appeal herein is from the judgment and from the order denying defendant's motion for a new trial.

It appears from the evidence that a cafe in Los Angeles known as the "Hill Street Five and Ten" was entered in the early morning by an intruder who mounted the fire escape, forced a window screen and climbed through a kitchen window. The night porter, one Campbell, colored, was assaulted by the intruder, who beat Campbell on the head and shoulders with a club. A small safe was forced open and $1,188 in money and checks were stolen. Campbell at first concealed the fact that he knew and recognized his assailant, defendant herein. He later admitted that he recognized defendant Tucker, also colored whom he had known since boyhood. In that regard his explanation was as follows: "* * * I was scared that the police would not catch him right then and that he might try to do something to me, if I told the truth and they didn't catch him." Tucker had been in the employ of the "Hill Street Five and Ten" until about a week before the robbery.

At the trial the auditor for the cafe, one Harry Brock, testified in substance that he had had a conversation with the defendant at the preliminary examination, in which conversation the defendant "remarked that he was sorry that he did it", but that he (defendant) thought the firm could get some money out of the deal inasmuch as it was insured. Defendant denied the conversation.

[1, 2] The sufficiency of the evidence to support the verdict is not disputed. The sole question raised on appeal results from the failure of the court to give two requested instructions, the first of which, in substance, was to the effect that evidence of oral admissions of a party "ought to be viewed with caution, pursuant to subdivision 4 of section 2061, Code of Civil Procedure, and the second was the instruction authorized by the provisions of subdivisions 1 and 2 of the same section. Subdivision 4 of said section has been held to be unconstitutional. Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451. It does not necessarily follow that prejudicial error resulted from the failure to give the instruction called for by subdivisions 1 and 2 of the above-mentioned section. Assuming that such instruction properly could have been given, nevertheless the instructions in all other respects were complete and fair, and effectively remove the likelihood of an unwarranted verdict resulting from the failure to give the requested instruction. Unless it appears that the verdict might have been different in the absence of such error, the judgment must be affirmed. See People v. Britton, 6 Cal.2d 10, 56 P.2d 491.

For the foregoing reasons the judgment and order denying a new trial are, and each is, affirmed.

We concur: YORK, P. J.; WHITE, J.

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28 Cal.App.2d 136

RAYNUM v. WALLACE

Civ. 11502.

District Court of Appeal, Second District, Division 1, California.

Aug. 12, 1938.

Judgment 🔑944

Evidence warranted refusal to enforce foreign judgment on ground that foreign court was without jurisdiction to enter such judgment.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action on foreign judgment by O. W. Raynum against B. G. Wallace. From the judgment, the plaintiff appeals.

Affirmed.

W. Ward Johnson, of Long Beach, for appellant.

Doyle, Clark & Thomas and H. O. Wallace, all of Long Beach, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from a judgment in an action based upon a judgment obtained in a foreign state.

The defendant and respondent herein, B. G. Wallace, was the defendant, and made an appearance as such, in an action brought in the district court of the United States for the district of North Dakota, southwestern division, in which action judgment was for plaintiff and against defendant Wallace and two others named therein as codefendants.

The judgment was partially satisfied. Later, to wit, on November 2, 1931, plaintiff in said action filed a supplementary and ancillary bill in said court against the same defendants, to enforce the former order and decree, and prayed for judgment against defendants accordingly. One C. B. Craven, an attorney at law, filed an answer for all of the defendants including Wallace, and thereafter represented all of them during and throughout the progress of the proceedings. The plaintiff prevailed and judgment was entered July 29, 1935. Said judgment was thereafter assigned to O. W. Raynum, a resident of California, who filed the within action on May 13, 1936.

The answer of defendant B. G. Wallace in the within California action alleges that the district court in North Dakota was without jurisdiction to enter the judgment against said B. G. Wallace for the reason that no service of summons had been effected, and that the appearance in said action of C. B. Craven, attorney at law, for and on behalf of B. G. Wallace, was without authorization.

The trial court found, in substance, that defendant Wallace had never been personally served with summons or any other process arising out of or in connection with the action in North Dakota upon which the action filed in California was based, also, that said Wallace "never authorized any attorney-at-law, or any other person to enter his appearance, accept service or answer for him in the aforesaid proceeding, nor did said defendant ever authorize any other person to employ an attorney to enter his appearance, accept service or answer for him in the aforesaid proceeding", and, furthermore, that said district court had no jurisdiction of the person of defendant Wallace and was without jurisdiction to enter the purported personal judgment against him.

Plaintiff and appellant contends "that the trial court was in error and that the judgment in favor of the defendant should be reversed, and judgment entered in favor of the plaintiff". It is argued in support of such contention that an attorney is presumed in the absence of evidence to the contrary to have authority to appear for any person for whom he professes to act; that the burden of proof rests on the party denying the authority of the attorney to act, and that if the question is raised after judgment rendered then the fact must be established by "cogent and strong evidence".

Manifestly the defense in the present action was an indirect attack on the former judgment, and primarily presented a question of fact for determination by the trial court. In substance, the defense was predicated upon an alleged lack of jurisdiction of the court which rendered the former judgment upon which the suit herein is based. In connection with such defense there appeared as witnesses, either in person or by deposition, not only the defendant Wallace, but one of his codefendants in the former suit, as well as the attorney, Mr. C. B. Craven. Letters and telegrams of defendant Wallace were also in evidence. It is obvious from a review of the proceedings that the evidence is conflicting, but in no sense can it be said that there is that lack of evidence to support the judgment which would warrant a reversal thereof.

There being no errors in the record, the judgment appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

28 Cal.App.2d 193

PEOPLE v. GROSSMAN et al.

Cr. 2014.

District Court of Appeal, First District,
Division 2, California.

Aug. 22, 1938.

Rehearing Denied Sept. 6, 1938.

Hearing Denied by Supreme Court
Sept. 20, 1938.

1. **Conspiracy 🔑47**

Evidence *held* to sustain conviction for conspiracy to commit grand theft.

2. **Larceny 🔑66**

Evidence *held* to sustain conviction for attempt to commit grand theft.

3. **Insurance 🔑31**

Evidence *held* to sustain conviction for violation of statute making it unlawful to present, or cause to be presented, any false or fraudulent claim for payment of a loss under a contract of insurance. St.1935, p. 511, § 556(a).

4. **Insurance 🔑31**

Evidence *held* to sustain conviction for violation of statute making it unlawful to prepare, make, or subscribe any writing with intent to present or use it or allow it to be presented or used in support of any false or fraudulent claim for the payment of a loss under a contract of insurance. St.1935, p. 511, § 556(b).

5. **Conspiracy 🔑47**

Evidence *held* to sustain conviction of conspiracy to violate statute making it unlawful to present or cause to be presented any false or fraudulent claim for payment of a loss under a contract of insurance or to prepare, make, or subscribe any writing with intent to present or use the same or allow it to be presented or used in support of any such claim. St.1935, p. 511, § 556(a, b).

6. **Insurance 🔑31**

In prosecution based on statute making it unlawful to present or cause to be presented any false or fraudulent claim for payment of a loss under an insurance contract or to prepare, make, or subscribe any writing with intent to present or use the same or allow it to be presented or used in support of any such claim, the gravamen of the offense was the accused's intent to defraud, and hence the prosecution was not required to prove that there was a valid binding insurance contract under which the fraudulent claim was presented. St.1935, p. 511, § 556(a, b).

7. **Insurance 🔑31**

In prosecution based on statute making it unlawful to present or cause to be presented any false or fraudulent claim for payment of a loss under an insurance contract or to prepare, make, or subscribe any writing with intent to present or use the same or allow it to be presented or used in support of any such fraudulent claim, evidence of existence of a valid insurance contract under which the fraudulent claim for payment of loss was made, even if existence of such a contract was necessary, was sufficient to sustain conviction. St.1935, p. 511, § 556(a, b).

8. **Insurance 🔑31**

In prosecution under statute making it unlawful to present a false or fraudulent claim for payment of a loss under an insurance contract, a letter from the accused, who was an attorney, to the insured, informing the insured of the injury for which the fraudulent claim was presented, was evidence of a "claim" within the contemplation of the statute. St.1935, p. 511, § 556(a, b).

[Ed. Note.—For other definitions of "Claim," see Words & Phrases.]

9. **Constitutional law 🔑265**

The statute providing that two or more different offenses of the same class of crime may be charged in one information did not violate the Fourteenth Amendment to the United States Constitution. Pen.Code, § 954; U.S.C.A.Const. Amend. 14.

10. **Criminal law 🔑37**

An accused who was charged with presenting a false or fraudulent claim for payment of loss under an insurance contract was not "entrapped," even though the authorities knew of the accused's scheme and allowed the accused to proceed with the scheme before arresting him, where there was no persuasion or inducement offered to the accused to do what he did. St.1935, p. 511, § 556(a, b).

[Ed. Note.—For other definitions of "Entrap; Entrapment," see Words & Phrases.]

11. **False pretenses 🔑21**

In prosecution for attempting to obtain money by false pretenses, the prosecution was not required to prove that the victim relied upon the alleged false pretenses of the accused.

12. **Conspiracy 🔑47**

In prosecution for conspiracy to commit grand theft and conspiracy to violate statute making it unlawful to present a false or fraudulent claim for payment of a loss under an insurance contract, evidence of an agreement to conspire was sufficient to sustain conviction. St.1935, p. 511, § 556 (a, b).

13. Criminal law ⚿824(7)

The failure to instruct jury that testimony of an accomplice must be corroborated was not error, where the accused did not ask for an instruction on that subject.

14. Criminal law ⚿1173(2)

The failure to instruct jury that testimony of an accomplice must be corroborated was not prejudicial, where there was corroboration of such testimony introduced in evidence.

15. Criminal law ⚿730(8)

A remark of the district attorney, that there was no use quibbling and that accused witness must have signed an answer in a certain case on advice of her attorney who was an accused, when the defense objected to question asked the witness, as to whether she had signed the answer on her attorney's advice, which remark constituted slight misconduct on the part of the district attorney, did not require reversal, where the court admonished the district attorney and informed the jury not to consider the remark.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Emile Grossman, Louis Kameny, and Adrienne Udstone were indicted for conspiracy to commit grand theft, attempt to commit grand theft, violation of certain provisions of the Insurance Code, and conspiracy to violate provisions of the Insurance Code, defendants Grossman and Kameny were convicted, and defendant Grossman appeals.

Affirmed.

Frederick Dubovsky, of Oakland, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Earl Warren, Dist. Atty., and J. F. Coakley, Asst. Dist. Atty., both of Oakland, and Arthur H. Sherry, Deputy Dist. Atty., of Berkeley, for the People.

STURTEVANT, Justice.

Emile Grossman, an attorney licensed to practice in the state of California; Louis Kameny, a physician and surgeon likewise licensed to practice in this state, and Adrienne Udstone were indicted by the grand jury of Alameda county on July 30, 1937, for the following offenses, charged in six counts, in this order: 1. Conspiracy to commit grand theft. 2. Attempt to commit grand theft. 3. A violation of section 556, subdivision a, of the Insurance Code, St.1935, p. 511. 4. A violation of section 556, subdivision b, of the Insurance Code. 5. A violation of section 556, subdivision b, of the Insurance Code. 6. Conspiracy to violate section 556 of the Insurance Code.

All were tried. Grossman and Kameny were convicted as charged in the indictment; their codefendant, Adrienne Udstone, was acquitted. The defendants Kameny and Grossman made motions for a new trial, which motions were denied, and Grossman appealed from the judgment of conviction and the order denying his motion for a new trial. The appellant will hereinafter be referred to as the defendant.

[1-5] In preparing his brief the defendant has not clearly stated his points. He has stated many academic propositions, a discussion of which will in no manner tend to show whether any error was committed by the trial court. However, from every word we see he is earnestly contending the evidence does not show guilt. We think it does show guilt and therefore we will set forth a resume.

On April 13, 1937, Mrs. Adrienne Udstone went to the Central Beauty Shop, owned and operated by Mrs. Anna Boggs, at Seventeenth and Broadway, Oakland, California, and ordered a permanent wave. During the course of receiving the permanent wave Mrs. Udstone complained that one of the curlers was hot. Mrs. Boggs asked her if the curler should be removed, but Mrs. Udstone replied she thought that was unnecessary. Mrs. Boggs, however, placed some cotton under the curler and Mrs. Udstone then stated that she was comfortable. Mrs. Boggs examined the place where Mrs. Udstone had complained of the heat, but could find no injury whatsoever. The portion of her head complained of by Mrs. Udstone was at the hair line on her neck and about two inches behind the right ear. Before Mrs. Udstone left the shop, Mrs. Boggs rubbed some medicated cream in the vicinity of the spot. On April 23, defendant, Emile

Grossman, came to Mrs. Boggs' shop. He inquired for Mrs. Boggs and asked her if she carried insurance. She replied that she did not, and the defendant then stated: "Now, you have a bad case of a burn on your hands and I am an attorney, and wouldn't it be wiser for you to take out insurance and pay the premium of the insurance; it would be cheaper for you to do that than to have the publicity of a lawsuit on your hands." Defendant went on to say it would be cheaper for Mrs. Boggs if she carried insurance and stated that in that way Mrs. Boggs could avoid publicity. Mrs. Boggs replied: "Yes, it would be all right to take out insurance but the doctor's record would have to be the same." The defendant stated the date of the accident could be postponed and when Mrs. Boggs asked how that would be shown by the doctor's record, he replied she need not worry about that, that he would take care of it. Defendant at that time offered to find out for Mrs. Boggs who wrote insurance for beauty shops, and made a telephone call, in her presence, in which he asked who wrote insurance for beauty shops. After receiving the information he desired, he hung up and called another number on the phone and handed the receiver to her, telling her it was an agency for Lloyd's of London, and asked her to talk to the party. She talked to a Mr. Hoepner of Tallman and Hoepner, and he told her he would come in later and see her and would send her an application in the meantime for her to fill out. Mr. Grossman then left and on April 27 Mrs. Boggs received an insurance application for beauty parlor liability insurance in Lloyd's of London. From April 23 to the 27th the defendant phoned Mrs. Boggs every day, some times two or three times in the same day, asking her about the application, whether or not she had received it, and generally urging her to proceed to obtain insurance. Mrs. Boggs, during one of these conversations, asked defendant for Mrs. Udstone's address, which he refused to give her but did refer her to his codefendant, Dr. Kameny. Mrs. Boggs, in the meantime, spoke to Edward F. Hansen, who is an insurance broker, and asked him what to do about the matter. After speaking to him she went with him to the office of Kennedy and Salisbury, attorneys practicing in Oakland, because she wanted advice. She talked to Mr. Salisbury and he suggested that she report the matter to the office of the district attorney. Therefore, on May 6 she went to the district attorney's office and informed Assistant District Attorney J. F. Coakley of what had occurred up to that time. At his suggestion she called on James Tallman, a member of the firm of Tallman and Hoepner, insurance brokers. Mr. Hoepner, with whom Mrs. Boggs talked at the defendant's suggestion when he first saw her, is a member of that firm. Through that firm she applied to Newhouse and Sayre, Inc., agents for Lloyd's of London, for a liability insurance policy on the beauty parlor. At that time it was her intention to obtain an insurance policy. From May 6 to May 17 Mrs. Boggs was out of town on a trip, leaving her shop in charge of a Mrs. McLay. Before leaving, however, she talked with the defendant on the telephone and told him she had applied for the policy and that it would be in her shop. On May 10 or 11, the defendant went to Mrs. Boggs' shop and obtained the insurance policy which had been issued by Lloyd's of London to Mrs. Boggs. Defendant called upon Mrs. Boggs again on May 19, and inquired about the policy and particularly wanted to know whether or not she had paid for it. At the same time he asked her to come to his office on the next day. In response to his invitation, Mrs. Boggs went to his office and he told her not to worry about the insurance company if it did not come through. He told her not to worry about the doctor's record, that he had taken care of that. He suggested at that time that she should have Mrs. Udstone return again to the beauty shop and have some sort of treatment so that a new date could be established as the date of the injury. The next day he phoned Mrs. Boggs and told her Mrs. Udstone was in his office and asked if she could come to the beauty shop for treatment on that day. An appointment was made and Mrs. Udstone went to the shop and received a treatment, during the course of which no heat of any kind was applied. On May 26, Mrs. Boggs received a letter from the defendant in which he said: "On May 21, 1937, Mrs. Udstone after receiving a permanent wave in your establishment suffered a severe burn on her neck." Tallman and Hoepner had issued a receipt acknowledging payment of the premium on the policy to Mrs. Boggs and she had told the defendant if he wanted to see the receipt he could come to her shop and see it. It is true that Mrs. Boggs had not made any actual payment at the time the receipt was issued, but it was not until the 18th or 19th of May that she knew she was not expected to make any payment on the policy. After receiving said letter from the defendant, Mrs. Boggs phoned to him from the district attorney's office on May 27. A stenographer attached to the district attorney's office listened in and later made a transcript of the conversation and it appears in full in the transcript on appeal. In this conversation the defendant told Mrs. Boggs to give his letter to the insurance company. On the same day defendant saw Mrs. Boggs at her shop about noon time; he appeared very excited and asked Mrs. Boggs to be sure to remember the day of May 21. The defendant phoned to her several times thereafter to inquire whether or not she had heard from the insurance company. On June 14, he again spoke to her and urged and reminded her not to forget that the claim was based on the date of May 21. The policy itself had been issued on May 7, and was delivered to her on May 8. Mr. Tallman testified that he wrote to the defendant on June 10 to the effect that the letter which defendant had sent to Mrs. Boggs on May 26 had been delivered to Newhouse and Sayre, the agents for Lloyd's of London. Mr. Tallman testified that he is an insurance broker. The contract of insurance was a contract issued by Newhouse and Sayre, Incorporated, as general agents for Lloyd's of London. Tallman and Hoepner, in turn, represented Newhouse and Sayre. The policy was issued at their request. It was a valid binding contract. The contract was subsequently canceled on July 27. Mr. Toso, vice-president of Newhouse and Sayre, testified that pursuant to his request the risk was covered and that the insurer was liable for any claims arising after April 27, the opening date of the contract, even before any written memorandum or agreement had reached his office. In this respect Mr. Toso testified: "We had a telephone conversation with Mr. Tallman on April 27, where he asked me to bind this risk. I told him subject to a satisfactory application, which he promised to obtain for me as soon as possible." He further testified: "Well, we agreed to cover the risk on April 27; if there had been any claim presented from that date on, we would be responsible, even though our written contract has not been issued. It is our office rule not to put our contract out in form until we had the necessary details, which in this case would be the completed application, in the meantime, giving our word this coverage was in effect." Mr. Toso also testified that his firm was authorized to handle adjustments under contracts placed with Lloyd's on behalf of the insurers. The contract of agency between Lloyd's of London and Newhouse and Sayre was introduced in evidence and the contract issued to Boggs was delivered pursuant to this contract. No payment was due under the contract at the time it was issued. He also testified that defendant made a claim against this insurance policy on behalf of Mrs. Boggs against Newhouse and Sayre and Lloyd's of London in a letter directed to them by defendant. After that claim was presented, Newhouse and Sayre authorized a firm of investigators, E. H. Bockius & Company, of San Francisco, to make an investigation. This investigation was conducted by H. G. Austin, an investigator and adjuster employed by the Bockius Company, on June 12. On June 16, Austin called on defendant at his office and talked with him about the claim. At that time the defendant stated the alleged burn had been suffered by Mrs. Udstone on May 21, and offered to accept a settlement of the claim for $500. He took Mr. Austin to the office of his codefendant, Dr. Kameny, who told Mr. Austin that he first saw Mrs. Udstone on May 22, and gave a medical description of the burn to the investigator. In truth he had first seen her in April. June 17th, Mr. Austin visited Mrs. Udstone at her place of employment. He asked her if she knew what date the accident happened. She said she did not recall but whatever date her attorney stated was correct. The defendant had stated the date was May 21, 1937. On June 28, Mr. Austin received a telephone call from defendant inquiring concerning the progress made in settling the claim and he promised to send Austin a copy of the medical report prepared by Dr. Kameny. Mr. Austin identified a copy of the report which was subsequently received in the mail from the defendant and it was introduced in evidence. On July 6, in another telephone conversation, Mr. Austin asked for the original medical report and defendant told him he would get it for him. There were a number of other conversations in which the defendant and Mr. Austin discussed various amounts ranging from $200 to $500 as a basis for settlement. In one of these conversations on

July 16, Austin again asked for the original report and discussed the matter of settlement further, and on the next day, July 17, Mr. Austin received that report. Finally, in a conversation on July 23, defendant stated that it was satisfactory to him and to Mrs. Udstone to accept the sum of $350 in full settlement of her claim. Mr. Austin then made an appointment with defendant to meet him at his office on July 24 and pay him the $350. On that day Mr. Austin was late for the appointment but waited around defendant's office in an unsuccessful attempt to see him. It had been agreed that defendant would, at that time, have Mrs. Udstone in his office to sign the necessary papers in connection with the settlement. By prearrangement with the district attorney's office and police department, defendant, Dr. Kameny, and Mrs. Udstone were to be arrested immediately after delivery of the check and the signing of a release and several officers had been stationed in defendant's building for that purpose. The defendant, however, left the building with the result that when Mrs. Udstone arrived he was not there. After waiting for about an hour, during which time Mr. Austin and Mrs. Udstone were conversing, Austin suggested that Mrs. Udstone accept the draft which he had and sign the release in defendant's absence. This Mrs. Udstone did. Both the draft and the release specified May 21st as the date of the alleged burn and this was called to her attention by Mr. Austin. She signed the release, received the check, and was arrested. Later that same day officers from the district attorney's office and the police department, armed with a warrant for the defendant's arrest, found him hiding behind the shower curtain in the bathroom of his home fully dressed. At the time that Mr. Austin had been negotiating with defendant, the latter had a file on his desk upon which the name of Mrs. Udstone appeared, but after his arrest the defendant stated he had no file whatever in connection with the case. Dr. Kameny was also arrested and his records, which were taken upon a search warrant, showed he had changed the date on his medical history card from April to May. Following his arrest the defendant was taken to his office. Outside of the building he met a deputy district attorney and before any words were addressed to him whatever, he stated there was no file in the case (indicating that he had become frightened and had destroyed the file which Mr. Austin had seen). A search of the office failed to reveal the file. After his arrest, defendant made no explanation of his hiding in his bathroom and refused to explain the absence of the file mentioned above. A desk diary which was discovered in defendant's office showed that as early as April 23, 1937, he spoke to Mrs. Udstone about her alleged claim against Mrs. Boggs. Further entries showed a number of calls from Mrs. Udstone prior to May 21st. The diary further showed the visit on the part of Mrs. Boggs on May 20th corroborating her testimony in this regard; a visit of Mrs. Udstone on the same day and a visit by Mrs. Udstone again on May 21st, the date she was sent to Mrs. Boggs' shop for a treatment upon which the false claim could be predicated. At the trial it was proved by the testimony of an expert and admitted by Dr. Kameny that the medical report on Mrs. Udstone had first been dated "4/27/37", and at some later time the figure "5" was superimposed over the "4". Defendant took the stand and testified in his own behalf. He stated that for a period of two years in his practice he had specialized in insurance law. He admitted that he first saw Mrs. Udstone on April 23, and on that date she stated the injury had occurred some time before. He stated that Mrs. Udstone authorized him and retained him to obtain a recovery. He admitted that he went to see Mrs. Boggs and asked her whether or not she had insurance, and admitted making two phone calls at that time concerning which she had testified. He admitted also taking the insurance policy from her shop to his office. He further admitted various transactions that he had with Mr. Austin and stated further that he told Dr. Kameny to change the date on his medical report, but stated he had done this merely as a favor to Mrs. Boggs. He admitted that when he was taken up to his building, following his arrest, he had lied to the deputy district attorney he met outside when he stated he had no file on the case. He admitted writing the letter of May 26, wherein he stated that it occurred on May 21st, but attempted to excuse his conduct by stating he did so as a favor of Mrs. Boggs; that this was not a false statement, it was simply a "mistake". He admitted he made this false statement knowingly but that he did not intend to do any harm to anyone. He admitted that he had told Mrs. Boggs he would induce Dr. Kameny to change the date on his medical report. He stated that Mrs. Boggs had told him that she had some difficulty in getting a certificate of insurance issued and stated she told him she had insurance at a former location; that she had some difficulty in getting the insurance transferred to cover the Central Beauty Shop and that for some reason, not clearly explained, she desired the date fixed as of May 21st because of this alleged trouble over her insurance. He testified that he was sure Mrs. Boggs had an insurance policy which was in effect prior to the effective date of the policy under which he made this claim. He said he thought this latter policy was merely a continuation of the old one. He stated he knew the date of the Udstone claim was to be changed but he did not think it was important to see the old policy. He stated that Mrs. Boggs requested him to send the letter of May 26th in spite of the fact that in the course of the phone conversation between himself and Mrs. Boggs when she phoned from the district attorney's office, the phone conversation that was reported in full and read into evidence, he requested and directed her to send this letter to her insurance company. Dr. Kameny testified he first saw Mrs. Udstone on April 22. He testified she came to him as a member of an insurance association and that under the rules of the association if she recovered damages as a result of her injury, he would be entitled to a doctor's fee. This was apparently stated by Dr. Kameny in order to explain his submission of a bill for $50 to Mr. Austin. He frankly admitted changing and falsifying the medical report and stated he did not think that was wrong. He made the following damaging admission under cross-examination:

> "Q. This is exactly what you did here, you made a false statement here for the purpose of enabling your friend, Mr. Grossman, to collect money from an insurance company, didn't you? A. I did not know there was anything wrong in it.
>
> "Q. You did that though, did you? A. I did it because he said, he told me it was all right to do it."

In rebuttal Mr. Harry C. Smith, who was an officer of the company in which Mrs. Udstone was insured, testified that Dr. Kameny was never authorized to make any charge to anyone for medical services rendered a member of the association. In rebuttal Mrs. Boggs testified that she never at any time told defendant she was insured and denied that she ever asked or requested defendant to falsify the date of the alleged accident. She further denied she ever had any difficulty in transferring her insurance policy from the former location to the Central Beauty Shop and stated not only did that never occur, but she had never stated anything to that effect to defendant. On the contrary she testified positively she told defendant she had no insurance whatever.

[6] The defendant seems to contend the prosecution was bound to show that the contract of insurance alleged in counts three, four, five, and six, imposed liability upon the insurer. The first answer is the prosecution made that showing. The second answer is that the gravamen of the offense alleged was the defendant's intent to defraud. That intent did not depend solely on the legal obligation, if any, arising out of said contract. People v. Morley, 8 Cal.App. 372, 97 P. 84, and cases there cited.

[7] In connection with the point just stated the defendant contends there was no evidence that a valid contract of insurance existed after April 27, 1937. We think he is in error. No frailty is shown by him. The policy put in the hands of Mrs. Boggs was regular in form. Defendant shows nothing to the contrary. The underwriters through their duly appointed representative, Mr. Toso, testified it was a valid subsisting contract.

[8] Again, defendant contends, there was no evidence that a claim was made within the provisions of sections 556(a) and 556(b) of the Insurance Code. But the defendant's letter was not disputed in any respect, and it was clearly evidence of a claim. The defendant argues that it did not constitute proof of loss. It was not necessary it should. A written claim and proof of loss are seldom embodied in one and the same document. As Mrs. Udstone claimed to have been injured by Mrs. Boggs, the letter was addressed to the latter. As Mrs. Boggs was supposed to collect from her insurance carrier, the letter was by her forwarded to the insurance company and thus served as a notice of claim first against Mrs. Boggs and secondly against the said company. As to the contents of the letter we fail to see in what respect it did not fully comply with

the calls of both sections 556(a) and 556(b) of the Insurance Code.

[9] The several counts hereinabove mentioned were all pleaded in one indictment pursuant to the provisions of section 954 of the Penal Code. The defendant claims said statute is unconstitutional. He claims it is violative of the Fourteenth Amendment to the Constitution of the United States, U.S.C.A. Const. Amend. 14. He cites no authority supporting that claim. People v. Kelly, 203 Cal. 128, 263 P. 226, and In re Culver, 84 Cal.App. 295, 257 P. 876, each hold that section 954 is not invalid. The latter case holds it is not vulnerable to the attack the defendant makes.

[10] The defendant claims he was entrapped. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249. A comparison of the facts in the instant case with the facts in the case just cited, shows the rule in the cited case may not be applied in the instant case. There is an absence of evidence that any persuasion or inducement was offered to defendant to do what he did. Therefore there was no entrapment. People v. Makovsky, 3 Cal.2d 366, 370, 44 P.2d 536.

[11] The defendant also contends it was necessary for the prosecution to prove, under the counts pleading attempts to obtain money by false pretenses, that the victim relied upon the alleged false pretenses. But the law is well settled to the contrary. Com. v. Johnson, 312 Pa. 140, 167 A. 344, 89 A.L.R. 333, 335, and extended note commencing on page 342; People v. Arberry, 13 Cal.App. 749, 114 P. 411; In re Harper, 17 Cal.App.2d 446, 62 P.2d 390.

[12] When the prosecution closed its case the defendant made a motion that the jury be directed to bring in a verdict for the defendants. The motion was denied and the defendant assigns that ruling as prejudicial error. He concedes that technically the motion was not properly worded, and that the motion should have been to advise the jury. Pen.Code, § 1118. Be that as it may, the motion was properly denied because the record shows the prosecution had produced an abundance of evidence and it could not be said that, if the cause had then been submitted, the evidence was "insufficient to warrant a conviction". The defendant specially presses the point as to the counts pleading a conspiracy. He claims there was no evidence of "an agreement", etc. If he means direct evidence he is correct. But there was plenty of indirect evidence of facts occurring during the life of the conspiracy which warranted the court in holding, in effect, that there was not a failure of proof as to "an agreement". People v. George, 74 Cal.App. 440, 241 P. 97.

The defendant complains because the trial court did not give a certain instruction. The vice in the complaint is that it is not supported by the record. The facts were as follows: After the jury had retired to deliberate it returned into court. Certain proceedings (the re-reading of instructions, etc.) were had. Then:

"The Court: Anything further, ladies and gentlemen?

"The foreman: Could we ask if during the life of that policy a claim could have been paid under that policy or that contract of insurance?

"The Court: Is it stipulated, gentlemen, that during the life of the policy a claim could be made for insurance money?

"Mr. Sullivan: No.

"Mr. Pierce: Positively not. That is the very issue in this case.

"Mr. Coakley: No use arguing the case now. I certainly want to be heard on that.

"Mr. Sullivan: We are not arguing. The Court asked for a stipulation and we say we cannot. That is one of the points at issue.

"The Court: Very well. You may retire for further deliberation."

In the foregoing colloquy we find no request for an instruction, and in particular, no such request by the defendants.

[13, 14] The contention is also made that the trial court failed to instruct the jury that the testimony of an accomplice must be corroborated. It is a sufficient answer to state that the defendants did not ask for an instruction on that subject. However, there was corroboration in the evidence introduced and the omission of an instruction worked no injury to the defendant.

[15] Finally the defendant contends the district attorney was guilty of misconduct. The contention is based on these facts. Mrs. Udstone sued Mrs. Boggs. The latter appeared and answered. In the instant case Mrs. Boggs was called as a witness by the prosecution. On cross-

examination the original file in Udstone v. Boggs was produced and offered in evidence. On redirect examination her answer in said suit was shown her and the proceedings were as follows:

"The Court: * * * You signed the Answer did you, you read and signed the Answer. It was read by you and you signed it, did you? A. Yes.

"Mr. Coakley: All right. Now, then, you did so under his advice and direction, is that correct?

"Mr. Pierce: Object to that, your Honor, calling for her opinion and conclusion, and hearsay.

"Mr. Sullivan: Also selfserving.

"Mr. Coakley: It stands to reason she did so; what's the use of quibbling?

"Mr. Pierce: Assign the remark of the district attorney as misconduct and ask the jury be directed not to consider it.

"The Court: Your remark is improper, Mr. Coakley, and may be stricken out and the jury directed not to consider it."

The record thus shows the slight error of the deputy district attorney was completely cured by the clear and decisive admonition of the trial court.

The judgment and order are affirmed.

I concur: NOURSE, P. J.

12 Cal.2d 20

In re SMEAD'S ESTATE.

LOUIS v. BIRD et al. (two cases).

L. A. 16599, 16600.

Supreme Court of California.

Aug. 22, 1938.

1. **Trusts** ⚷298

Trial court in hearing and settling accounts of testamentary trustee was engaged in the exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. Probate Code, § 1120.

2. **New trial** ⚷2

New trial proceedings are inapplicable to a decree or order of the probate court settling a testamentary trustee's final account. Probate Code, § 1240; Code Civ. Proc. § 657.

3. **Trusts** ⚷329

Where testamentary trustee filed notice of intent to move for new trial or for order vacating and modifying decree settling final account and contestants more than 60 days after decree settling trustee's final account was rendered filed notice of appeal, new trial proceedings being inapplicable to order settling the final account, notice of appeal came too late and appeal would be dismissed. Probate Code, § 1231; Code Civ.Proc. § 657.

4. **Judgment** ⚷485

If fatal defect is apparent from an inspection of the judgment roll, it may be urged upon either direct or collateral attack.

5. **Judgment** ⚷297

After entry of original decree settling testamentary trustee's final account, trial court was without power or jurisdiction, on trustee's new trial proceedings, to modify the original decree.

6. **Appeal and error** ⚷112

A void judgment or decree is appealable.

7. **Courts** ⚷202(5)

Under statute enumerating the appealable probate orders, an order denying a motion to strike notice of intent to move for new trial was not appealable. Probate Code, § 1240; Code Civ.Proc. § 657.

8. **Trusts** ⚷329

Where, after entry of original decree settling testamentary trustee's final account, trial court entered modified decree on trustee's new trial proceedings, order of trial court refusing to strike notice of intent to move for new trial should have been attacked by an appeal from purported modified decree which was appealable, notwithstanding that it was void and beyond the jurisdiction of the court. Probate Code, § 1120; Code Civ.Proc. §§ 657, 662.

9. **Trusts** ⚷194

Under statute enumerating the appealable probate orders, an order directing or authorizing the sale or conveyance or confirming the sale of property in hands of trustee is appealable. Probate Code, § 1240.

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Elnora Carrie Smead, deceased, in which Irvin C. Louis, as trustee, filed his final account, opposed by Phillip Smead Bird and another, contestants, and proceeding in the matter of the estate of A. Amelia Smead, deceased, in which Irvin C. Louis, as trustee, filed final account, opposed by Phillip Smead Bird and another, contestants. From a consolidated decree settling both accounts, contestants appeal and trustee moves to dismiss appeals on ground that they were prematurely taken during pendency of trustee's new trial proceedings and that consolidated decree was not appealable.

Decree in accordance with opinion.

Joseph D. Taylor, of Los Angeles (formerly of Holbrook, Taylor, Tarr & Reed, of Los Angeles), for appellants.

Harold B. Pool, of Los Angeles, for respondent.

WASTE, Chief Justice.

Motions have been made to dismiss the several appeals in each of the above-entitled proceedings. The facts underlying the litigation are involved and we shall recite only such as are necessary to a consideration of the motions now before us. It appears that in the course of the administration of the estate of each of the above-named decedents, the probate court, pursuant to the terms of a testamentary trust provided for in the will of each decedent, appointed the respondent, who was also executor, trustee of each of said trusts. Subsequently, the life beneficiaries died and the corpus of the trusts vested in the remaindermen, who were the same in each instance, subject to final accounting of the trustee. In due course, the trustee presented his first and final account with petition for distribution of each trust and for trustee's and attorney's fees. The remaindermen advanced certain objections to the accounts as submitted and the court, after hearing, entered a consolidated decree on December 16, 1936, settling both accounts, allowing certain compensation to the trustee and to his attorney, and directing distribution of the net corpus of each trust to the remaindermen. The decree likewise specifically determined that the remaindermen should have judgment against the trustee for several thousand dollars for losses suffered by the trusts and found to be chargeable to the trustee. On February 5, 1937, the trustee filed a notice of intent to move for new trial or for an order vacating and modifying the consolidated decree. The motion was based on five of the seven grounds specified in section 657 of the Code of Civil Procedure as grounds for new trial. Pending disposition of this motion, the remaindermen on March 16, 1937, filed in each proceeding their notice of appeal to this court from the consolidated decree settling the trustee's final accounts.

The trustee now moves this court to dismiss the appeals from the consolidated decree settling his final accounts on the grounds that they were prematurely taken during the pendency of new trial proceedings, and upon the further ground that the consolidated decree is not the final decree in the proceedings and is therefore not appealable. We are of the view that said appeals must be dismissed, but not for the reasons advanced by the movant. The latter ground of the motion is patently without merit for section 1240 of the Probate Code expressly declares that an appeal may be taken from an order settling an account of a trustee. Nor can we find merit in the contention advanced as the first ground of the motion to dismiss, that the appeals were prematurely taken because of the pendency of new trial proceedings. On the contrary, we are of the view that the appeals from the consolidated decree settling the accounts of the trustee were not taken within time and must be dismissed for that reason. This result follows because of our conclusion that new trial proceedings are inapplicable to a decree or order of the probate court settling a testamentary trustee's final account and that the purported new trial proceedings herein did not, therefore, as is customarily the case, serve to extend the time for appeal and the notices of appeal from the consolidated decree settling the trustee's final accounts having been filed on March 16, 1937, more than sixty days after the entry of such consolidated decree on December 16, 1936, were tardily filed and are abortive for all purposes.

It is significant to note that the respondent remaindermen, in their opposition to the motions to dismiss, are in accord with our determination that new trial proceedings are inapplicable to the situation here presented. Their concession in this respect is addressed to another phase of the litigation, viz., that the inapplicability of such new trial proceedings deprived the court below of jurisdiction to vacate the original consolidated decree and amend the same as it subsequently purported to do apparently under the authority of section 662 of the Code of Civil Procedure, a matter to which we shall more particularly address ourselves at a later point in this opinion. However, in so arguing and conceding the inapplicability of new trial proceedings, the respondent remaindermen have failed to appreciate that they thereby expose the fatal defect in their appeals from the consolidated decree settling the trustee's accounts.

[1] We do not base our conclusion as to the inapplicability of new trial proceedings herein upon the concession of respondents to that effect but rather are we of the view that the statutes and decided cases suggest, if not dictate, such conclusion. Preliminarily, it should be stated that the court below in hearing and settling the accounts of the testamentary trustee herein was engaged in the exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. Sec. 1120, Probate Code; In re Estate of McLellan, 8 Cal.2d 49, 55, 56, 63 P.2d 1120; Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 753–758, 37 P.2d 69; Thomas v. Superior Court, 17 Cal.App.2d 40, 41, 61 P.2d 496; In re Estate of Smith, 4 Cal.App.2d 548, 552, 41 P.2d 565. In the last cited case wherein this court denied a hearing, it is declared that (page 567) "We believe the language employed in the present section [1120] of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust. This view is strengthened by a con-

sideration of section 1240, of the Probate Code, which provides for an appeal from an order settling an account of a trustee, from an order instructing a trustee, from an order 'determining heirship or the persons to whom distribution should be made or trust property should pass,' and from an order refusing to make any of said orders."

It is obvious, therefore, that the court below in settling the accounts of the testamentary trustee was acting in the exercise of its probate jurisdiction. This being so, we must now ascertain whether new trial proceedings are applicable to the issues determined upon such settlement. Section 1231 of the Probate Code provides that "A motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried."

[2, 3] In Re Estate of England, 214 Cal. 298, 300, 301, 5 P.2d 428, this court held that new trial proceedings were inapplicable to an order settling the final account of an administrator and directing distribution. We perceive of no material, or any, distinction between the exercise of such jurisdiction by the probate court and the exercise of its jurisdiction, above shown to exist, in settling the final account of a testamentary trustee and directing distribution. New trial proceedings, in our opinion, are inapplicable to its action in either situation. Consequently, and as we have already pointed out, the notices of appeal from the consolidated order or decree settling the accounts of the respondent trustee and directing distribution, having been filed more than sixty days after entry of such decree, were not within time and said appeals must be dismissed.

[4] If, as urged by the respective parties, certain provisions of the decree, which has since become final, are void and beyond the jurisdiction of the court below, a point we do not decide, it is sufficient to say that if the fatal defect is apparent from an inspection of the judgment roll it may be urged upon either direct or collateral attack and the asserted void portions may be lopped off as dead branches upon the judicial tree. People v. Davis, 143 Cal. 673, 675, 676, 77 P. 651; People v. Greene, 74 Cal. 400, 405, 16 P. 197, 199, 5 Am.St.Rep. 448.

[5, 6] We turn our attention now to two other appeals herein which the respondent trustee seeks to have dismissed. Following the filing of the notices of appeal by the remaindermen from the consolidated decree settling the trustee's accounts, which appeals we have just disposed of, the court below on March 26, 1937, entered a modified consolidated decree, in response to the trustee's motion mentioned above, in which it was recited, in substance, that the motion was denied in so far as it requested a new trial of the issues but granted as to a modification of the consolidated decree settling the accounts. A modified consolidated decree was accordingly entered, in one proceeding on March 26, 1937, and in the other proceeding on March 27, 1937. As indicated earlier in this opinion, the motion of the respondent trustee in the court below was based on five of the grounds specified in section 657 of the Code of Civil Procedure as grounds for new trial. The order and decree granting a portion thereof and modifying the consolidated decree originally entered, was apparently based upon the provisions of section 662 of the same code to the effect that in ruling on a motion for new trial, in a cause tried without a jury, the court may vacate the judgment in whole or in part or modify the same in whole or in part. However, inasmuch as we have determined that new trial proceedings were inapplicable to the consolidated decree settling the trustee's accounts, it necessarily follows that the court below was without power or jurisdiction in denying the purported new trial proceedings to vacate and modify the consolidated decree. In re Estate of England, supra, at page 301, 5 P.2d 428. Its action in this connection was a nullity and while the remaindermen failed to appeal therefrom, and it is settled that a void judgment or decree is appealable, the purported modified consolidated decree being a nullity may be disregarded whenever and wherever relied on. (Authorities, supra.)

[7, 8] The remaindermen did, however, attempt to overcome the effect of the court's action by moving in each proceeding, though unsuccessfully, to strike out the notice of intent to move for new trial and the modified consolidated decree settling the accounts. They noticed appeals to this court from the orders denying the motions. The respondent trustee also moves to dismiss these appeals upon the ground the orders are nonappealable. The motions to dismiss

must be granted: Section 1240 of the Probate Code enumerates the appealable probate orders and nowhere therein do we find any reference to an order denying a motion to strike. The matters sought to be reviewed upon these latter appeals should have been attacked by an appeal from the purported modified and consolidated decree settling the accounts which, as we have already stated, was appealable even if void and beyond the jurisdiction of the court to make and enter. No such appeal was taken.

[9] In conjunction with and as part of their notices of appeal from the respective orders denying motions to strike, the remaindermen likewise noticed appeals from orders authorizing the trustee to sell certain of the trust property. An order "directing or authorizing the sale or conveyances or confirming the sale of property" is appealable under section 1240, supra. The motions to dismiss these latter appeals must therefore be denied.

To recapitulate: The motions to dismiss the appeals from the consolidated decree settling trustee's accounts, entered December 16, 1936, and to dismiss the appeals from the orders denying motions to strike are, and each is, granted and said appeals are hereby dismissed. The motions to dismiss the appeals from the orders authorizing a sale of property are, and each is, hereby denied.

We concur: SHENK, J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

David E. HINCKLE and Alice Clark Ryan, Plaintiffs, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES et al., Defendants.

S. F. 16114.

Supreme Court of California.

Aug. 25, 1938.

In Bank.

Stater & Dawson, of Los Angeles, for petitioners.

PER CURIAM.

The petition for a writ of mandate is denied without prejudice to the consideration of the contentions of the petitioners, plaintiffs herein, on the appeal from any judgment which may be rendered in the action pending in the superior court of the state of California, in and for the county of Los Angeles, entitled: "David E. Hinckle, plaintiff, v. Board of Education of City of Los Angeles et al., defendants", and numbered 430815.

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28 Cal.App.2d 224

BANDINI ESTATE CO. v. LOS ANGELES COUNTY.

Civ. 6036.

District Court of Appeal, Third District, California.

Aug. 23, 1938.

Hearing Denied by Supreme Court Oct. 20, 1938.

1. Taxation 🔑483

An application for equalization of assessment on realty on ground of "excessive valuation" was sufficient where application was presented upon forms prescribed by the county and no objection was made to the insufficiency of the allegation at time of filing or during the hearing. Pol.Code, § 3674.

2. Statutes 🔑245

Tax proceedings are in invitum and are strictly construed in favor of the taxpayer.

3. Taxation 🔑480

The equalization stages of a tax proceeding are in invitum and are to be strictly construed in favor of the taxpayer. Pol. Code, § 3674.

4. Taxation 🔑480

Under constitutional provisions providing that property shall be taxed in proportion to its value and designating boards of supervisors of several counties as boards of equalization and statutes relating to the meeting of board of supervisors to examine and equalize assessments, no single member of the board of equalization can carry out the powers granted to the board and, before a tax valuation can become the basis of any further step in the proceedings, it must pass the scrutiny of the entire board of equalization. Pol.Code, §§ 3672–3682; Const. art. 13, §§ 1, 9.

5. **Taxation** ⚷486

Under the constitutional and statutory provisions relating to county boards of equalization, taxpayer was entitled to a hearing before a majority of the board of equalization. Pol.Code, §§ 3672–3682; Const. art. 13, §§ 1, 9.

6. **Constitutional law** ⚷284(1)

Under statute and constitutional provisions relating to boards of equalization, due process required that the board of equalization be constituted in accordance with the statutory mode. Pol.Code, §§ 3672–3682; Const. art. 13, §§ 1, 9.

7. **Taxation** ⚷480

As respects taxpayer's right to hearing before board of equalization on application for equalization of taxes, composition of the board of equalization being a matter of statute and jurisdictional, it cannot be waived by the taxpayer, notwithstanding that no specific objection is made. Pol.Code, §§ 3672–3682; Const. art. 13, §§ 1, 9.

8. **Constitutional law** ⚷284(2)

Where taxpayer was denied hearing by a legally constituted board of equalization in that one member of the board attempted to act as a board of equalization to hear application for equalization of taxes, taxpayer was denied due process and proceeding was void. Pol.Code, §§ 3672–3682; Const. art. 13, §§ 1, 9.

9. **Taxation** ⚷485(2)

A note concerning property valuation made subsequent to formal hearing on taxpayer's application for equalization, out of the presence of the taxpayer and signed by two members of assessor's staff, was inadmissible and could not be considered by board of equalization. Pol.Code, § 3674.

10. **Taxation** ⚷587

A taxpayer may not defend against a tax on ground that it was fraudulently and corruptly based on an exorbitant valuation without alleging that he has paid or offered to pay what would have been right upon what taxpayer concedes would have been a fair valuation of property or offering to pay what the court should ascertain to be fair.

11. **Taxation** ⚷543(9)

In taxpayer's action to recover taxes alleged to have been illegally collected because of void equalization proceeding, where taxpayer alleged that it offered to pay what would have been right upon what taxpayer conceded would have been a fair valuation of property and offered to pay what court should ascertain to be fair and county failed to establish and court failed to find what was fair valuation of lands in question, cause would be remanded to trial court to ascertain proper values of lands in question and to determine the amount of taxes due thereon. Pol.Code, § 3804.

◆

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by the Bandini Estate Company, a corporation, against Los Angeles County, a body corporate and politic to recover certain realty taxes. From an adverse judgment, plaintiff appeals.

Reversed and remanded.

Holbrook, Taylor & Reed, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action to recover taxes paid by appellant Bandini Estate Company, a corporation, upon twenty-four parcels of real property in the County of Los Angeles.

On the first Monday in March, 1931, and for several years prior thereto, this property had belonged to the Laguna Maywood Land Corporation. In July, 1931, the Laguna Maywood Land Corporation filed with the Los Angeles County board of supervisors, sitting as a county board of equalization, an application for reduction of the assessment on said real property.

In its behalf the Land Corporation employed a tax agent, Charles Husband, to present its demands. Husband filed the application with the board of supervisors, sitting as a board of equalization, and requested that a hearing thereon be had before a majority of the board instead of only one as had been the custom. This request was refused, and after a hearing before a single member of the board, the request for a reduction was denied.

In September, 1931, and before the payment of the taxes, this property was purchased by appellant herein, Bandini Estate Company. The Estate Company then paid the taxes thereon and filed a claim with the board of supervisors for a refund. This was denied by the board, and this action for refund of a portion thereof was then commenced, being for an amount estimated by appellant fairly to represent the amount of the tax upon so much of the valuation as exceeded the lower valuation requested in the application to the board of equalization.

The evidence introduced upon the trial of this action was the application to the board of equalization, the reporter's transcript and other evidence of the testimony, and certain exhibits introduced upon the hearing before supervisor Wright. In addition, further evidence was introduced over the objection of respondent as to the assessor's method of assessment of the property and as to the relative value of appellant's and adjacent property. Judgment was entered against Bandini Estate Company, from which judgment this appeal is taken.

Since this was an action brought to secure a refund of taxes allegedly illegally collected from appellant (Pol.Code, § 3804), the gist of the action was the illegality of such collections.

The principal objection urged by appellant Bandini Estate Company is that the assessment was illegal and erroneous on the following grounds: First, the refusal of the board of equalization to conduct a hearing by a full board or by a majority of the members of a full board; secondly, that the only testimony taken by the board made out a prima facie case for equalization and reduction in accordance with the application; and, thirdly, the action of the board in disregarding all competent evidence constituted an arbitrary act, an abuse of discretion and a constructive fraud on plaintiff, voiding the assessment, and finally, that the sole members of the board of supervisors, sitting as a board of equalization, heard testimony or listened to argument out of the presence of the petitioner, without opportunity of cross-examination by petitioner, thereby rendering its determination void, and the assessment illegal.

[1] It was the contention of appellant that its property had been overvalued by the assessor in the year 1931, and in accordance with law made an application to the board of supervisors, constituting the board of equalization, to determine the value of the property and to equalize the assessment. Some question is raised by respondent that the grounds stated in the petition were inadequate, merely specifying "excessive valuation". We believe, however, that no one was misled by the brevity of the allegation as the hearing took a wide scope and it was understood by all concerned to set forth the taxpayer's claim of discrimination as compared with similarly situated lands.

It was held in County of Los Angeles v. Ransohoff, Cal.App., 74 P.2d 828, that section 3674 of the Political Code does not prescribe any special form of application the taxpayer must file with the board of equalization in order to obtain an adjustment of the assessment of its property, nor need the allegations in such an application follow any technical rule of pleading, it only being necessary that the board may learn from the application what the claim of the applicant is, to the end that such claims may be investigated by the assessing authorities prior to the hearing. In the Ransohoff Case, supra, the ground upon which such charge was based was given as "unequal value" whereas in the instant case the grounds given were "excessive valuation". In view of the fact that the application was presented upon forms prescribed by the county and that no objection was made to the insufficiency of the allegation either at the time of filing or during the hearing, and in accordance with the holding in the Ransohoff Case, supra, the allegation must be considered adequate.

[2] Tax proceedings are made up primarily of four steps: First, the assessment; second, equalization; third, the computation of tax rate; fourth, collection procedure. It requires the citation of no authority to establish the principle that tax proceedings are in invitum and are necessarily strictly construed in favor of the taxpayer.

[3] The equalization stages of a tax proceeding are no exception to this rule. In Birch v. Board of Supervisors, 191 Cal. 235, 215 P. 903, an appeal was taken from a judgment in favor of plaintiff in a proceeding to review the action of the board of supervisors raising the assessment upon plaintiff's property on the assessment roll, after a hearing upon plaintiff's application for a reduction. The board contended that inasmuch as all the parties concerned were

before the board it had jurisdiction to make the order. The difficulty with this argument, the court said, "is that the power of the board of supervisors is purely statutory, and that the proceedings are in invitum, and that the board must act in the manner prescribed by statute, otherwise their action is void", and that the taxpayer had a constitutional right to a hearing upon the valuation as fixed by the taxing power.

[4] The law does not contemplate that the valuations of property be left to the discretion of a sole appraiser. Reference to our tax statutes reveals that before a tax valuation can become the basis of any further step in the proceedings, it must pass the scrutiny not of the assessor but of a board of equalization. In Hutson v. Protection District, 79 Cal. 90, 16 P. 549, 550, 21 P. 435, the court had before it the constitutionality of taxes levied by a swamp land district. In holding that the taxes levied were void, because of the lack of any hearing on the part of the taxpayer before the imposition of the tax, the court said:

"No provision is made anywhere in the statute for any hearing by the land-owner whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The collection provided for is summary and without suit brought at which the property owner can be heard. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality."

Turning our attention to the proceedings had before the so-called board of equalization we find that article 13, section 1, of our Constitution provides: "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value." In accordance therewith article 13, section 9, of the Constitution, providing for the mode of equalization, specifies: "The boards of supervisors of the several counties of the state shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, * * to increase or lower the entire assessment-roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment-roll, and make the assessment conform to the true value in money of the property contained in said roll * * * ."

Reference to Political Code sections 3672 and 3682, inclusive, disclose that the board of supervisors of each county must meet upon a day fixed to examine the assessment book and equalize the assessment of property in the county. Glancing at these sections we find reference in each instance was made to the "Board"; that the "Board" was required to examine on oath; subpœna witnesses; direct the assessor to assess taxable property and deliver the assessment books so corrected to the county auditor. No delegation of any authority can be found therein to a single member of such board to carry out any of the powers therein granted. In the instant case, over the objection of appellant, one member of the board of supervisors constituted himself a board of equalization.

[5] In the recent case of Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, the Supreme Court of the United States, speaking through the Chief Justice, laid down the requirements of due process as applied to proceedings before a quasi judicial tribunal. What is there said may very aptly be applied to the situation here. In accordance with the principles there laid down it would clearly appear that appellant in order to receive the benefits of due process was entitled to a hearing of a majority of the board of equalization.

[6] Due process also requires that the tribunal conducting the hearing be constituted in accordance with statutory requirement. Ex parte Giambonini, 117 Cal. 573, 49 P. 732. The same rule of due process as to a properly constituted tribunal is as applicable to a quasi judicial board as to a court. In Taboada v. Sociedad Espanola, etc., 191 Cal. 187, 215 P. 673, 674, 27 A.L.R. 1508, the court said: "This rule is not confined alone to courts of justice and strictly legal tribunals, but is applicable to every tribunal which has the power and authority to adjudicate questions involving legal consequences." Due process, therefore, would require that the board of equalization be

constituted in accordance with the statutory mode.

These constitutional and statutory provisions providing for a board of equalization require such board be composed of at least a majority of the five members of the board of supervisors and not simply of a single member. There seems to be no dispute that Mr. Wright alone conducted the Bandini hearing, and that three or four other supervisors were conducting individual hearings on other applications in other parts of the room at the same time that supervisor Wright was hearing the testimony on appellant's application.

[7] There is no question that composition of the board of equalization being a matter of statute and jurisdictional, it cannot be waived by the taxpayer, although in this case specific objection was noted by the taxpayer to the matter being heard by a single member of the board.

It is unnecessary to cite the many cases in California which have followed the rule enumerated in Hutson v. Protection District, supra. Neither need we more than cite a few of the federal cases that hold that unless the tax statute provides an opportunity for a hearing of the taxpayer at some stage of the proceedings before the tax becomes fixed it is void under the fourteenth amendment. To this effect is County of Santa Clara v. Southern Pacific R. Co. C.C., 18 F. 385. Londoner v. City & County of Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103; Turner v. Wade, 254 U.S. 64, 41 S.Ct. 27, 65 L.Ed. 134; Morgan v. U. S., supra, as well as the many authorities cited in these cases.

[8] We believe the foregoing establishes that the Land Corporation was denied a hearing by a legally constituted tribunal in that one member of the board attempted to act as a board of equalization, and for that reason the Land Corporation was denied its legal rights.

It is also claimed by appellant that conceding the hearing was not illegal, that nevertheless such proceedings were not conducted in accordance with the requirements of an orderly and impartial hearing for the reason that certain testimony or statements of the assessor were taken out of the presence and without the knowledge of the taxpayer, and also that the decision rendered by the examiner was not in accordance with the indisputable evidence taken at the hearing.

[9] In support of the claim that evidence was taken out of the presence of the taxpayer it appears that subsequent to the formal hearing and out of his presence, a note was made upon the application for equalization, reading, "Recommend no reduction. This property was very carefully checked and values very reasonable as they are," and signed by two members of the assessor's staff. It was error to receive and consider this evidence. Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218.

As to the conclusion that the finding of the board was not in accord with the evidence taken, appellant points out that from the reporter's transcript of the hearing before the board of equalization it is shown that only two witnesses were examined by Mr. Wright, the first, Mr. Husband, the tax agent, and the other an officer of the corporation. Their testimony was to the effect the properties were over assessed in comparison with immediately adjoining and adjacent properties of the same type and character. Certain maps and airplane photographs were introduced in support of this testimony. No attempt was made to explain the alleged discrepancies. It is therefore contended the board had nothing before it upon which to base a finding contrary to appellant, except the ex parte notation written on the application after the hearing.

[10, 11] If we are correct in holding that the entire tax proceeding was void, the county had an opportunity to have corrected the situation by beginning a new tax proceeding. Pol.Code, § 3681a. This was not done. However, a taxpayer may not defend against a tax on the ground it was fraudulently and corruptly based on an exorbitant valuation without alleging that the defendant has paid or offered to pay what would have been right upon what he concedes would have been a fair valuation of his property or offering to pay what the court should ascertain to be fair. County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329. This the appellant did in its complaint but the county failed to establish and the court failed to find what was a fair valuation of the several parcels of land in question. It was stipulated that it was the general method of assessment in Los Angeles county in 1931 to assess parcels of land at not to exceed 50 per cent of their market value. The tax rate for 1931 was also stipulated to as regards each of the respective parcels here involved.

It is therefore ordered that the judgment appealed from be reversed, and the cause remanded to the trial court to ascertain the proper values of the various parcels in question, and determine the amount of the taxes due thereon.

I concur: THOMPSON, J.

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28 Cal.App.2d 181

In re ALLAN'S ESTATE.

ALLAN v. ALLAN et al.

Civ. 11871.

District Court of Appeal, Second District, Division 2, California.

Aug. 20, 1938.

Rehearing Denied Sept. 16, 1938.

1. Husband and wife 🔑264

Evidence *held* to justify decree determining that brother, nephew and nieces of deceased who died intestate without lineal heirs and leaving widow him surviving were entitled to one-half of realty left by decedent on ground that realty which was acquired by deceased after his marriage was separate property of decedent at date of his death.

2. Records 🔑9(13)

Where realty has been registered pursuant to requirements of Land Title Law of 1915 and a transfer thereof is made and entered in the manner prescribed in such law, the certificate of ownership issued by the registrar of titles is conclusive evidence of the title as therein stated. Land Title Law, St.1915, p. 1932.

3. Husband and wife 🔑274(4)

In proceeding in estate on petition of wife who claimed that realty acquired by decedent after marriage was community property, finding that realty acquired by deceased husband subsequent to his marriage was separate property of husband at time of his death was error where owner's certificate of title issued by registrar of titles to husband showed land as community property of husband and wife. Land Title Law, St.1915, p. 1932.

4. Evidence 🔑227

In proceeding in estate on petition of wife who claimed that realty acquired by deceased husband after marriage was community property, income and estate tax returns signed and filed by wife as administratrix of estate of husband describing realty owned by decedent at death as separate property of husband's estate was properly received as admission against interest. Code Civ.Proc. § 1870, subd. 2.

5. Evidence 🔑272

An act or declaration of a party which is against his pecuniary or proprietary interest at the time when made is admissible in evidence against such party. Code Civ. Proc. § 1870, subd. 2.

6. Husband and wife 🔑263

In proceeding in estate on petition of wife who claimed that realty acquired by decedent after marriage was community property, income tax return filed by decedent prior to date of marriage tending to show value of his property at date of filing return, contents of revoked will of decedent wherein property in question was described as his separate property, and conversation between decedent and his attorney relative to value of his securities and other property which he owned were inadmissible.

7. Husband and wife 🔑264

Character of the ownership of property whether separate or community is to be determined from proof showing the mode of acquisition rather than by any declaration of one of the parties that the property was or was not community property.

8. Appeal and error 🔑1170(7)

In proceeding in estate on petition of wife claiming that realty acquired by decedent after marriage was community or separate property, error in admission in evidence of income tax return filed by decedent prior to date of marriage tending to show value of his property at date of filing return, contents of revoked will of deceased wherein property was described by him as his separate property, and conversations between decedent and his attorney relative to value of his securities and other property which he owned was not prejudicial and was required to be disregarded by reviewing court. Const. art. 6, § 4½.

9. Evidence 🔑263(1)

In proceeding in estate on petition of wife claiming that realty acquired by de-

cedent after marriage was community property, refusal to permit decedent's wife to show conversations which she had with tax expert prior to time when she as administratrix filed income and estate tax return describing realty in controversy as separate property of decedent estate was not error, although wife's acts and declarations in connection with return were competent evidence. Code Civ.Proc. § 1870, subd. 2.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding in the matter of the estate of George H. Allan, deceased, wherein Maude Marie Allan filed a petition which was opposed by Charles E. Allan and others. From a decree determining heirship, the petitioner appeals.

Affirmed in part and reversed in part and remanded, with directions.

LeCompte Davis, MacDonald & Thompson, J. H. Gosling, and Lynn V. Gosling, all of Los Angeles, for appellant.

Freston & Files, by Ralph E. Lewis, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal by petitioner, the widow of George H. Allan, deceased, has been transferred by the Supreme Court to this court for decision pursuant to the provisions of article 6, section 4 of the Constitution of the state of California. It is from a decree determining heirship to the real property hereinafter described after trial before the court without a jury.

Viewing the evidence most favorable to the respondents, the essential facts are:

Mr. Allan and appellant were married in 1919. At the time of their marriage he had property of the approximate value of $100,000 and she possessed no property excepting a few personal belongings. April 1, 1934, Mr. Allan died intestate. Estate of Allan, 15 Cal.App.2d 272, 59 P.2d 425. Subsequent to his marriage to appellant decedent acquired the following described property:

Parcel A

"The east half of lot twelve (12) and the east half of the north fifty-five (55) feet of lot eleven (11) in block forty-three (43) of the city of Pomona, county of Los Angeles, state of California, as per map recorded in book 3, pages 90 and 91, miscellaneous records of said county", also known as No. 176-190 East Second street, city of Pomona.

Parcel B

"Lot eighteen (18) and the south seventeen and seventeen hundredths (17.17) feet of lot nineteen (19), in block thirteen (13) of Whittier, in the city of Whittier, county of Los Angeles, state of California, as per map recorded in book 21, pages 55 and 56, miscellaneous records of said county", also known as No. 122-124 Greenleaf avenue, city of Whittier.

Parcel C

"The west twenty-two and eight one-hundredths (22.08) feet ex. of street, lot 5 and 6, block C, Grider and Hamilton Tract, the easterly portion of Bell Tract, as per book 36 of maps, records of Los Angeles County, California", also known as Nos. 4120-4122-4124-4126 Baker avenue, in the city of Bell.

Decedent left no lineal heirs, his surviving relatives consisting of his widow, appellant; a brother, Charles E. Allan; a nephew, William B. Ittner, Jr.; and two nieces, Helen Ittner Lorber and Gladys Ittner Orr, respondents. The trial court found that the real property above described was the separate property of Mr. Allan at the time of his death, and entered an appropriate decree determining that respondents were entitled to one-half thereof.

Appellant relies for reversal of the decree on these propositions:

First: There is no substantial evidence to sustain the trial court's finding of facts that the real property hereinabove designated as Parcels A, B, and C were the separate property of decedent at the time of his death.

Second: The owner's certificate of title issued by the registrar of titles of Los Angeles county certifying that George H. Allan held the real property designated above as Parcel B (this real estate having been previously registered under the Land Title Law of 1915, Stats.1915, p. 1932, Act 8589, vol. 3 Deering's General Laws [1931] p. 4842) as community property was conclusive evidence as to decedent's interest in said real property.

Third: The trial court committed prejudicial error in receiving in evidence over appellant's objection:

(a) Income and estate tax returns signed and filed by appellant as administratrix of

the estate of decedent, wherein the above described real property was set forth as the separate property of decedent's estate;

(b) Income tax returns filed by decedent prior to the date of his marriage to appellant, which tended to show the value of his property at the date of the filing of said returns;

(c) The contents of a revoked will of decedent wherein the property here in question was described by him as his separate property; and

(d) Conversations between Mr. Allan and his attorney relative to the value of his securities and other property which he owned.

Fourth: The trial court committed prejudicial error in not permitting appellant to show conversations she had with a tax expert prior to the time she as administratrix filed income and estate tax returns.

[1] As to appellant's first proposition, an examination of the record discloses there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the finding of facts that Parcels A and C, supra, were the separate property of decedent at the date of his death. For example, the income and estate tax returns filed by appellant as administratrix of decedent's estate returned the property as the separate estate of Mr. Allan. This evidence alone was sufficient to sustain the trial court's finding that the land described in Parcels A and C constituted separate property of the decedent. Therefore, further discussion of the evidence relative to these pieces of land is unnecessary. Thatch v. Livingston, 13 Cal.App.2d 202, 56 P.2d 549; People v. Groves, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399. As to the land described in Parcel B, supra, a different situation obtains, which we shall dispose of, in connection with appellant's second proposition.

[2] The second contention of appellant is tenable. The law is settled that when real estate has been registered pursuant to the requirements of the Land Title Law of 1915, supra, and a transfer thereof is made and entered in the manner prescribed in said act, the certificate of ownership issued by the registrar of titles is conclusive evidence of the title as therein stated. Robinson v. Kerrigan, 151 Cal. 40, 44, 90 P. 129, 121 Am.St.Rep. 90, 12 Ann. Cas. 829. Mr. Justice Shaw in the case just cited at page 45, 90 P. at page 131, thus states the rule:

"Subsequent transfers of such 'registered land' are to be made and entered in the manner prescribed in the act, and certificates thereof are to be issued by the registrar to the transferee, which shall be conclusive evidence of his title as therein stated."

In the instant case the land described in Parcel B, supra, had been registered under the Land Title Law of 1915 prior to the time Mr. Allan purchased it. Upon purchasing this property Mr. Allan and appellant executed and acknowledged the following document:

"Transferee's Affidavit and Receipt for Duplicate Certificate

"The undersigned, George H. Allan and Maud M. Allan, being first duly sworn by the officer whose signature appears below, depose and say: That his full name is George H. Allan, age 49, and occupation Broker. Her full name is Maud M. Allan, age over 21 and occupation housewife, and that they are married to each other, that their residence and post office address is 116 South Van Ness Avenue, city of and county of Los Angeles, California; that he is the transferee named in the within instrument; *that the property therein described is acquired and held by him as community property;* and that they are free from any legal disability. This is also a receipt for the Duplicate Certificate of Title issued pursuant to the within instrument, and the Registrar of Titles is authorized to deliver the same to First National Bank, whose address is Whittier, California.

"George H. Allan
"Maud M. Allan."

(Italics added.)

They thereafter received from the registrar of titles of Los Angeles county a certificate reading in part as follows:

"Owner's Certificate
(Original in the Office of the Registrar of Land Titles.)

"This is to certify that George H. Allan, broker, aged 49 years, married to Maud M. Allan, housewife, aged over 21 years, with whom he resides at No. 116 South Van Ness Avenue, Los Angeles, California, which is their post office address, is the owner of an estate in fee simple, *holding the same as the community property of himself and the said Maud M. Allan, his wife,* of and in the following described land situated in the city of Whittier, County of Los Angeles, State of California, to-wit: Lot Eighteen (18) and the South seventeen and seventeen hundredths (17.17) feet of Lot Nineteen (19) in Block Thirteen (13) of Whittier, as per map recorded in Book 21 pages 55 and 56 of Miscellaneous Records in the office of the Recorder of said County.

"Subject, however, to the estates, interests, encumbrances, easements, liens and charges noted by the memorials hereunder or endorsed herein; and subject also to any and all provisions of the Act above referred to.

"In witness whereof I have hereunto set my hand and caused my official seal to be affixed this 12th day of May, 1923, at 8:30 a. m.

"C. L. Logan
"Registrar of Titles
"Los Angeles County
"California
"By R. C. Gaede, Deputy."

(Italics added.)

[3] Applying the above stated rule of law to the foregoing uncontradicted fact, that is, that the owner's certificate of title issued by the registrar of titles showed the land described in Parcel B as the community property of decedent and appellant, the trial court was in error in finding it to be the separate property of decedent at the time of his death.

[4, 5] The evidence described in paragraph (a) of appellant's third proposition was properly received. The law is settled that the act or declaration of a party which is against his pecuniary or proprietary interest at the time when made is admissible in evidence against such party. Sec. 1870, subd. 2, Code Civ.Proc.; In re Estate of Baird, 193 Cal. 225, 241, 223 P. 974. It needs no argument to demonstrate that the act and declaration of appellant in executing and causing to be filed income and estate tax returns in which she declared that the land described in Parcels A and C, supra, were the separate property of her deceased husband were acts and declarations against her pecuniary and proprietary interests at the time they were made.

[6-8] The evidence mentioned in paragraphs (b), (c), and (d) of appellant's third proposition was inadmissible. However, in light of the well established rule that the character of the ownership of property, that is, whether separate or community, is to be determined from proof showing the mode of acquisition rather than by any declaration of one of the parties that the property was or was not community property (Bias v. Reed, 169 Cal. 33, 42, 145 P. 516), we are of the opinion that such evidence was not prejudicial to appellant, and that under the provisions of article 6, section 4½ of the Constitution of California such error must be disregarded by us.

[9] Appellant's final contention is without merit. The proffered evidence was from a tax expert and was of conversations between appellant and such tax expert who prepared the estate income and estate tax returns. His testimony of what he said to appellant or she said to him was not admissible. It was her acts and declarations in connection with the returns which were competent evidence and not the proffered testimony.

Appellant suggests numerous other errors in rulings of the trial court on the admission or rejection of evidence, some of which are supported by argument. Most of them, however, have received no further attention from appellant than the mere claim of error. We have examined them all and find that appellant's contentions in this regard are without merit and that the rulings of which complaint is made were in no instance prejudicial except as above set forth.

For the foregoing reasons the decree is affirmed as to Parcels A and C and is reversed as to Parcel B. The case is remanded to the trial court with instructions to prepare and enter a modified decree in accord with the views expressed in this opinion.

I concur: CRAIL, P. J.

28 Cal.App.2d 175

EVINGER v. MacDOUGALL et al.

Civ. 11786.

District Court of Appeal, Second District,
Division 2, California.

Aug. 20, 1938.

Hearing Denied by Supreme Court
Oct. 17, 1938.

1. Building and loan associations ⇨40

A building and loan association, which received a deposit of money from one person and issued its passbook and certificate in the name of that person as trustee for another person as beneficiary without notice of any agreement between trustee and beneficiary, had no duty to inquire as to the existence or terms of a trust between trustee and beneficiary before transferring the account to a third person upon the direction of the trustee. Civ.Code, §§ 279, 328b.

2. Trusts ⇨59(1)

A deposit by one person of money in his own name as trustee for another does not of itself establish an irrevocable trust during the lifetime of the depositor, and the trust is revocable at the will of the depositor until he dies, unless he completes the gift in his lifetime by some unequivocal act or declaration.

3. Trusts ⇨30½(1)

A person depositing money in building and loan association in his own name and as trustee for his brother and signing signature card with his own name solely created a trust revocable at will during such person's lifetime.

4. Trusts ⇨59(4)

A trust created by person depositing money in building and loan association in his own name and as trustee for his brother and signing signature card with his own name solely was revoked by depositor's pledging of the passbook to a third person from whom depositor borrowed money, and the company to which passbook was subsequently assigned received the passbook and certificate free of any trust or claim of brother.

5. Building and loan associations ⇨40

A passbook and certificate issued by building and loan association to person depositing money constituted an indivisible and integral part of the transaction with association, and the issuance of passbook and certificate created the relation of debtor and creditor between association and depositor.

6. Evidence ⇨471(1)

Generally, answers to questions calling for conclusion of witness are properly excluded from the evidence.

7. Evidence ⇨471(28)

In action for alleged conversion of building and loan certificate and passbook issued to person depositing money in association in his own name as trustee for his brother, refusal to permit depositor to state whether he had any agreement with brother as to what was depositor's right, title and interest in the passbook was not error, since the question called for depositor's conclusion as to what constituted "any agreement."

8. Evidence ⇨314(1)

In action for alleged conversion of building and loan certificate and passbook issued to person depositing money in association in his own name as trustee for his brother, refusal to admit evidence of alleged trust agreement between depositor and his brother was not error, since evidence was hearsay so far as defendants were concerned, in absence of showing that defendants had knowledge of such agreement.

9. Building and loan associations ⇨40

The failure to insert name of assignee in assignment of building and loan association passbook did not invalidate the assignment.

10. Assignments ⇨41

The person to whom an assignment in blank is delivered is deemed to be authorized to fill in the name of the assignee.

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Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Coy Evinger against J. A. MacDougall and others to recover damages for the alleged conversion of a building and loan certificate and passbook. From a judgment in favor of all the defendants except J. A. MacDougall, the plaintiff appeals.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

B. W. Kemper, of Los Angeles, for respondent H. C. Irish.

Frank L. Perry, of Redondo Beach, for respondent People's Finance Co. of Redondo Beach.

Tanner, Odell & Taft, of Los Angeles, and L. B. Reynolds, of Redondo Beach, for respondent American Mut. Building & Loan Ass'n.

McCOMB, Justice.

From a judgment in favor of all defendants except defendant MacDougall after trial before the court without a jury in an action to recover damages for the alleged conversion by respondents of a building and loan certificate and passbook of the value of $8,020 plaintiff appeals.

The essential facts are:

December 22, 1930, L. W. Evinger, brother of plaintiff, purchased from defendant American Mutual Building and Loan Association one of its certificates and passbooks of the face value of $8,000. The certificate and passbook were issued to "L. W. Evinger, trustee for Coy Evinger". The signature card was signed "L. W. Evinger".

September 27, 1932, L. W. Evinger borrowed from defendant MacDougall, who was doing business under the name of Beverly Investor's Syndicate, $2,000, and as security for the loan signed an agreement transferring and assigning the passbook above mentioned to Beverly Investor's Syndicate, and also executed, leaving the name of the assignee in blank, an assignment of the passbook. September 28, 1932, H. C. Irish presented the above-mentioned passbook together with the assignment executed by L. W. Evinger, in which H. C. Irish's name had been filled in as assignee, and also an assignment of the passbook certificate above described executed by H. C. Irish in favor of defendant People's Finance Company of Redondo Beach to the American Mutual Building and Loan Association, whereupon a new certificate and passbook were issued to the People's Finance Company of Redondo Beach as payee.

These are the questions presented for determination:

First: Is a building and loan association which has received a deposit of money from one person and has issued its passbook and certificate in the name of that person as trustee for another, not having any notice of any agreement between the trustee and beneficiary, under a duty to inquire as to the existence or terms of a trust between the trustee and beneficiary before transferring the account to another upon the direction of the trustee?

Second: Where one person deposits money in the name of that person as trustee for another, is the trust in the absence of any other agreement of which the depository has notice revocable at the will of the trustee at any time prior to his death?

Third: Did the trial court commit prejudicial error in not receiving in evidence over objection

(a) the answer to this question: "Did you have any agreement with Coy Evinger as to what was your right, title and interest in that passbook; 'Yes or no'?"

Fourth: Was the assignment of the passbook of defendant American Mutual Building and Loan Association by L. W. Evinger invalid because the name of the assignee was left blank?

[1] The first question must be answered in the negative. Whenever certificates for shares of a corporation have been issued to a person as trustee on the books or records of the corporation, whether or not such certificates describe the trust or identify the beneficiary, it is presumed in favor of such corporation that the trustee has the power to transfer title to the certificate and the corporation is not under a duty to inquire into or determine the existence or validity of any trust or the terms thereof or whether the trustee is committing a breach of his obligation or exceeding his authority. Sec. 328b, Civ.Code.

In 1932 section 328b, title 1, part 4, division 1 of the Civil Code read in part as follows:

"Whenever certificates for shares or other securities of a corporation * * * have been issued * * * to a person * * * as trustee on the books or records of the corporation, whether or not such certificates * * * describe the trust or identify any beneficiary, it shall be presumed in favor of such corporation and its transfer agent that such trustee has the power to accept and transfer title to such certificates * * * and there shall be no duty upon the corporation * * * to inquire into or determine the existence or validity of any trust or the terms thereof, or whether the trustee is committing a breach of obligation or exceeding his authority."

At the time of the transaction here under consideration section 279 of title 1, part 4, division 1 of the Civil Code read in part thus:

> "The provisions of this title are applicable to every private corporation, profit or nonprofit, stock or nonstock, now existing or hereafter formed, and the outstanding and future securities thereof, unless such corporation be expressly excepted from the operation thereof, or there be a special provision in relation to any class thereof inconsistent with some provision of this title, in which case the special provision prevails."

Since mutual building and loan associations are not excepted from the provisions of section 328b of the Civil Code nor are there any specific provisions in regard to such corporations inconsistent with the terms of said section, it was applicable to the situation here presented and the American Mutual Building and Loan Association was under no duty to inquire as to the existence of the alleged trust between plaintiff and his brother or as to whether plaintiff's brother was exceeding his authority in transferring the passbook and certificate in question. Therefore, the trial court properly gave judgment in favor of defendant American Mutual Building and Loan Association.

[2] The second question must be answered in the affirmative. A deposit by one person of money in his own name as trustee for another standing alone does not establish an irrevocable trust during the lifetime of the depositor. Such trust is revocable at the will of the depositor until he dies or unless he completes the gift in his lifetime by some unequivocal act or declaration. In re Totten, 179 N.Y. 112, 71 N.E. 748, 752, 70 L.R.A. 711, 1 Ann.Cas. 900.

The case just cited has received the approval of the appellate courts of this state in Kuck v. Raftery, 117 Cal.App. 755, 758, 4 P.2d 552.

[3, 4] Applying the rule just stated to the facts of the instant case, it is clear that plaintiff's brother, having deposited money in his own name as trustee for his brother and having signed the signature card with his own name solely, created at best a trust revocable at will during his lifetime. This trust he revoked when he pledged the passbook with defendant MacDougall. Therefore, defendants Irish and People's Finance Company of Redondo Beach received in due course the passbook and certificate free of any trust or claim of plaintiff.

[5] Plaintiff's attempted distinction between the assignment of the passbook and the certificate of the American Mutual Building and Loan Association is without merit. In legal contemplation each of these documents constituted an indivisible and integral part of the transaction with defendant American Mutual Building and Loan Association, the net result being that the relation of debtor and creditor was created between defendant American Mutual Building and Loan Association and L. W. Evinger when the passbook and certificate were issued to him.

[6, 7] The trial court's ruling relative to the question set forth in paragraph (a) of the third question was correct. The general rule is that answers to questions calling for the conclusion of the witness are properly excluded from evidence. The question here under consideration called for the conclusion of the witness as to what constituted "any agreement" and, therefore, the objection to the question was properly sustained. Callahan v. Marshall, 163 Cal. 552, 559, 126 P. 358; Ackerman v. Channel Commercial Co., 53 Cal. App. 259, 266, 199 P. 1101.

[8] The trial court properly sustained the objection to the evidence set forth in paragraph (b) of the third question, for the reason that such evidence was clearly hearsay so far as the defendants were concerned, there being no showing that any of them had knowledge of the alleged agreement prior to the time of the trial.

[9, 10] The final question must be answered in the negative. It is the established law of California that one to whom an assignment in blank is delivered is deemed to be authorized to fill in the name of the assignee. Thomas v. Fursman, 39 Cal.App. 278, 280, 178 P. 870.

For the foregoing reasons the judgment is affirmed.

I concur: CRAIL, P. J.

28 Cal.App.2d 252

McLEOD v. McMAHON.

Civ. 11947.

District Court of Appeal, Second District, Division 2, California.

Aug. 24, 1938.

Appeal and error 🔑627(2), 773(2)

Where appellant failed to file transcript of record or brief, although time therefor was long past due, appeal would be dismissed.

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Action by Clara E. McLeod against J. F. McMahon. From an adverse judgment, plaintiff appeals.

Appeal dismissed.

John Elliott Cook, of San Francisco, and Stanley N. Barnes, of Los Angeles, for appellant.

Sigurd E. Murphy and Bernard E. Allard, both of Los Angeles, for respondent.

PER CURIAM.

This case comes before the court on motion of respondent to dismiss the appeal for failure of the appellant to file a transcript of the record or brief, although the time therefor is long past due. The motion is good and it is granted.

Appeal dismissed.

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28 Cal.App.2d 246

FREUND v. OAKLAND BOARD OF EDUCATION et al.

Civ. 10711.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1938.

Rehearing Denied Sept. 23, 1938.

Hearing Denied by Supreme Court Oct. 20, 1938.

1. Schools and school districts 🔑89

Where lockers in public school gymnasium were nailed to studding in wall, the pulling loose of a locker from the wall constituted a patent rather than a latent defect, as regards liability of board of education to student who was injured when locker fell on her. School Code, § 2.801; St.1923, p. 675.

2. Schools and school districts 🔑121

Evidence, that 15-year-old student was injured when a locker in public school gymnasium fell upon her while she was waiting to be dismissed at close of class period, *held* prima facie to show negligence of board of education. School Code, § 2.801; St.1923, p. 675.

3. Negligence 🔑121(2)

When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from the want of care.

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Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Phyllis Freund, a minor, by and through her guardian ad litem, Ruby Freund, against the Oakland Board of Education and others to recover for injuries sustained when the minor was struck by a locker which fell over in the gymnasium building on the school grounds. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

Earl Warren, Dist. Atty., and Applebaum & Mitchell, all of Oakland, and Charles V. Barfield and John H. Finger, both of San Francisco, for appellant.

Elliott Johnson and D. W. Brobst, both of Oakland, for respondent.

STURTEVANT, Justice.

Phyllis Freund, a minor, by her guardian ad litem, commenced this action to recover damages for injuries sustained when struck by a locker which toppled over in the gymnasium building on the school grounds.

The complaint alleged in substance that the plaintiff was a student at Claremont Junior High School, Oakland; that a locker room was maintained for the convenience of the students; that certain steel lockers in that room were in a dangerous and defective condition in that they were not fastened to prevent their falling; that on information and belief such condition had existed for at least thirty days and that the defendants had notice of such dangerous condition. It is then alleged that as a result of such negligent maintenance one of the aforesaid lockers fell on the plaintiff inflicting the injuries complained of.

The defendants named in the complaint were the Oakland Board of Education, Oakland High School District of Alameda County, Oakland Junior High School District of Alameda County, and H. N. Massey. All but Oakland Junior High School District of Alameda County answered. The jury returned a verdict against all defendants. The brief recites that the Board of Education appealed. We will accept that recital and hereinafter refer to it as the defendant.

The accident occurred on March 1, 1937, between the hours of 9 a. m. and 10 a. m. at the Claremont Junior High School. It happened in an out building which is used as a locker room and a dressing room by girls in classes in physical education, and as a gymnasium in rainy weather. It is also used for dancing. The room, on three sides, had lockers fastened to the walls, the outside dimensions of each locker being 7 feet by 12 inches by 12 inches, each locker containing two separate compartments, an upper and a lower, each compartment being 36 inches high. The lockers were attached together in groups of from three to six, four sets in the group that fell, i. e., eight separate compartments. They stood upright against the wall, and, in the manner stated above, were nailed at the backs to the studding in the wall, although they would stand without being attached to the wall. They had been installed in the building in August, 1931. There is testimony that, after the accident, the other lockers were loose but did not fall when pulled on. The principal testified that at no time had any of the teachers or students brought to his attention the fact that any lockers were loose until after the accident. There is evidence that none of the lockers had pulled out before, and the plaintiff testified that prior to the time of the accident she had never noticed anything loose about the lockers. Photographs showing the interior of the room were introduced in evidence. An examination of them discloses that the walls consisted of studs apparently two inches by four inches placed upright. The studs are three and a half feet apart. On the outside the walls consisted of planking nailed on the studs horizontally. There is no inside lining. The locker cases vary in width. They rest on the floor and stand against the studs. The floor is level and in good condition. Depending on their width, some lockers may abut no stud, some may abut one stud, some may abut more than one stud. As to the locker that fell, the evidence does not disclose whether it abutted one stud or more. The backs of the lockers were tin and some of the lockers were nailed to the studs by driving nails through the back of the locker into a stud. On each locker was a handle. On the handles the students hung their garments and withdrew them. Chains were used to lock the lockers, that is, a chain was fastened on one side and was so drawn through the handles of the lockers as to keep several lockers closed. Whether the chain on the particular locker which fell was unduly pulled on is not disclosed in the evidence. After the accident an examination disclosed all nails in the locker which fell had been pulled. The evidence shows an eight penny nail was found after the accident but it does not show that it had been pulled out of the back of the locker that fell.

The lockers had been "inspected" by the janitor twice a year, during the summer and Christmas vacations. But how they were "inspected" no witness testified. There was no evidence that at any time before the accident any test was made to ascertain the results of six years of use. There was no evidence that the lockers were installed by a competent contractor nor that the mode of installation which we have delineated above is reasonably proper construction. With the doors of the lockers standing open it is clear one merely walking by the lockers can see all of the elements of strength and weakness and the mode of installation hereinabove set forth.

On the morning in question the class, fifty to eighty in number, followed its usual procedure. The girls came in from the yard about ten minutes before the close of the period, took about seven minutes to dress, and then had three minutes in which to "clean up" before the period was up. After the girls were dressed they sat on benches about two feet in front of the lockers, and when all were seated, they were excused by the teachers for the next class. Shortly before the warning bell rang, certain lockers fell against the plaintiff who was seated with her back to the lockers. The plaintiff testified all the girls in the class but one were seated at the time, although testimony of other girls in the class showed many of the girls were wandering around trying to get their clothes put away and finish dressing. One witness testified that one girl was standing on the bench on which the plaintiff was seated and jumped off just before the accident. Other girls, seated on the same bench as the plaintiff, jumped out of the way of the falling lockers.

[1] The defendant's first point is that, as owner of the property, it is not responsible for injury to a pupil caused by latent defects in the property of the school district of which defects it had no notice, actual or constructive. It cites many authorities. The plaintiff replies that the case presents a question of patent defects and not latent defects. We think that contention is supported by the record.

The defendant next contends that the plaintiff was bound to plead such facts as would bring her case within the provisions of The Public Liability Act of 1923 (Stats. 1923, p. 675, Deering's Gen.Laws, Act 5619), and not under the provisions of section 2.801 of the California School Code. The plaintiff claims she was entitled to and did so frame her complaint as to bring her case within the provisions of both statutes. Continuing she asserts that the case was tried in the trial court upon the theory that the school district and its employees failed to exercise ordinary care in the maintenance of the steel lockers that fell upon the plaintiff and that by the exercise of ordinary care a reasonably prudent person would have discovered the dangerous condition of the lockers and the peril of their falling. She cites and relies on Bellman, Minor v. San Francisco High School Dist., Cal.Sup., 81 P.2d 894; Spore v. Washington, 96 Cal. App. 345, 274 P. 407; Ahern v. Livermore Union High School Dist., 208 Cal. 770, 284 P. 1105; Damgaard v. Oakland High School Dist., 212 Cal. 316, 298 P. 983; and Maede v. Oakland High School Dist., 212 Cal. 419, 298 P. 987. The defendant replies that no one of said actions was similar to the instant case in its facts and that all of them were based on section 2.801 of the School Code. Continuing it asserts that as to its liability under Act 5619, supra, the plaintiff wholly failed to prove a case and that the trial court committed prejudicial error in refusing to give its requested instructions applying said statute to the instant case. The plaintiff concedes that if said statute is applicable then such errors were committed. But she insists that under the provisions of said section 2.801 she was entitled to and did plead general negligence, to-wit, that the defendants did negligently maintain said lockers, etc. To that claim the defendant answers: that there was no proof of such general negligence, that no witness testified said lockers were ever seen loose; that even the plaintiff testified she had never seen them in that condition, and that they were carefully inspected twice each year and were inspected the last time about sixty days before the accident. The defendant then argues that as for latent defects it may not be said such inspection was negligent, (Baddeley v. Shea, 114 Cal. 1, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56; Micek v. Weaver-Jackson Co., 12 Cal.App. 2d 19, 21, 54 P.2d 768), and there is no evidence the defects were patent.

[2, 3] The foregoing exhausts the reasoning and arguments of counsel. If the plaintiff were in fact a tenant and suing her landlord, it might be argued that she had no standing. Daley v. Quick, 99 Cal. 179, 33 P. 859. However, she was not a tenant. She was a child fifteen years of age. Under the law of this state she was compelled to go to school. Under the law of this state she was compelled to go to the identical school she was attending. Under the law of this state she was compelled to go into the particular room where the accident occurred. She went in there and was seated on a bench. While so seated a part of the fixtures of the building tumbled onto her causing the injury for which she asks damages. In the trial court the jury heard the evidence and brought in a verdict in favor of the plaintiff. On the defendant's appeal we are asked, in effect, to hold that the plaintiff has shown no actionable wrong. We think she has prima facie shown an actionable wrong. That conclusion is supported by a well-defined rule. In Judson v. Giant Powder Co., 107 Cal. 549, at page 556, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146, the court quoted with approval (page 1021): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things

does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." In the instant case there was no satisfactory explanation by the defendant and therefore the judgment must stand. Haun v. Tally, 40 Cal.App. 585, 181 P. 81.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

RODMAN v. SUPERIOR COURT IN AND FOR NEVADA COUNTY et al. *

Civ. 6131.

District Court of Appeal, Third District, California.

Aug. 23, 1938.

Hearing Granted by Supreme Court Oct. 21, 1938.

1. Certiorari 🔑29

A writ of review is not the proper means of attacking an order where court's act is not in excess of court's jurisdiction, regardless of whether such act was erroneous.

2. Criminal law 🔑1011

An order directing that money deposited as bail by defendant's friend be applied toward the payment of a fine was not reviewable by writ of review, where court had jurisdiction of the person and of the offense for which defendant was held. Pen.Code, § 1297.

3. Criminal law 🔑1011

Where court has power to act in criminal proceeding, it has power to determine wrongly as well as correctly, and mere error in exercise of its power is not reviewable on certiorari.

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Petition by Eli Rodman against the Superior Court of the State of California in and for the County of Nevada, and others to review an order of the Superior Court directing the application of certain money deposited as bail toward the payment of a fine.

Order of trial court affirmed.

George R. Andersen, of San Francisco, for petitioner.

Vernon Stoll, Dist. Atty., of Grass Valley, for respondents.

PER CURIAM.

This is a proceeding to review an order of the Superior Court wherein it was ordered and directed that certain money on deposit as bail be applied toward the payment of a fine.

A criminal prosecution had been instituted against one C. E. Circle. Eli Rodman, petitioner herein, and a friend of Circle, in order to secure his release deposited the sum of $500 as bail, which had been previously set at that amount. Thereafter Circle was convicted and the court in pronouncing judgment, imposed a fine upon him in the sum of $600, and ordered that the clerk apply the money deposited as bail toward the payment of the fine.

It is now claimed this order was made without and in excess of the jurisdiction of the court in view of the provisions of section 1297 of the Penal Code.

[1] We do not deem it necessary to pass upon the various points raised, for we are of the opinion that petitioner has mistaken his remedy. A writ of review is not a proper means of attacking an order of the court, where the act of the court was not in excess of its jurisdiction, regardless of whether or not the act of the court may be erroneous. Karry et al. v. Superior Court, 162 Cal. 281, 282, 122 P. 475, 128 P. 760. The mere fact the court may have erred does not make its act an excess of jurisdiction.

[2, 3] There is no question but that the Superior Court had jurisdiction both of the person and of the offense for which the defendant was held. The court was also given the power of directing any deposit as bail to be applied toward the payment of any fine that might be imposed, under certain conditions set forth in the statute. Pen.Code, § 1297. Whichever course the court took, it was acting in the exercise of its jurisdiction and not in excess thereof. There is a distinction between jurisdiction and power. It had the power to act and even if the exercise

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*For subsequent opinion see 89 P.2d 109.

of that power was erroneous it was not beyond its jurisdiction, and mere error is not reviewable on certiorari.

"Where a court is invested with jurisdiction to determine the question of the guilt or innocence of one charged with a public offense, as was the police court in this case, by the filing of the complaint and by acquiring jurisdiction over the person of the defendant, its determination on the question of guilt or innocence, whether based on sufficient evidence or not, is a determination arrived at in the exercise of its jurisdiction, and, however erroneous it may be, it is not void for want of power in the court to render the decision. Invested with the jurisdiction to determine the matter, the court has the power to determine it wrongly upon the evidence as well as correctly, and, under our law, the defendant's only remedy in the event of an incorrect decision is by appeal." Roberts v. Police Court, 185 Cal. 65, 68, 195 P. 1053, 1054.

The order of the trial court is affirmed.

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28 Cal.App.2d 251

Ex parte PETRAEUS et al.

Cr. 3143.

District Court of Appeal, Second District, Division 2, California.

Aug. 24, 1938.

Habeas corpus ⚷87

Where it appeared on oral argument that questions raised in petition for writ of habeas corpus had become moot, writ would be discharged, and bond filed by petitioner would be exonerated.

Proceeding in the matter of the application of Westy Petraeus and Westy Petraeus, Jr., for a writ of habeas corpus.

Writ discharged.

W. I. Gilbert and James B. Fredericks, both of Los Angeles, for petitioner Verda Moir.

A. H. Van Cott, of Los Angeles, for respondent.

McCOMB, Justice.

At the time the above-entitled matter was called for hearing on oral argument it was made to appear to the satisfaction of the court that the questions raised in the petition for a writ of habeas corpus had become moot.

Therefore, the writ is discharged and the bond heretofore filed in this matter by petitioner is exonerated.

We concur: CRAIL, P. J.; WOOD, J.

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28 Cal.App.2d 211

SWEET et al. v. SAGER et al.

Civ. 11845.

District Court of Appeal, Second District, Division 2, California.

Aug. 22, 1938.

Rehearing Denied Sept. 6, 1938.

Hearing Denied by Supreme Court Oct. 20, 1938.

1. Trial ⚷127

In action for death of deceased who was killed when truck in which deceased was riding was struck from behind by another truck, references to insurance of codefendant brought out on cross-examination of codefendant's witness by defendant, where court at request of plaintiff instructed jury to disregard references to insurance companies, did not deprive defendant of fair trial.

2. Appeal and error ⚷216(2)

In action for death of deceased who was killed when truck in which deceased was riding was struck from behind by another truck, where defendant's cross-examination of codefendant's witness brought out certain references to insurance, instruction that, upon question of liability and damages references to insurance, insurance companies or their representatives should be wholly disregarded, was not prejudicial to defendant in absence of request for more specific instruction.

3. Automobiles ⚷245(60)

In action for death of deceased who was killed when truck in which deceased was riding was struck from behind by another truck, question of proximate cause of collision was for the jury.

4. Death ⚷99(4)

$8,000 for death of man 52 years of age, who left wife and three children, two of whom were minors, *held* not excessive.

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Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Edward F. Sweet and another, minors, by Mary J. Sweet, their guardian ad litem, and others, against Victor Sager and others for the death of Walter S. Sweet, who was killed in a collision between a truck driven by Harry Thole and a truck driven by first-named defendant. From an adverse judgment, Harry Thole appeals.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for respondents.

Percy C. Heckendorf, Dist. Atty., and Coleman E. Stewart, both of Santa Barbara (Fred J. Goble, of Santa Maria, of counsel), for appellant.

WOOD, Justice.

This action was commenced by the heirs of Walter S. Sweet to recover damages resulting from his death, which occurred when a truck driven by defendant Thole collided with a truck driven by defendant Sager near the city limits of Santa Maria. The jury rendered a verdict in favor of plaintiffs against Sager and his employers and also against defendant Thole and the County of Santa Barbara. A judgment was entered in accordance with the verdict, but the trial court set aside the verdict as against the County of Santa Barbara. Defendant Thole prosecutes this appeal from the judgment. There is also a purported appeal by Thole from the order denying a motion for a new trial.

In the morning of March 20, 1937, defendant Thole, an employee of the County of Santa Barbara, was driving a truck owned by the county in a southerly direction on South Broadway. He was transporting a number of State Emergency Relief Act workers to their place of employment. Testimony was received showing that when Thole reached a point about fifteen or twenty feet north of the northerly line of the intersection of Broadway and Stowell road he made a diagonal turn to his left, cutting the corner, and without giving a signal of his intention to make the turn. Defendant Sager's truck, coming from behind, ran into the Thole truck and turned it over, causing the deaths of Mr. Sweet and another workman, Innocente Corral. An action on behalf of the heirs of Mr. Corral was brought to trial and an appeal from the judgment in that case was determined by this court on March 14, 1938. Corral v. Sager et al., Cal.App., 77 P.2d 303.

Appellant contends that he was deprived of a fair trial for the reason that it was shown in evidence that an insurance company was interested in the outcome of the trial. The deposition of the witness Ferreira was taken at San Jose on behalf of defendant Sager and his employers. The witness was asked by attorney Stewart, who represented defendants Thole and the County of Santa Barbara, the following question: "Did you talk to anyone else after the accident before you came up to give your deposition here this morning?" To this question the witness answered: "No, I have talked to this insurance man, told us if we wanted to have, come down here for this try out, ask these questions, so we told him we'd like to do it if we had the time to do it. We couldn't put ourselves out very much in our time, because kind of busy this time of the year." This deposition was read in evidence. During the trial the chief of police of Santa Maria, L. M. McCandless, was presented as a witness on behalf of defendant Sager and his employers. He testified that shortly after the accident he inspected the mechanical arm signal on the Thole truck. On cross-examination by Mr. Stewart the witness was asked: "How did it come you went over to the county yard about eight hours later?" The witness replied: "There was a gentleman came into my office whom I had seen earlier in the day, that claimed he was an insurance man and asked if I would go over with him and Mr. Sager and look at this particular part of the truck." Later counsel for Sager and his employer stipulated that the insurance agent referred to by Mr. McCandless was an insurance agent representing the employers of Sager. When these references to an insurance agent were made counsel for plaintiff promptly asked the court to instruct the jury to disregard every statement that had been made with reference to insurance. During the course of their deliberation the jury returned to the courtroom for instructions as to the form of the verdict, at which time juror Allen asked: "Who paid the insurance in the last case,—I mean the damages, the amount that the woman got?" To this the court replied in part: "No insurance company is a party defendant in this action. In your deliberations upon the question of liability of any of the defendants and upon the question of the amount of damages, if any, to be assessed, you will wholly disregard any reference made by any counsel or witness, during the progress of this trial, to insurance, insurance companies or their representatives."

[1] It will be noted that the matter of insurance was brought out incidentally upon cross-examination by counsel for defendant Thole of the witnesses of the other defendants. No reference whatever was made to any insurance which may have been carried by defendant Thole, the only party now appealing. Counsel for plaintiffs took no part in the questioning which brought out the references to insurance but he promptly asked the court to disregard all such references. A similar situation was presented in De Martini v. Wheatley, 126 Cal.App. 230, 14 P.2d 869. In that case a controversy concerning insurance arose between the attorneys representing the respective defendants but the attorney for the plaintiff took no part in the controversy. The reviewing court refused to reverse the judgment. In view of the admonition by the court, appellant has not shown that the trial was not fair as to him by reason of the question of the juror Allen. In Maggart v. Bell, 116 Cal.App. 306, 2 P.2d 516, a juror interrupted the proceedings of the trial to ask the question: "Are you fully covered against accident insurance?" (page 517.) The court promptly told the juror that the question was improper. The reviewing court refused to set aside the judgment.

[2] Appellant argues that the instruction given to the jury on the subject of references to insurance was erroneous; that the instruction "precludes the jury from considering the intervention of the insurance agent and the part he played in procuring such testimony". We fail to see how appellant could have been prejudiced by the instruction given to the jury. Moreover, if he wished to have the jury given more specific instructions he should have requested the court to give them. Peluso v. City Taxi Co., 41 Cal.App. 297, 182 P. 808.

[3] Appellant contends that the evidence shows that the collision was caused by the negligence of defendant Sager only. There is no merit in this contention. The question of the proximate cause of the collision was properly left to the determination of the jurors, who found upon substantial evidence that the negligence of both drivers caused the collision.

[4] Appellant finally contends that the amount of the verdict is excessive. The decedent was fifty-two years of age and left a wife and three children, two of whom were minors. The verdict was for $8,000. The contention is so devoid of merit that discussion would be inappropriate.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

We concur: CRAIL, P. J.; McCOMB, J.

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28 Cal.App.2d 232

PEOPLE v. KINNEY.

Cr. 1633.

District Court of Appeal, Third District, California.

Aug. 23, 1938.

1. Automobiles 🔑355(8)

Evidence which showed that woman guest of accused was seriously injured in automobile accident, and that accused having obtained help at 4 o'clock in the morning was driven together with unconscious woman guest to hospital in which accused under assumed name received treatment, telling attendants that he had fallen downstairs and that unconscious woman left outside in his automobile was drunk, and accused took unconscious guest home, where another person called physician who arrived at 8:30 finding guest suffering from compound fracture of wrist, concussion of brain, and other serious injuries, sustained conviction of failure to make arrangements for the carrying of guest to a physician, surgeon, or hospital for medical treatment; it being apparent that treatment was necessary. St.1935, p. 171, § 482.

2. Automobiles 🔑336

The statute requiring the rendering of assistance to one who is injured by an automobile does not limit the performance of such acts to the drivers of automobiles which strike and injure a pedestrian, or which are involved in collision with other vehicles, but includes all machines which are involved in accidents of any nature whatever in which another individual is injured or killed. St.1935, pp. 170, 171, §§ 480, 482(a).

3. Automobiles 🔑336

The statute requiring the rendering of assistance to one who is injured by an automobile does not exclude the necessity of rendering reasonable assistance in providing for medical care for a person who is apparently seriously injured while riding as a guest of the driver when his automobile is involved in an accident. St.1935, p. 171, § 482.

4. Automobiles 🔑357

Where indictment charged accused with failing to render reasonable assistance for the carrying of an automobile guest to a physician, surgeon, or hospital for medical or surgical treatment, it being apparent that such treatment was necessary and case was tried on such theory, and other offenses under statute relating to rendering of assistance to one who was injured by an automobile were not involved in the indictment or trial, court's charge covering every essential element of offense charged, but not requiring consideration of other possible offenses, was not error. St.1935, p. 171, § 482.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

John Kinney was convicted of failing to render reasonable assistance to a guest who was injured while riding in his automobile, and he appeals.

Affirmed.

Raymond T. Coughlin, Robert A. Zarick, and Thomas O'Hara, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted of failing to render reasonable assistance to a guest who was injured while riding in his automobile when the machine ran over an embankment. He was indicted and prosecuted under the provisions of section 482 of the Vehicle Code of California, St.1935, p. 171.

It is contended the verdict and judgment are not supported by the evidence; that the statute applies only to the driver of an automobile which injures a person in a collision with another machine or which strikes and injures a pedestrian. It is also asserted the court erred in instructing the jury, and that, since the statute provides for different offenses, it must appear that the jurors were unanimous in convicting the accused of a particular crime contained therein.

The defendant was a member of the Sacramento fire department. He answered a false alarm which occurred at two o'clock on the morning of January 25, 1938. Patricia Michael and her sister-in-law, Emeline Williams, who lived together, heard the alarm and went in search of the fire. The defendant met them and went to their apartment, where he persuaded Mrs. Michael to go for a drink and a ride in his automobile. In attempting to make a sharp turn at a high rate of speed onto the Garden Highway beyond the city limits, the defendant lost control of his machine and it plunged over the levee embankment and overturned, demolishing the car, inflicting slight wounds to the defendant's ear and scalp and fatally injuring his companion. She was rendered unconscious, but was still living. He extricated himself from the wreck. About four o'clock that morning he knocked at the door of Manuel Costa, who lives in that locality, saying he had had an automobile accident, and asked him for assistance. Together they drove Costa's machine to the scene of the accident, where they found Patricia Michael unconscious and crumpled down between the front seat and the instrument board. They lifted her out and took her in Mr. Costa's automobile to the apartment of her sister-in-law. When they arrived, Mr. Costa discovered that Mrs. Michael had a broken wrist and he observed her serious condition. He then urged the defendant to take the injured woman to a hospital for medical treatment. She was transferred from the

Costa machine to the rear seat of Mrs. Williams' car. Costa then went home. The defendant and Mrs. Williams drove with Patricia Michael to the Sacramento emergency hospital. During that journey Mrs. Williams sat in the rear seat supporting the unconscious form of her sister-in-law. On the way to the hospital, the defendant said he intended to represent himself to the attendants as James Madsen, so as to avoid notoriety on account of his position in the fire department. He did introduce himself to them under that fictitious name.

When the defendant arrived at the hospital, he parked the car at the front entrance, and saying, concerning Mrs. Michael, "she is all right", he left the ladies in the car and entered the hospital alone, requesting medical aid for himself only. He did not mention the fact that he had been involved in an automobile accident, nor did he inform the doctor or attendants he had left an injured companion in his car outside the door. He was treated for slight abrasions of an ear and scalp and then returned to the automobile.

Doctor Saeltzer, the attending surgeon at the emergency hospital, testified that the defendant arrived at that institution at 6:30 a. m. and gave his name as James Madsen; that he said he was slightly injured as a result of falling downstairs; that he did not mention an automobile accident, nor inform him of the injuries sustained by his companion; that he did not say anyone accompanied him to the hospital or remained in his car. The witness said the defendant did not seem to be dazed, but on the contrary appeared to be perfectly rational.

Amy Grau, a nurse at the hospital, corroborated Doctor Saeltzer in all the material circumstances of the affair to which he testified.

While the defendant was receiving treatment for his lacerations, in accordance with the rules of the hospital an officer was summoned to obtain the facts from which a required report of the accident might be made. In response to their message, John Sumner arrived and interviewed the defendant. He testified that the defendant gave his name as James Madsen, and that he told him he had been injured as a result of falling downstairs. Learning that defendant had left associates in his car which was parked at the entrance to the hospital, Sumner went down to check his story with that of the occupants of the car. He then discovered the unconscious woman in the rear seat of the machine. Returning to the reception room, he asked the defendant what had happened to his lady friend. The defendant replied that she was drunk. Sumner asked him if he had not been involved in an automobile accident, which the defendant emphatically denied. Upon being asked if his friend did not require medical treatment, he said, "No, she is just drunk."

After his treatment the defendant returned to the automobile and drove the ladies back to their apartment. Mrs. Michael was still unconscious. She never regained consciousness. Upon reaching the apartment house, the defendant took the injured woman in his arms and started to carry her upstairs. Mrs. Williams called for assistance from Mr. Don Cooper, who lived in the same apartment house. He helped the defendant carry the unconscious woman to her room where they placed her on the bed, and Cooper assisted in removing her jacket and some of her clothing. She was carried upstairs and her garments removed with great difficulty for the reason that she was unconscious and limp and both of her arms were broken. While Patricia Michael was being prepared for bed, the defendant stood around in the room with very little to say. When Mr. Cooper asked him why he had not taken the injured woman to a physician for treatment, he replied that, "The doctor wouldn't take her in."

Mrs. Williams then told the defendant she thought they should call a doctor. The defendant did not even suggest the name of a possible available physician. He rendered absolutely no assistance in procuring the attendance of a doctor. Finally, at the defendant's request Mrs. Williams took him home in her machine. She returned immediately and promptly called Doctor Henderson, who arrived at 8:30 that morning. He found Mrs. Michael unconscious and suffering from a compound fracture of the wrist, concussion of the brain and other serious injuries. She was at once removed to the county hospital where she subsequently died as a result of her injuries.

Doctor Lipp performed an autopsy on the body of Patricia Michael, ascertaining that she suffered an abrasion over the bridge of her nose, bleeding from both ears, a fracture of the right elbow, a compound fracture of the left wrist, contusions on the hips, hands and legs and a subdural hemorrhage of the brain.

In a conversation which subsequently occurred between the defendant, Mrs. Williams, and her mother, he was asked why Patricia Michael was not taken to the hospital for medical care, to which he replied, "I didn't think she was injured, because she walked up the bank between Mr. Costa and I, and she was laughing and talking." That was an untrue statement, as were many others which he made concerning the accident.

Upon the foregoing evidence the jury rendered a verdict finding the defendant guilty as charged.

[1] There is an abundance of evidence in this case to warrant the conviction of the defendant of failing to render reasonable assistance, as required by section 482 of the Vehicle Code, to Patricia Michael who was injured while riding as a guest in his automobile. The specific offense with which the defendant was charged, and of which he was convicted, was a failure to "carry or make arrangements for the carrying of said Patricia Michael to a physician, surgeon or hospital for medical or surgical treatment, it being apparent that such treatment was necessary".

The record leaves little doubt that it was apparent from her condition after the accident occurred that Patricia Michael was seriously injured and that she required immediate medical attention. It is also evident that the defendant knew of her serious condition, or that, as a reasonable person, he should have known it and that he deliberately refrained from attempting to procure medical aid for her even though she had been taken to the very door of the emergency hospital. Not only did he fail to render necessary assistance to her, but he concealed his own identity and deliberately misrepresented her condition at the hospital and in his subsequent conversation with the mother of Mrs. Williams. The evidence adequately supports the charge of failing to render necessary assistance to a person who was injured in an automobile accident in violation of the provisions of section 482 of the Vehicle Code.

[2] It is asserted that section 482 of the Vehicle Code does not require the rendering of assistance to one who is injured by an automobile unless the accident occurs by striking a pedestrian or injuring the driver or occupant of another vehicle with which the machine collides. In other words, it is claimed the statute does not require the driver of an automobile who is involved in a casualty other than a collision or the striking of a pedestrian to render assistance to a person who is injured while riding in his machine as a guest. We are of the opinion that is too narrow a construction of the statute in question. That limitation of the application of section 482 of the Vehicle Code would defeat, to a substantial extent, the very purpose for which it was enacted. The statute evidently was intended to require the furnishing of information by the driver of any vehicle involved in an automobile accident of any kind, in which another person is injured, so as to identify the driver and fix the responsibility therefor on the culpable party. It also requires the performance of certain humanitarian acts, such as the making of arrangements for necessary medical care for the injured person. In determining the purpose of the legislature in enacting that statute, it is necessary to construe together sections 480 and 482 of the Vehicle Code, St.1935, pp. 170, 171. Section 480 provides in part:

"The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of section 482 (a) hereof * * *."

Section 482 (a) reads:

"*The driver of any vehicle involved in an accident resulting in injury to or death of any person* shall also give his name, address and the registration number of the vehicle he is driving, the name of the owner, and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver or occupants of any vehicle collided with or shall give such information and exhibit such license to any traffic or police officer at the scene of the accident *and shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.*"

Reading the portion of the preceding section which we have italicized for emphasis it will be readily seen that "the driver of *any vehicle* involved in an accident [of any sort] resulting in injury to or death of any person * * * shall render to any person injured *in such accident* reasonable assistance, including * * * the making [of] arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary". That language clearly does not limit the performance of such acts to the drivers of automobiles which strike and injure a pedestrian, or which are involved in a collision with other vehicles. It includes all machines which are involved in accidents of any nature whatever in which another individual is injured or killed. If there is any doubt regarding the purpose of the legislature to include in that section the duties required of a driver of a vehicle which is involved in any sort of accident resulting in injury or death of other individuals, whether riding as guests in the machine, walking on the highway or occupying another automobile with which a collision occurs, the title to the act amending sections 480, 481, 482, etc., of the Vehicle Code (Stats.1935, p. 2141, chap. 764) conclusively indicates that these sections were intended to have general application to all sorts of motor vehicle accidents, and were not intended to be restricted to the class of accidents only which are conceded by the appellant. The title to the act amending those sections reads:

> "An act to amend sections 480, 481, 482 * * * of the Vehicle Code * * * *relating to accidents involving motor vehicles, the duty of drivers of such vehicles to stop, render aid and give certain information* * * *."

[3] There is no merit in appellant's contention that the provisions of section 482 of the Vehicle Code, under which he was convicted, excludes the necessity of rendering reasonable assistance, by providing for medical care for a person who is seriously and apparently injured while riding as a guest of the driver when his machine is involved in an accident.

It is contended the court erred in failing to instruct the jury, on its own initiative, that section 482 of the Vehicle Code provides for several distinct offenses when the driver of a vehicle is involved in an accident in which a person is injured or killed, to-wit: (1) giving the driver's name and address and the number of his machine, (2) giving the name of the owner of the automobile, (3) exhibiting to the person injured or to the traffic officers his operator's license, when requested, and (4) rendering reasonable assistance to the injured person, including that of taking the injured person, or arranging to have her taken, to a physician, surgeon or hospital for medical care when it is apparent that such treatment is necessary, and that it was incumbent upon the jurors to all agree upon one and the same specific charge, as suggested in the cases of People v. Scofield, 203 Cal. 703, 265 P. 914, and People v. Hoenschle, 132 Cal.App. 387, 22 P.2d 777. There is no merit in that assignment of error under the circumstances of this case.

[4] The defendant was merely charged in the indictment with one distinct offense, namely, failing to render "reasonable assistance or any assistance, * * * and did not carry or make arrangements for the carrying of said Patricia Michael to a physician, surgeon or hospital for medical or surgical treatment, it being apparent that such treatment was necessary". The cause was tried on the theory that the only violation of the statute with which the defendant was charged was his failure to render reasonable assistance to procure necessary medical care for Patricia Michael. The evidence shows without conflict that there was no occasion or demand for the defendant to give to the injured person or to traffic officers his name and address or the number of his machine. Those other specific offenses included in the statute were not involved in this indictment or trial. In the court's charge the indictment was read to the jury and the jury were fully and fairly instructed regarding every essential element of failing to render reasonable assistance by providing the injured person with medical aid. The jury were not requested to consider, and had no opportunity of considering, any other offense than that of failing to furnish necessary medical assistance to the injured person. It is clear that all jurors necessarily must have agreed that the defendant was guilty of failing to render necessary assistance to Patricia Michael by omitting to provide her with medical care when it was apparent that she was then in immediate need of professional treatment for her serious injuries.

The judgment and the order are affirmed.

I concur: PULLEN, P. J.

28 Cal.App.2d 208

INTERSTATE LUMBER CO. v. TWEEDY et al.

Civ. 11830.

District Court of Appeal, Second District, Division 2, California.

Aug. 22, 1938.

1. Courts ⚿95(2)

The interpretation of a sister state's statute by highest court of such state is binding on California courts.

2. Corporations ⚿340(3)

Under Montana Supreme Court's construction of Montana statute imposing liability on directors of corporation failing to file report of corporation's condition with designated county official, directors of Montana corporation incurring debts before corporation was required to file such report were not liable on judgment subsequently obtained for such debts, notwithstanding corporation failed to file report covering year in which debts were incurred and directors did not file exempting affidavits. Rev.Codes Mont.1935, § 6003.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by the Interstate Lumber Company against James J. Tweedy and another to enforce defendants' alleged statutory liability as directors of the Tweedy Bros. Corporation on a judgment against the corporation for debts. Judgment for defendants, and plaintiff appeals.

Affirmed.

Emmett E. Doherty and Robert G. Blanchard, both of Los Angeles, for appellant.

Guthrie & Darling, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff seeks to recover from defendants upon their statutory liability as directors of a corporation under the laws of the state of Montana. The trial court sustained the demurrer of defendants without leave to amend and plaintiff has appealed from the judgment thereafter entered.

Defendants were directors of Tweedy Brothers Corporation, which was duly organized as a corporation under the laws of the state of Montana on or about June 1, 1935. The corporation became indebted to plaintiff on an open account for goods furnished between May and October of 1935 and on September 17, 1936, plaintiff obtained a judgment against the corporation for this debt.

It is provided in section 6003 of the Revised Codes of Montana that a corporation must file by March 1 of each year with a designated official of the county in which the principal place of business of the corporation is situated a report of the condition of the corporation on December 31 of the preceding year. If such report is not filed joint and several liability is imposed on the directors of the corporation "for all debts or judgments of the corporation which may thereafter be in any wise incurred until such report shall be made and filed", unless within twenty days thereafter the directors file certain exempting affidavits. The corporation of which defendants were directors failed to file the report required by the code section by March 1, 1936, and the directors failed to file the exempting affidavits.

[1] We are called upon to place an interpretation upon the Montana statute. In doing so we are bound by the established rule that the interpretation placed upon a statute of a sister state by the highest court of that state is binding upon the courts of California. Osborne v. Home Life Ins. Co., 123 Cal. 610, 56 P. 616; McGrew v. Mutual Life Insurance Co., 132 Cal. 85, 64 P. 103, 84 Am.St.Rep. 20; People v. Goddard, 84 Cal.App. 382, 258 P. 447. We are satisfied that the highest court of the state of Montana has placed upon the statute in question the interpretation for which defendants now contend.

[2] In Continental Supply Co. v. Abell et al., 95 Mont. 148, 24 P.2d 133, section 6003 of the Revised Code of Montana was discussed at length and given an interpretation which we deem conclusive in the present litigation. It was there pointed out that the purpose to be served in the filing of a report showing the assets and liabilities of a corporation is to enable those contemplating dealing with the corporation to ascertain whether or not it is a good risk. It was further pointed out that prior to the year 1907 the statutory liability was for all "debts" then existing or thereafter incurred but that the section was then amended to provide liability for "all debts or judgments". In 1927 the statute was further amended by omitting the words "then existing or". The court further pointed out that Montana is the only state

imposing liability for judgments and that (page 136), "When, therefore, the Legislature of Montana added 'judgments' to 'debts,' it intended to impose a liability other than that for judgments obtained in actions for debt, and, as a judgment in a tort action would not support enforcement of directors' liability, we have a class of judgments which, by the amendment, constitutes an added liability and explains the action of the Legislature." The court held that "the plaintiff was required to show that liability, not at the time the judgment was secured, but rather at the time the debt was incurred".

Since in the present action the debts were incurred during the year 1935, at a time when the corporation and its directors were not in default under the provisions of the section, we must hold, in line with the Montana decision just referred to, that the defendants are not liable and that the court's action in sustaining the demurrer was correct.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

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28 Cal.App.2d 767

EMERY CONSOLIDATED MINING COMPANY, Plaintiff and Appellant, v. James J. TWEEDY and Maurice Tweedy, Defendants and Respondents.

Civ. 11831.

District Court of Appeal, Second District, Division 2, California.

Aug. 22, 1938.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Emmett E. Doherty and Robert G. Blanchard, both of Los Angeles, for appellant.

Guthrie & Darling, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff seeks to recover from defendants upon their statutory liability as directors of a corporation under the laws of the state of Montana. Plaintiff has appealed from a judgment entered after the trial court sustained the defendants' demurrer without leave to amend.

The facts in the present action are the same as the facts in Interstate Lumber Co. v. Tweedy, Cal.App., 82 P.2d 208, except that the judgment entered was for mining royalties upon shipments of ore made between August 5 and November 1, 1935. The principles of law involved are identical with those involved in the case to which reference has just been made. For the reasons stated in the opinion in that case the judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

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28 Cal.App.2d 122

PEOPLE v. DARNEL et al.

Cr. 367.

District Court of Appeal, Fourth District, California.

Aug. 11, 1938.

1. Criminal law 🔑742(1)

The jury has right to accept or reject testimony as given by the respective witnesses for the accused and the prosecution.

2. Burglary 🔑41(1)

Evidence *held* to sustain conviction of burglary in the second degree.

3. Burglary 🔑42(1)

Where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in the possession of a person who gives a false account or refuses to give any account of the manner in which he came into possession, proof of the possession and guilty conduct is presumptive evidence not only that the party stole the goods but that he made use of means by which access to them was obtained.

4. Criminal law 🔑406(5)

Where prior conviction of a felony charged in the information, was denied by an accused, evidence of any admission made by such accused as to a prior conviction was admissible.

5. Criminal law ⚿1169(5)

In prosecution of two defendants, one of whom admitted a previous conviction of a felony which was charged in the information, and one of whom denied a previous conviction charged against him, an erroneous reference to the admitted prior conviction by a witness in response to question propounded by the district attorney as to a conversation had between the witness and the defendant who did not admit the prior conviction which was charged, did not require reversal where the error was accidental, the witness corrected his testimony when he discovered his mistake, and the court admonished the jury to disregard the erroneous testimony.

6. Criminal law ⚿1144(15)

The District Court of Appeal would assume that the jury followed the admonition of the trial court and disregarded testimony which was stricken.

◆

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

John Darnel, alias Homer Clark, and Sherman Shaw, alias Bill Shaw, were convicted of burglary in the second degree, and defendants appeal.

Affirmed.

Albert D. Trujello, of San Bernardino, for appellants.

U. S. Webb, Atty. Gen., and Warner Praul, Deputy Atty. Gen., for the People.

GORDON THOMPSON, Justice pro tem.

The defendants were convicted by a jury of eight counts of burglary in the second degree and have appealed from the judgments and from the orders denying their motions for a new trial.

A general store, known as the Tatum General Store, in the town of Nuevo, Riverside county, was entered on the 19th day of November, 1937. The cash register was opened, with about $25 in small change missing. In addition to the cash, there were about 18 cartons of cigarettes missing.

On December 5, 1937, the Greyhound Service Station in Perris, Riverside county, was burglarized and about $6 or $8 in small change taken. There was also a screwdriver and a pair of pliers missing.

The Texaco Service Station in Perris, Riverside county, was entered on December 12, 1937, and approximately $2 in change and five cartons of cigarettes were missing.

December 18, 1937, Small's Grocery Store in Perris, was entered and approximately $5 was removed from the cash register. Cigarettes and groceries were also found missing.

An establishment known as the Sandwich Shack, in Perris, was entered on December 18, 1937. A cigarette machine had been broken open and some cigarettes removed. There was also ice cream and milk missing.

Burhan's Grocery Store, in the town of Murrieta, was burglarized on December 27, 1937, and approximately $16 in small change was taken. There was also a considerable amount of dry goods, consisting of hosiery, shoes and overalls, which had disappeared. Some watches were also taken at the same time.

On January 11, 1938, Wilson's Grocery Store, situated in the town of Moreno, was burglarized and the cash register containing $25 in small change was missing.

[1, 2] Appellants urge all of the statutory grounds for a reversal of their convictions, but particularly urge that the verdicts are contrary to the evidence. It is contended by appellant Shaw that the testimony given on each of the several counts does not prove other than mere suspicion and that it would have been impossible for him to have committed or aided in the commission of the offenses charged, in that he was in the state of Texas at the time the Tatum General Store was burglarized. Appellant Shaw introduced testimony to prove that he did not leave Texas until November 23, 1937, four days after the Tatum burglary. The witness so testifying was appellant Shaw's stepfather. He testified that he lived in a tourist camp at Odessa, Texas; that Bill Shaw came there about November 5th or 6th, and stayed with him until November 23d, and that he himself remained there until January 2, 1938, when he came to California. He was positive that Shaw had remained in Odessa, Texas, until November 23, 1937, although on cross-examination he testified that he, the witness, left the tourist camp

at Odessa, Texas, on November 21, 1937, and went to Hobbs, New Mexico. It would seem from this testimony that he was in no position to know when Shaw left Texas. The jury apparently discounted his testimony. The People, however, introduced testimony that the appellants were seen together at a vineyard about five miles from Perris, during the months of November, December and January. There was also testimony that appellants were seen together in November and December in the vicinity of the Greyhound Service Station, and in the localities where the other burglaries were committed. The jury apparently rejected the testimony of the appellants' witnesses and accepted that of the witnesses for the People. There was also other evidence introduced at the trial, that the appellant Shaw was elsewhere at the time of the commission of the other offenses charged in the information, and this was likewise rejected by the jury. The jury had a right to accept or reject the testimony as given by the respective witnesses and, having chosen to believe the People's witnesses, found against the appellant Shaw on his defense of alibi.

A witness for the People testified that on the morning of January 16th he was delivering papers in the vicinity of Nuevo; that he noticed a Ford coupe traveling ahead of him without any lights; that a few minutes later the Ford coupe turned north and that the lights had been turned on. A photograph of Darnel's Ford coupe was shown to this witness and identified by him as being similar to the coupe seen by him. The place where this car was seen was near a culvert about three miles from Moreno. The missing cash register from the Moreno store was found in this culvert. Footprints and tracks were also discovered in the vicinity of this culvert. These tracks were measured and were found to be about 11½ inches long. Automobile tracks in this vicinity were also measured and compared with the tires on the car belonging to appellant Darnel. This comparison disclosed that the tire marks fitted exactly.

Footprints found in the vicinity of the Hamre Grocery Store at Hemet showed one pair of shoes to be fairly new and measured 11½ inches long. These were compared with the shoes in appellants' possession and found to correspond. Similar tracks were discovered near the Sandwich Shack and Small's Grocery Store. These tracks all corresponded with the shoe received in evidence.

During the imprisonment of the appellants in the San Bernardino jail, measurements were made of their shoes. The shoe of appellant Darnel was 11½ inches long, and the appellant Shaw's shoe measured 12 inches. The evidence further established that there were some 12-inch tracks found at the Hamre store.

In monetary transactions effected by them during November, December and January, small change was used in the same denominations as was taken from the various stores.

Tools found in Darnel's car were used in effecting entrance to several of the stores. A tire wrench found in the car exactly fitted an impression on the transom of Tatum's store.

There was evidence presented which established that on the 23d of January, 1938, appellants rented a cottage at 525 East Cardiff street, San Bernardino. A cot was placed in the kitchen for occupancy by appellant Shaw. Subsequent to the arrest of appellants, deputy sheriffs went to the address at San Bernardino and discovered numerous articles of merchandise which had been stolen from the various stores. Certain tire irons and wrenches were also found in the Ford coupe belonging to appellant Darnel, which were fitted into the various marks and impressions made when the doors of the several stores were forced. These tools were used in accomplishing the burglaries.

Quantities of merchandise, identified as having come from the various stores, were found in the possession of the appellants at the place where they were living.

[3] It is settled law in this state:

"That where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came in their possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of means by which access to them was obtained." People v. Lang, 142 Cal. 482, 76 P. 232, 233.

Neither appellant took the witness stand nor made any explanation of their possession of the stolen property. During a conversation with appellant Shaw as to where the merchandise had come from, he stated, "He would not dare to tell if he wanted to live."

From the foregoing evidence adduced at the trial, it is apparent that the evidence was sufficient to support the conviction. There was a sharp conflict in the testimony, which was resolved in favor of the People. The circumstances, when considered together, point directly to the guilt of the appellants.

Appellants further contend that the trial court committed prejudicial error in receiving evidence of an admission of appellant Shaw. During the trial of this case a deputy sheriff was called as a witness for the People. He was asked to relate a conversation had with appellant Darnel as to whether he had ever been convicted of a felony. In relating the conversation, the witness confused Shaw with Darnel and testified to a conversation had with Shaw instead of Darnel. Appellant Darnel had entered a plea of not guilty to the prior conviction charged in the information. Appellant Shaw had admitted those charged against him. The trial court had stricken from the record the conversation the witness had with appellant Shaw and the jury was admonished to disregard this testimony. Because of this error, appellants urge that their rights were prejudiced by reference to this prior conviction of Shaw, which was admitted at the time of plea.

[4] At the time of plea, appellant Darnel denied a prior conviction of a felony and because of this denial it was proper for the prosecution to introduce in evidence any admission made by him as to a prior conviction.

The question here presented is: "Were the rights of the appellants prejudiced by reference to a prior conviction admitted by appellant Shaw, which was alluded to by the witness in response to a question propounded by the district attorney as to a conversation had with appellant Darnel?"

[5, 6] We think not. This confusion on the part of the witness was simply a mistake and misunderstanding on his part, for which neither counsel was to blame. As soon as he discovered his error, the witness corrected his testimony and the trial judge struck out his former evidence and admonished the jury to disregard it. We must assume that the jury followed the admonition of the court and disregarded the testimony stricken out. In the case of People v. Mock Don Yuen, 67 Cal.App. 597, 227 P. 948, the court held that where the District Attorney, in the cross-examination of a defendant, made an inadvertent reference to a prior conviction, the defendant's rights could not have been prejudiced, after the court's admonition to the jury to disregard the reference.

The error which appears was accidental and was cured by the court's admonition to the jury. Under these circumstances, the error was not sufficiently prejudicial to justify a reversal.

The judgments and the orders denying motions for a new trial are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 164

DIERSSEN et al. v. McCORMACK et al.

Civ. 10841.

District Court of Appeal, First District, Division 2, California.

Aug. 19, 1938.

Rehearing Denied Sept. 17, 1938.

Hearing Denied by Supreme Court Oct. 17, 1938.

1. Appeal and error 🔑907(3)

Where appeal is taken upon the judgment roll alone, it must be assumed that there was ample evidence to sustain the findings.

2. Waters and water courses 🔑156(7)

Where servient owner granted to dominant owner a perpetual right of way over servient owner's land for purpose of maintaining irrigation ditch, reserving to servient owner the right to use entire flow of water on 10 fixed days in each month, "for the irrigation of said lands of" the servient owner, servient owner was not prevented from using the water on lands other than his own on the 10 fixed days. Civ.Code, § 1069.

3. Easements 🔑38

Every incident of ownership which is not inconsistent with an easement and the enjoyment of the easement is reserved to the grantor of the easement. Civ.Code, § 1069.

4. Easements ⚿38

The owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of an existing easement. Civ.Code, § 1069.

5. Easements ⚿42

A grant of an easement should ordinarily not be held to be enlarged by reason of the wording of a reservation therein except where the intention so to enlarge the grant clearly appears from a reading of the entire instrument. Civ.Code, § 1069.

6. Waters and water courses ⚿158½(2)

In dominant owner's suit to enjoin use of water, court's findings and conclusions that third party had the right to divert and use the water of irrigation ditch on days on which servient owner had right to use entire flow of water, by reason of permission from servient owner, and that no rights of dominant owner who had right of way over servient owner's land for purpose of maintaining the ditch were violated by such diversion, were consistent with findings and conclusions that dominant and servient owners had entered into an agreement whereby dominant owner acquired right of way, and which reserved to servient owner the right to use the entire flow of water on fixed days "for the irrigation of said lands of" servient owner. Civ.Code, § 1069.

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Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Suit by Norman E. Dierssen and others against Thomas H. McCormack and others to enjoin defendants from diverting water from an irrigation ditch, and to recover damages. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Grove J. Fink and Garton D. Keyston, both of San Francisco, for appellants.

Downey Brand & Seymour and F. R. Pierce, all of Sacramento, for respondents.

SPENCE, Justice.

Plaintiffs sought to enjoin defendants from diverting water from a certain irrigation ditch and to recover damages. The cause was tried by the court sitting without a jury and from a judgment in favor of defendants, plaintiffs appeal upon the judgment roll. The plaintiffs may be hereinafter referred to as the Dierssens; the defendants Thomas H. McCormack and Clara H. McCormack as the McCormacks; and the defendants Isador Schad and Augusta Schad, as the Schads.

The parties are adjoining property owners on Sherman Island. All of the properties front on the north bank of the San Joaquin river at a point where said river forms a large arc, running in a general southwesterly direction. The Dierssen and Schad properties were formerly one tract held by the Dierssens and Schads as tenants in common. Said tract was roughly triangular in shape with the river forming the hypotenuse thereof. The McCormack tract was roughly rectangular in shape and adjoined the Dierssen and Schad property on the west, the common boundary line running approximately north and south. In 1916, the Dierssens and Schads partitioned their lands by agreement, the Dierssens taking the northerly two-thirds thereof and the Schads taking the southerly one-third thereof. The line dividing their respective portions ran in a northwesterly direction from a point on the river to a point on the common boundary with the lands of the McCormacks.

The ditch, which is the subject of this controversy, constitutes the enlargement and extension of a previously existing ditch, which last mentioned ditch was, for the most part, situated in what is known as Gavigan Slough. Said slough was formerly a natural watercourse but since the development of the levees on the river, and the reclamation of Sherman Island, said slough has been cut off from the river. It has been dry except during the rainy season. The trial court found that the slough extended "from the San Joaquin river to a point near the boundary line between the lands of defendants Schad and McCormack, thence northwesterly through and across the lands of Schad and McCormack and thence northeasterly through the lands of plaintiffs." With respect to the previously existing ditch to which reference has been made, the trial court found that for the purpose of bringing water therein for irrigation purposes, "defendants and their predecessors in interest for many years prior to the commencement of this action, constructed and thereafter used, maintained and operated", (a) a siphon and pipes for the purpose of diverting water from the river into the slough, (b) an irrigation ditch in the channel of said slough for "the entire length thereof excepting for portions thereof where said ditch follows the boundary line between the lands of defendants Schad and

McCormack, and which said ditch and the channel of said slough were so maintained and operated for the purpose of carrying water therein and to subirrigate the lands of defendants; and (c) lateral ditches leading from said irrigation ditch across the lands of said defendants and each and all of them for the purpose of diverting waters from said ditch onto said lands of defendants for surface irrigation". It was further found that prior to October 17, 1916, the date of the partition above mentioned, "the rights in and to said irrigation system were owned, used, enjoyed and possessed jointly by said defendants Schad, said plaintiffs and the predecessors in interest of said defendants McCormack".

The enlarged ditch was subsequently developed under an agreement between the Dierssens and the Schads. The trial court found with respect thereto that between 1916 and 1920, "plaintiffs, and defendants Schad did construct said irrigation ditch by enlarging, altering and lengthening said slough ditch; that said ditch as so enlarged lies in part along the same course and is a part of the irrigation system hereinabove referred to, being partially along and across the lands of defendants Schad and partially along, and immediately adjacent to, the boundary between said lands and the lands of defendants McCormack, and thence over and across plaintiffs' lands. That after the construction of said ditch, to wit, on or about the spring of the year 1920, plaintiffs and defendants Isador and Augusta Schad, and (from and after the spring of 1923) the defendants McCormack and each and all of them, commenced to use said ditch, and thereafter and ever since said time have continued to use the same for the purposes at the times and in the manner as hereinafter set forth. That the use of said ditch by said defendants McCormack, and each and both of them, has at all times been with the full permission and consent of defendants Schad and each and both of them."

The agreement, under which said enlarged ditch was constructed and maintained, was entered into between the Dierssens and the Schads immediately after the partition of their lands in 1916. The Schads thereby granted to the Dierssens a perpetual right of way over their lands for said purpose. Said agreement was included in the findings of the trial court. The right of way is described therein and the obligations of the Dierssens and the Schads with respect to the construction and maintenance thereof is set forth in detail. Then follows a clause reading, "Reserving to the party of the first part, said Isador Schad, his heirs, executors and assigns, the right and privilege of using said ditch and siphon for the entire distance the same shall traverse the lands of said party of the first part, and to withdraw water therefrom for the irrigation of the lands of said Isador Schad as herein provided for."

With respect to the use of the water in the ditch, it was provided, "Said party of the first part, Isador Schad, his heirs, executors and assigns, shall have the entire flow of water in said ditch flowing through the first two siphons installed for supplying water to this ditch and all water can flow through said first two siphons for ten full days in each month, to-wit: on the 1st, 4th, 7th, 10th, 13th, 16th, 19th, 22nd, 25th and 28th day of each month. The parties of the second part, their heirs, executors and assigns, shall have the entire flow of all water in said ditch for all the remaining days in said month; also such further water as shall flow in said ditch on the ten days specifically mentioned above which shall be conveyed to said ditch either by a third siphon to be installed by said parties of the second part, their heirs, executors and assigns, or by any pumping plant which shall be installed by said parties of the second part, of both, provided, however, nothing herein shall be construed to mean that said Isador Schad shall have less water than hereinabove provided for and allotted to him on said ten days specifically above mentioned."

It will be noted that the Schads and Dierssens were the parties to said agreement and that the McCormacks were not. No third siphon or pumping plant was ever installed by the Dierssens as provided in the last above quoted provisions of the agreement and the parties have therefore referred to the ten days of each month specified above as the Schad days and to the remaining days as the Dierssen days.

[1] This action was filed in 1933. It was alleged that "on May 23, 1931 and on divers other dates before and after May 23, 1931" defendants had diverted water from the ditch. This allegation was specifically directed at one of the Dierssen days and was not specifically directed at any other particular day, whether a Schad day or a Dierssen day. The trial court found that it was not true that defendants

or any of them had diverted water on said May 23, 1931 but that they had diverted water on the Schad days "and not otherwise". Appellants state in their briefs that there is no finding "which says that respondents McCormack restricted their use of the water to the Schad days". This statement is incorrect as the trial court not only made the findings last mentioned but also found "that it is not true that defendants, or any of them, have performed any of the acts in said complaint complained save to the extent and in the manner hereinabove set forth". Said findings were responsive to all of the issues made by the pleadings as to the days upon which respondents diverted the water and, as this is an appeal upon the judgment roll alone, it must be assumed that there was ample evidence to sustain said findings.

The position of appellants is summarized in their reply brief where they state that they complain of "the use by the respondents McCormack on their land on any days (whether Schad days or Dierssen days) of water from the irrigation system constructed pursuant to the agreement above referred to". As the findings were against appellants as to any use of the water by any of the respondents on the Dierssen days, and as they concede the right of Schads, under the agreement, to the use of the water on the Schad days, the question here is confined to whether the findings show that any right of appellants was violated by the use of the water by the McCormacks on the Schad days.

Before passing to a consideration of the specific contentions of appellants, it should be stated that the trial court found and concluded that no right of appellants had been violated. It found that the Schads, as owner of the land and under the terms of the agreement, had the right to permit the diversion and use of said water from said ditch on the McCormack lands on the Schad days and that the diversion and use of said water by said McCormacks was with the permission and consent of the Schads. It further found that the use made by the McCormacks of the water from the ditch did not result in any damage to appellants, but, on the contrary, was of benefit to appellants by affording them irrigation to certain high lands adjacent to one of the laterals.

Appellants contend that "the agreement is inconsistent with the findings" and that "the findings are inconsistent and irreconcilable requiring a reversal of the judgment". Respondents take the position that there is no inconsistency in the findings; that McCormacks had the right to use the ditch by reason of the ownership and use of the original irrigation system; that McCormacks had the right to use the ditch on the Schad days by reason of the permission from the Schads; that no rights of appellants have been violated; and that even if appellants had any rights which were violated, such rights have long since been taken adversely. These and other points are raised by respondents in support of the judgment but it does not appear to be necessary to discuss all of them.

Appellants concede that their rights are to be measured by the terms of their agreement with the Schads. It is by reason of the incorporation of this agreement into the findings, that appellants contend that the findings are inconsistent and irreconcilable. We are of the opinion that appellants' claim respecting the effect of said agreement may not be sustained and that their claim that the findings are inconsistent and irreconcilable is without merit. In view of the conclusions which we have reached, it appears proper under the findings before us to confine our discussion to the effect of said agreement and to the right of the McCormacks to the use of the water on the Schad days under permission from the Schads.

[2] When said agreement was entered into, the Schads were the owners of the fee simple title to the land. They thereby granted an easement to the Dierssens. A reservation was contained in said grant and it is upon the wording of said reservations that appellants place their greatest reliance. Said wording is set forth above together with other provisions of the agreement. Appellants take the position that under said agreement, the right of the Schads extended only to the use of the water upon the Schad days and then only to the use thereof upon the Schad lands. In other words, they claim that the effect of the use of the words "for the irrigation of the said lands of said Isador Schad", as contained in the reservation was to place a limitation upon the rights of the Schads, which limitation prevented them from permitting the use of the water on other lands even on the Schad days. Taking the agreement by its four corners and giving consideration to the fact that these words were contained in a reservation by the owners of the fee who were

making the grant, we do not believe that appellants' position is tenable.

[3-6] The law is jealous of the claim of an easement (19 Cor.Jur. 958) and likewise of the extent of the rights claimed under an instrument granting an easement. The rule is that every incident of ownership not inconsistent with the easement and the enjoyment of the same, is reserved to the grantor. Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 P. 1053, 13 L.R.A.,N.S., 904; Hoyt v. Hart, 149 Cal. 722, 87 P. 569; Galletly v. Bockius, 1 Cal.App. 724, 82 P. 1109. As was said in Hoyt v. Hart, supra, at page 728, 87 P. at page 571, "It is well settled, as a general proposition, that the owner of the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement." This principle is consonant with the statutory provision that "a reservation in any grant, * * * is to be interpreted in favor of the grantor". Civ.Code, sec. 1069. We are therefore of the opinion that the reservation in the grant before us should not be construed to limit the place of use of the water by the grantors on the Schad days as ordinarily a grant should not be held to be enlarged by reason of the wording of a reservation. Walker v. Lillingston, 137 Cal. 401, 70 P. 282; Duross v. Singer, 224 Pa. 573, 73 A. 951; St. Joseph Valley Railway Co. v. Galligan, 120 Mich. 468, 79 N.W. 685. This rule may be qualified by stating that it should not apply where the intention to so enlarge the grant clearly appears from a reading of the entire instrument but such was not the case here. We are therefore of the opinion that the findings and conclusions of the trial court to the effect that the McCormacks had the right to divert and use the water on the Schad days as found by the court by reason of permission from the Schads and that no rights of appellants were violated by such diversion and use are entirely consistent with the findings and conclusions that the Schads and Dierssens had entered into said agreement whereby certain rights were conferred upon the Dierssens. We conclude that there is no inconsistency in the findings as claimed by appellants and that said findings sustain the judgment as entered.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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28 Cal.App.2d 215

SANDSTOE v. ATCHISON, T. & S. F. RY. CO. et al.

Civ. 11820.

District Court of Appeal, Second District, Division 2, California.

Aug. 23, 1938.

Hearing Denied by Supreme Court Oct. 20, 1938.

1. Municipal corporations 🔑767, 788(3)

If, in the exercise of its right to maintain streets, city creates a dangerous or defective condition, it is liable for injuries to persons resulting from such condition, provided city had knowledge of such condition and failed or neglected to remedy the condition for a reasonable time after acquiring such notice. St.1923, p. 675.

2. Municipal corporations 🔑821(5)

Generally, whether a given set of facts or circumstances creates a dangerous or defective condition under statute imposing liability upon city for failure to maintain streets in reasonably safe condition for use in proper manner is for the jury. St.1923, p. 675.

3. Municipal corporations 🔑798

It is the duty of a city to warn persons lawfully using a street that a dangerous condition exists if that condition was not created by the city and is beyond its control. St.1923, p. 675.

4. Evidence 🔑23(1)

It is a matter of common knowledge that traffic officials follow the practice of painting zigzag lines at places where drivers approach situations of danger.

5. Automobiles 🔑308(6)

Whether municipality should have painted zigzag line indicating approach to a dangerous situation or should have deviated line to the right at such a distance that motorists following line would avoid striking concrete obstruction in center of street at railroad crossing was a jury question.

6. Automobiles 🔑273

In automobile guest's action against city for injuries sustained in collision on foggy night with cement block foundation of wigwag signal at railroad crossing, allegations that city painted white line designating center of street and that white line passed through point whereon wigwag signal was located and that dangerous condition existed for more than year prior to accident sufficiently alleged notice to city of dangerous condition, since city created condition for which guest sought to hold it liable. St. 1923, p. 675.

7. Automobiles 🔑282

In automobile guest's action against city for injuries sustained in collision on foggy night with cement block foundation of wigwag signal maintained by railroad in center of street at railroad crossing, improper maintenance of the foundation by the railroad would not free city from liability for locating and maintaining painted line designating center of street and passing through foundation on which wigwag signal was located, thereby creating a dangerous condition. St.1923, p. 675.

8. Automobiles 🔑288

In automobile guest's action against city for injuries sustained in collision on foggy night with cement block foundation of wigwag signal maintained by railroad in center of street at railroad crossing, fact that host drove automobile so that it was one foot across white line designating center of street would not preclude recovery, where foundation extended three feet on each side of white line. St.1923, p. 675.

9. Municipal corporations 🔑703(1)

The regulation of traffic upon the streets of a city is not a municipal affair.

10. Municipal corporations 🔑812(4)

The right to sue municipality for negligence in maintenance of streets exists only by virtue of statute and Legislature may limit right by any requirement respecting giving of notice or presentation of claims which it sees fit to impose. St.1923, p. 675; St.1931, p. 2475, § 1.

11. Municipal corporations 🔑812(1)

The purpose of filing a claim against a city for negligent maintenance of streets is to enable city officials to make proper investigation concerning the merits of the claim and to settle it without the expense of a lawsuit if settlement should be shown to be proper. St.1923, p. 675; St.1931, p. 2475, § 1.

12. Municipal corporations 🔑1021

Under charter provision of city of Pasadena relating to the presentation of claims against city before bringing suit, substantial compliance with charter requirement is sufficient.

13. Automobiles 🔑293

In automobile guest's action against city for injuries sustained in collision on foggy night with cement block foundation of wigwag signal maintained by railroad at railroad crossing, allegation showing that claim was filed within 90 days after accident as provided by statute and in substantial compliance with city charter and matter was referred to city attorney and carefully investigated by city manager showed sufficient compliance with provisions relating to filing of claims. St.1923, p. 675; St.1931, p. 2475, § 1.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Bernita Sandstoe against the Atchison, Topeka & Santa Fé Railway Company, a corporation, and another for injuries sustained when an automobile in which plaintiff was riding collided with a wigwag signal placed by defendant railroad in the center of a certain street traversed by its railroad tracks. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Arthur J. Mullen, Raymond Tremaine, and Franklin L. Knox, Jr., all of Los Angeles, for appellant.

Harold P. Huls, City Atty., and Thomas W. Le Sage, Deputy City Atty., both of Pasadena, for respondent.

PER CURIAM.

Plaintiff appeals from a judgment in favor of defendant City of Pasadena in an action to recover damages for personal injuries, entered after the trial court sustained the city's demurrer to the third amended complaint without leave to amend.

According to plaintiff's allegations, she was riding as a passenger in an automobile being driven in an easterly direction on Walnut street in the City of Pasadena at 1:30 a. m. on December 24, 1937. The atmosphere was extremely foggy and the automobile collided with a wigwag signal which had been placed by defendant railroad company in the center of Walnut street near the railroad tracks which traversed the street. The wigwag signal was constructed upon a heavy cement block foundation approximately six feet square at the base and narrowing to approximately two feet square at the top, which is approximately five feet from the surface of the road. The defendant railroad company had not installed equipment to properly illuminate the cement foundation or give warning of the obstruction in the roadway so that oncoming automobiles could observe it in time to avoid striking the cement foundation under any conditions when visibility might be slightly obscured. No red lights were installed upon the foundation. The wigwag "device" was not equipped with lights which could be seen by an approaching motorist under foggy conditions for a distance in excess of ten feet. On the night of plaintiff's injuries the wigwag device, including the cement foundation, was not illuminated in any manner whatsoever so that it would be visible to one approaching from the west.

Plaintiff further alleged that defendant city had placed along the center of Walnut street a white line for the purpose of designating to motorists the center of the street and that this white line passed through the point whereon the wigwag signal was located; that the wigwag signal device and the white line thus painted had existed in this dangerous condition for more than one year before December 24, 1937.

It is further alleged in the complaint that on the night in question one Miles Jackson was driving the automobile in which plaintiff was riding easterly on Walnut street along the white line which had been placed in the center of the street by defendant city with the left front and left rear wheels of his car practically one foot on the north side of the white line for the reason that visibility was impaired due to the extremely foggy atmospheric condition; that said Jackson was attempting to avoid running into any parked unlighted automobiles; and that by reason of being unable to observe the cement foundation he drove the automobile into the signal device, resulting in plaintiff's injuries; that the collision was caused by the negligence and carelessness of the railroad company in maintaining such an obstruction in the center of the street and also by the negligence and carelessness of defendant city in placing the white line through the center of the street without having it deviate from the center of the street in order to warn oncoming motorists that it was unsafe to proceed in a straight direction along the white line.

[1, 2] Plaintiff's cause of action as against defendant city is based upon the Public Liability Act of 1923, St.1923, p. 675, which imposes the duty upon a city to maintain its streets in a reasonably safe condition for their use in a proper manner. If in the exercise of its right to maintain streets the city creates a dangerous or defective condition therein it is liable for injuries to persons resulting from such condition provided it had knowledge of such condition and failed or neglected to remedy the condition for a reasonable time after acquiring such notice. "This liability is one for negligence." George v. City of Los Angeles, Cal.Sup., 79 P.2d 723, 725. As to what constitutes a dangerous or defective condition no hard and fast rule can be applied, but each case must depend upon its own set of facts. Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643. It has been repeatedly held that as a general rule it is a question for the jury to determine whether a given set of facts or circumstances creates a dangerous or defective condition. Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Barrett v. Southern Pac. Co., 207 Cal. 154, 277 P. 481; Gerberich v. Southern Calif. Edison Co., 5 Cal.2d 46, 53 P.2d 948.

[3-5] It is the duty of a city to warn persons lawfully using the street that a dangerous condition exists even if that condition was not created by the city and is beyond its control. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365. In recent years traffic officials have followed the practice of painting white lines on highways to better regulate traffic and ensure the safety of motorists. These lines are doubtless of great assistance to drivers, especially on occasions of heavy fog when drivers frequently follow the painted lines. It is a matter of common knowledge that traffic officials follow the practice of painting zigzag lines at places where drivers approach situations of danger. It might be well argued that defendant city should have either painted the line in a zigzag course or should have deviated it to the right at such a distance that drivers following the line would avoid striking the cement obstruction. These matters clearly should be left to the determination of the triers of facts.

[6] There is no merit in defendant city's contention that it had no notice of the dangerous condition. According to the allegations of the complaint the city created the condition for which plaintiff seeks to hold it liable. Under the decisions it was not necessary for plaintiff to allege further notice. Black v. Southern Pac. Co., 124 Cal.App. 321, 12 P.2d 981; Wise v. City of Los Angeles, 9 Cal.App.2d 364, 49 P.2d 1122, 50 P.2d 1079. Therefore we need not consider the point presented by plaintiff that the dangerous condition existed a sufficient length of time to give constructive notice to the city.

[7] Counsel for defendant city argue that in order to impose liability upon the city it must be alleged that the city made or suffered to be made the "complete condition" which would constitute a dangerous or defective condition under the Public Liability Act. The fact that the railroad company may have improperly maintained the cement foundation does not free the city from liability for locating and maintaining the painted line in a dangerous manner. In Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547, the railroad commission had ordered the city to maintain a portion of a viaduct over the tracks of the railroad company and had ordered the railroad company to maintain the other portion. "The debris on the roadway over which the Hupmobile passed and the dilapidated timbers of the curbing with which the wheel of the automobile came in contact and mounted were on the portion of the viaduct to be maintained by the company and the guard rail through which the automobile crashed was on that portion to be maintained by the city under the order of the Railroad Commission." (Page 552.) In reversing a judgment of nonsuit the reviewing court said: "In our opinion, where the thing exists which is denounced by the statute, namely, the neglect to remedy a dangerous or defective condition after knowledge thereof, and it proximately causes the injury, the city is liable under the clear meaning of the law despite the existence of another and concurring cause."

[8] The argument advanced by counsel for the city that plaintiff is precluded from recovery by the conduct of Jackson in driving his car one foot north of the white line is without merit. In Barrett v. So. Pac. Co., 207 Cal. 154, 163, 277 P. 481, 485, it is stated: "At the time of the impact the right wheels of the car must have been at least 12 feet from the right-hand edge of the pavement. This position of the car on a twenty-foot highway would place the left wheels of the car very near the edge of the pavement at the left. But we think that in the absence of a vehicle approaching from the opposite direction or of an observed or observable obstruction ahead, this position of the automobile on the highway may not be said to establish negligence on the part of the plaintiff as matter of law." If Jackson had been driving with his car entirely to the right of the white line it could be well argued that the collision nevertheless would have resulted, since the cement foundation extended three feet on each side of the center line.

Counsel for defendant city argue that plaintiff may not maintain the action, for failure to comply with the requirements of the city charter of Pasadena in the matter of filing of claims against the city. In answer plaintiff contends that the act of the legislature of 1931, with the terms of which she complied, governs the situation and that in any event she did in fact make substantial compliance with the requirements of the city charter. Both of plaintiff's contentions must be sustained.

[9, 10] When it was enacted in 1923 the Public Liability Act made no provision regulating the time for filing claims against the various political units which were thereby made liable for the maintenance of dangerous or defective conditions. In 1931 the legislature enacted chapter 1167 and in section 1 it is provided: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Stats.1931, p. 2475. It has been held in many decisions that the regulation of traffic upon the streets of the city is not a municipal af-

fair. Key System Transit Co. v. City of Oakland, 124 Cal.App. 733, 742, 13 P.2d 979; Ex Parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. In Douglass v. City of Los Angeles, 5 Cal.2d, 123, 128, 53 P.2d 353, it is stated (page 355): "The important question of the liability of municipalities, counties, and school districts for the tortious acts or omissions of their servants is a matter of general state concern, and not, as contended by the plaintiff, a municipal affair. As this point is now regularly raised, we confirm the 'foreword' stated by this court in Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, that it would be an anomalous situation if a city could, by adopting a freeholders' charter, exclude itself from the operation of a general law of the state imposing a liability on municipalities generally for the negligent acts or omissions of its servants in the maintenance of the public streets, on the theory that such city is independent of general laws in municipal affairs. The question of the safety of public ways is 'a matter of state concern, and the obligation of a city to make its highways reasonably safe for general use cannot be chartered away, even though a municipality should attempt to do so'". Since the legislature has power to make regulations covering matters of state concern, as it did in enacting the Public Liability Act of 1923, it also has power to regulate the manner in which the rights given by the Public Liability Act may be enforced. This it did when it provided in 1931 that a verified claim should be presented to the clerk of the legislative body of the municipality within ninety days after the accident. Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580.

In White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 933, the plaintiff commenced an action for damages based upon the provisions of the Public Liability Act of 1923 but did not file a verified claim within the time set by the act of 1931. In declaring that the plaintiff was barred for noncompliance with the statutory provision the court referred to section 376 of the charter of the city of Los Angeles which provides that "except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six months after the occurrence from which the damages arose". The court stated (page 934): "Perusal of the foregoing provisions of the city charter and general laws demonstrates that the 90 days' period controls in the filing of claims such as the one here in question * * *." It is to be noted that the provisions of the charter of Pasadena are practically identical with the provisions contained in section 376 of the charter of the city of Los Angeles: "Except in those cases where a shorter period of time is otherwise specified by law all claims for damages against the City, or any department thereof, must be presented within six months after the occurrence * * *". (Charter of City of Pasadena, art. XI, sec. 12.)

Even under the view of defendant city's counsel that the charter provisions prevail on this point, plaintiff has shown by her complaint that she made substantial compliance with the requirements of the charter in the matter of the presentation of claims. It is provided in section 1 of article II of the charter of Pasadena that "Every demand shall be presented to the city controller and shall be numbered by him". In section 12 of article XI it is provided in part: "Any claim rejected in whole or in part by the City Controller or other officer except the legislative body of the city whose approval may be required, may be presented to the legislative body of the city within thirty (30) days after such rejection, and must be so presented before the bringing of any suit against said city or any officer, board or department thereof in his or its official capacity, and suit on any claim shall be brought within six months after the rejection of such claim in whole or in part by such legislative body". It is alleged in the complaint that plaintiff filed her verified claim in duplicate with the city clerk of Pasadena and with the city controller of Pasadena. It is further alleged: "That plaintiff was informed on or about the 31st day of March, 1937, by said Bessie Chamberlain, said city clerk of Pasadena, that her claim was presented to the board of directors of the City of Pasadena and had been referred to the city attorney of Pasadena. That said claim was rejected by the city of Pasadena. That on or about the 21st day of May, 1937, plaintiff was informed by the defendant, city of Pasadena, that on May 18, 1937, the defendant, city of Pasadena, had denied and rejected said claim in whole.

That a copy of this note is atttached hereto, marked exhibit A and by this reference made a part hereof with like force and effect as if herein set forth in full." Exhibit A is a letter dated May 21, 1937, addressed to plaintiff and signed by the city controller, in which it is stated that the city manager of Pasadena after careful investigation had rejected the claim.

[11-13] The purpose of filing a claim against the city is to enable city officials to make proper investigation concerning the merits of the claim and to settle it without the expense of a law suit if settlement should be shown to be proper. In the absence of an intention to mislead, a substantial compliance with the charter requirement is sufficient. In Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377, the court quoted with approval from Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, Ann.Cas.1916E, 720: "When, therefore, there is no evident intention to mislead, but a bona fide attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead". (28 P.2d page 379.) The court further stated: "The general rule with respect to this sort of notice of claim is that a substantial compliance with the provisions of the statute is sufficient. 19 R.C.L. 1044." Plaintiff did in effect present her claim to the legislative body of the city of Pasadena when she filed it with the city clerk. In Douglass v. City of Los Angeles, supra, it was held that a claim filed with the city clerk should be deemed to be presented to the city council. She also filed her claim with the city controller. It is argued that her claim should have been filed with the legislative body within thirty days after its rejection by the city controller and that the filing of the claim in duplicate at the same time with the clerk and controller does not satisfy the charter requirement and therefore bars the filing of the action in court. It cannot reasonably be argued that defendant city was not given full opportunity to investigate the merits of the claim. The matter was referred to the city attorney and "carefully investigated" by the city manager. The city was not misled or prejudiced in any manner by the method pursued by plaintiff in filing her claim.

The judgment is reversed and the trial court directed to overrule the demurrer.

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31 Cal.App.2d Supp. 766

HART BROS. CO. v. LOS ANGELES COUNTY.

Civ. A 4023.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 24, 1938.

1. Counties ⚷131

One who demands payment of a claim against a county must show some statute authorizing the claim, or that the claim arises from some contract, express or implied, which itself finds authority of law, and it is not sufficient that the services performed, for which payment is claimed, were beneficial to the county.

2. Counties ⚷139

The Los Angeles Municipal Court is a "county court" within statute providing that the expenses necessarily incurred for services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges. Pol.Code, § 4307, subd. 3; St.1931, p. 1699, § 22.

[Ed. Note.—For other definitions of "County Court," see Words & Phrases.]

3. Counties ⚷139

In order to come within statute providing that the expenses necessarily incurred for services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges, the services need not be performed by a county officer or any particular person. Pol. Code, § 4307, subd. 3; St.1931, p. 1699, § 22.

4. Counties ⚷139

A corporation which, at the request of the marshal of the municipal court, furnished meals and lodging and transportation to and from the lodging place for the trial jury sitting in a criminal case in the court, could recover from the county for the services, under statute providing that expenses necessarily incurred for services in relation to criminal proceedings for which no specific compensation is prescribed by law, are county charges. Pol.Code, § 4307, subd. 3.

5. Counties ⚷139
Trial ⚷297

The municipal court had power to direct the furnishing of meals, lodging and transportation to and from the lodging place for the trial jury sitting in a criminal case in the municipal court, regardless of any statutory authority, as regards county's liability for services so rendered. Pol.Code, § 4307, subd. 3; St.1931, p. 1538, § 7b; p. 1699, § 22; Pen.Code, §§ 1440, 1461a.

6. Trial ⚷297

At common law, the custom was to leave the jury without food until they agreed, thus starving them into submission.

7. Trial ⚷297

A jury is a part of the "court" for purpose of a jury trial, and the court has inherent power to provide for the jury's functioning under conditions which will favor its doing so efficiently, even to the extent of providing meals and lodging and transportation, if necessary, in cases of prolonged deliberation. St.1931, p. 1538, § 7b; p. 1699, § 22.

[Ed. Note.—For other definitions of "Court (Of Justice)," see Words & Phrases.]

8. Courts ⚷187

The municipal courts, while not directly set up by the Constitution, are named in it and their establishment is authorized by it, and they are included in its list of courts of record, and they are, therefore, entitled to the benefit of all the rules as to inherent or implied powers of courts set up by the Constitution.

9. Counties ⚷139

A corporation which, at the request of the marshal of the municipal court, furnished meals, lodging and transportation to and from the lodging place for the trial jury sitting in a criminal case in the court, was entitled to recover from the county for meals, lodging and transportation furnished to the bailiff who was in charge of the jury. Pol.Code, § 4307, subd. 3; St.1931, p. 1538, § 7b.

Appeal from Municipal Court of City of Los Angeles; Ray Brockman, Judge.

Action by the Hart Bros. Company, a corporation, against Los Angeles County to recover for meals and lodging and transportation furnished to the trial jury sitting in a criminal case in the municipal court. Judgment for plaintiff by default after demurrer overruled, and defendant appeals. Affirmed.

J. H. O'Connor, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for appellant.

Felix H. McGinnis, of Los Angeles, for respondent.

SHAW, Presiding Judge.

After defendant's demurrer to the complaint was overruled, judgment as prayed for was rendered against it by default, from which it appeals. From the complaint, it appears that plaintiff, at the request of the marshal of the municipal court of the City of Los Angeles, furnished meals and lodging and transportation to and from the lodging place for the trial jury sitting in a criminal case then on trial in said municipal court and the bailiff in charge of them, while said jury were being kept together during the progress of the trial and after their retirement for deliberation. The marshal arranged for these accommodations for the jury pursuant to an order of said court directing him so to do. The reasonable value of the accommodations so furnished was $78. Plaintiff presented its claim therefor to the Board of Supervisors of defendant, which rejected it on the ground that the county had no legal authority to pay it, and this action followed.

[1] Defendant relies on the rule, well established in this state, that "one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial." Irwin v. County of Yuba, 1898, 119 Cal. 686, 690, 52 P. 35, 37; cited and approved in California Pastoral & Agricultural Co. v. Whitson, 1900, 129 Cal. 376, 380, 62 P. 28, and Gibson v. County of Sacramento, 1918, 37 Cal.App. 523, 525, 174 P. 935. To the same effect see Los Angeles Warehouse Co. v. County of Los Angeles, 1934, 139 Cal.App. 368, 371, 33 P.2d 1058.

As statutory authority for its claim, plaintiff points to section 1136 of the Penal Code. If applicable here, that section undoubtedly settles the case in plaintiff's favor, for it provides that "While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court must direct the sheriff to provide the jury with suitable and sufficient food and lodging, or other reasonable necessities." We doubt whether this section is applicable to municipal courts. It is a part of Title 7 of Part 2 of the Penal Code. The general heading of Part 2 of that code is "Criminal Procedure." Titles 3 to 8 of that part deal primarily with proceedings in the superior court after indictment or upon information. In re Kennerly, 1923, 190 Cal. 774, 775, 776, 214 P. 857; In re Casas, 1935, 9 Cal.App. 2d 122, 123, 48 P.2d 990. In Title 11 of Part 2 is Chapter 1, headed "Proceedings in Justices' and Police Courts." Section 1461a, which has been added to this chapter since municipal courts were provided for, makes its provisions applicable to procedure in those courts, and in People v. Aymar, 1929, 98 Cal.App. 1, 3, 276 P. 595, it was declared that sections on procedure not found in Title 11 are applicable to superior courts only. On the other hand, it was held in Re Herron, 1933, 217 Cal. 400, 404, 19 P.2d 4, that section 1203 of the Penal Code, which is not in Title 11 of Part 2, but in Title 8 thereof, is, by reason of the nature of its provisions, applicable to all courts, including municipal courts. There may be other sections to which this holding would apply. We find it unnecessary, however, to decide whether section 1136 authorizes the action taken here by the municipal court, because we think that action may be upheld on other grounds.

[2-4] Plaintiff further calls attention to section 4307 of the Political Code, and particularly to subdivision 3 thereof. That section and subdivision read in part as follows: "The following are county charges: * * * 3. The expenses necessarily incurred * * * for other services in relation to criminal proceedings for which no specific compensation is prescribed by law." In cases to which this provision applies, it is a sufficient statutory authority to satisfy the rule declared in Irwin v. County of Yuba, supra, 1898, 119 Cal. 686, 690, 52 P. 35, on which defendant relies. See Gibson v. County of Sacramento, supra, 1918, 37 Cal.App. 523, 525, 174 P. 935. If we assume that this provision is by implication limited to criminal proceedings carried on in courts which are supported by the county, the Los Angeles Municipal Court is, in spite of its name, such a court, for all its expenses are paid from county funds, by the terms of section 22 of the Municipal Court Act (Deering's Gen. Laws, Act 5238), as amended by Stats. 1931, page 1699. To come within the above quoted provision of section 4307 of the Political Code, services need not be performed by a county officer or any particular person. Gibson v. County of Sacramento, supra, at page 527, 174 P. 935. In the case just cited, this provision was held to cover services rendered by an attorney appointed by the court to prosecute against a district attorney a charge of official misconduct. In Los Angeles Warehouse Co. v. County of Los Angeles, supra, 1934, 139 Cal. App. 368, 370, 373, 33 P.2d 1058, it was held to cover services rendered by the plaintiff in storing automobiles which were to be used as evidence in criminal proceedings. We see no reason to doubt that it is adequate to cover the services rendered by plaintiff here, if the municipal court had power to direct their rendition.

[5-7] We think it had such power, regardless of any statutory authority. At common law the custom seems to have been to leave the jury without food until they agreed, thus starving them into submission. See concurring opinion of Justice Sharpstein, in People v. Gray, 1882, 61 Cal. 164, 188, 44 Am.Rep. 549; 8 Cal.Jur. 382. But that course does not conform to the rule in this country that a jury shall be left free and untrammelled, to reach a verdict without any sort of compulsion. There are many cases in which it is reasonably necessary for a jury to be kept out for a longer period than that during which men and women should be expected to go without food or sleep, and such cases may arise in municipal courts as well as those of higher jurisdiction. Section 1440 of the Penal Code, which by section 1461a is expressly made applicable to municipal courts, provides that "the jury may decide in court, or may retire for consideration." Obviously a jury cannot indulge mature "consideration" in cases with involved issues and extensive evidence, without proper quarters and supplies, including lodging and food. For the purpose of a jury trial the jury is a part of the court, and the court has inherent power to provide for its functioning under conditions which will favor its doing so efficiently, even to the extent of providing meals and lodging and transportation, if necessary, in cases of prolonged deliberation. Furthermore, section 22 of the Municipal Court Act directs that the supervisors "shall provide suitable quarters for the municipal courts, and shall supply them with * * * supplies necessary for carrying out their duties * * *." It is true, the jurors in criminal cases receive fees which may be considered as compensation for their services, and while

they are permitted to remain separate and maintain themselves in such fashion as they see fit, they are expected to use these fees to provide for themselves; but when they are kept together in charge of the officer of the court they are no longer free to follow their own desires and provide for themselves and the court which prevents them from so doing has inherent power to provide for them, to the extent involved in this case, even without express statutory authority, beyond that cited, to that effect. This question seems not to have been decided in California; but the same problem has arisen elsewhere and the courts of several states have rendered decisions in accordance with the views just expressed. Lycoming County Commissioners v. Hall, 1838, 7 Watts, Pa., 290; State v. Armstrong, Auditor, 1850, 19 Ohio 116, 125; Bates v. Independence County, 1861, 23 Ark. 722; Allegany County Com'rs v. Howard County Com'rs, 1881, 57 Md. 393; Stowell v. Jackson Co., Board of Supervisors, 1885, 57 Mich. 31, 23 N.W. 557.

[8] On the general subject of implied or inherent powers of the court, Millholen v. Riley, 1930, 211 Cal. 29, 33, 293 P. 69, 71, declares that "A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation." In Brydonjack v. State Bar, 1929, 208 Cal. 439, 442, 281 P. 1018, 1020, 66 A.L.R. 1507, the court said, "the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government." Again in Nicholl v. Koster, 1910, 157 Cal. 416, 423, 108 P. 302, 305, the court said, "But if the Legislature or the Constitution should fail to provide such persons [assistants of the court], a court invested with jurisdiction would have all the powers necessary to its convenient exercise, and could appoint such assistants as might be required." The municipal courts, while not directly set up by the constitution, are named in it and their establishment is authorized by it, and they are included in its list of courts of record. They are therefore entitled to the benefit of all the rules as to inherent or implied powers stated in the cases above cited.

[9] Plaintiff's claim includes six dollars for meals, lodging and transportation furnished, while the jury were being kept together, to the bailiff who was in charge of them. Defendant does not specially object to that part of the claim, and perhaps the court could have ordered this also, under its inherent power above discussed; but the complaint does not allege that it did so. However, section 7b of the Municipal Court Act (Deering's Gen.Laws, Act 5238), as amended by Stats.1931, p. 1538, and now in force, which applies to the Los Angeles Municipal Court, provides that "the marshal and deputy marshals shall be allowed their necessary incidental expenses incurred in the performance of their duty." The marshal is the ministerial officer of the municipal court and the bailiff was his deputy. This provision of the statute supports this part of the claim.

The judgment is affirmed, respondent to recover its costs of appeal.

I concur: SCHAUER, J.

12 Cal.2d 41

PEOPLE v. EUDY et al.

Cr. 4151.

Supreme Court of California.

Aug. 24, 1938.

1. Criminal law 🔑1158(3)

In murder prosecution where, in examination of jurors, all of the answers of each prospective juror were not entirely consistent, the determination of the trial judge regarding qualification of such jurors was conclusive upon reviewing court, as against contention that accused were required to exercise peremptory challenges where challenges for cause should have been sustained. Pen.Code, §§ 1073, 1076.

2. Criminal law 🔑622(1)

Where accused are jointly charged with crime, a separate trial is not a matter of right. Pen.Code, § 1098.

3. Criminal law 🔑622(2)

Where accused are jointly charged with crime and it appears that evidence will be admissible against one of the accused which the jury cannot consider as against the others, the law does not require separate trials upon demand therefor. Pen.Code, § 1098.

4. Homicide 🔑179

In prosecution of five convicts for murder of prison warden, where convicts had acted together in attacking prison officers, what was said and done at the time was evidence to be considered in determining the sanity of each of the convicts.

5. Criminal law 🔑622(1)

The determination whether a motion for severance of trial should be granted always rests within the sound discretion of the trial judge, "exercise of discretion" meaning that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. Pen.Code, § 1098.

[Ed. Note.—For other definitions of "Exercise," see Words & Phrases.]

6. Criminal law 🔑1148

The ruling of the trial court on question whether a motion for severance of trial should be granted will be disturbed on appeal only where an abuse of discretion is shown. Pen.Code, § 1098.

7. Criminal law 🔑1134(2)

An appellate court, in determining the propriety of a ruling upon a motion for severance of trial, will look only to the facts presented to the court at the time the motion was made and not to events that occurred afterward. Pen.Code, § 1098.

8. Criminal law 🔑622(2)

In prosecution of five convicts for murder of prison warden, wherein four of the convicts pleaded insanity, court did not abuse discretion in denying separate trials on issue of insanity. Pen.Code, § 1098.

9. Criminal law 🔑762(3)

In murder prosecution, wherein defense of insanity was interposed, court did not err in instructing that an ingenious counterfeit of mental infirmity should never furnish immunity to guilt, in view of admonition to jury that jury were sole judges of questions of fact and credibility of witnesses. Const. art. 6, § 19.

10. Criminal law 🔑755½

The right of a trial judge to make fair and general comment on evidence and defenses interposed, may be exercised in the manner which the judge deems necessary for the proper determination of the case and is not confined to a colorless recital of facts, but such remarks should be temperate and unemotional in tenor. Const. art. 6, § 19.

11. Criminal law 🔑762(2)

A judge's expression of his opinion concerning the guilt or innocence of an accused is within the scope of comment which judge may make, provided the province of the jury is not invaded. Const. art. 6, § 19.

12. Homicide 🔑237, 250

In prosecution of five convicts for murder of prison warden, wherein four of the convicts pleaded insanity, evidence was sufficient to sustain convictions.

◆

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Wesley E. Eudy, Albert Kessell, Robert Lee Cannon, Ed Davis, and Fred Barnes were convicted of murder, and they appeal.

Affirmed.

Elvin F. Sheehy, of Sacramento, for appellant Wesley E. Eudy.

Ben D. Frantz, of Sacramento, for appellant Albert Kessell.

Archibald D. McDougall, of Sacramento, for appellant Robert Lee Cannon.

Horace E. Dunning, of Sacramento, for appellant Ed Davis.

Daniel E. Weyand, of Colusa, for appellant Fred Barnes.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

EDMONDS, Justice.

The five defendants in this case were jointly charged with the crime of murder. One of them, Robert Lee Cannon, pleaded not guilty; the four others pleaded not guilty and also not guilty by reason of insanity. The issues joined by the pleas of not guilty were presented to a jury in a trial of all defendants. The jury found each of them guilty. Thereafter each of the four who pleaded not guilty by reason of insanity moved the court for a separate trial upon that issue. This motion was denied and upon trial each was found sane at the time of the commission of the offense. The defendants have appealed from an order denying them a new trial and also from the judgment subsequently entered imposing the death penalty.

The crime of which the defendants stand convicted was committed on September 19, 1937. All of them were then inmates of Folsom state prison. Clarence Larkin, the warden of the institution was in his office, located just off the prison yard, for the purpose of interviewing the prisoners who wished to see him. Each convict waiting to see the warden was allowed to enter this office as his turn came. When the defendant Eudy entered, six other convicts bearing knives and a pistol rushed into the office from the yard. They overpowered the warden and the captain of the guard, who were both unarmed, and marched them into the yard as hostages in an attempt to escape. There two of the convicts were shot and killed by guards in towers on the prison wall. Warden Larkin was then fatally stabbed by the five remaining prisoners; and in a melee between guards and prisoners, in which the latter were subdued, a guard also received injuries from which he died.

The defendants' first point upon which they rely for reversal is that the trial court erred in disallowing certain challenges for cause made by them during the voir dire examination of jurors and in later refusing additional peremptory challenges. The record shows that after the defendants had used all of their peremptory challenges they requested three additional ones to replace those which had been exercised in excusing jurors challenged for cause. The court allowed one additional peremptory challenge, and then, on its own motion, excused the one remaining juror whom the defendants had challenged for cause. Two more jurors were then examined and accepted without objection.

The defendants complain that the jury as then constituted was unsatisfactory to them because it included one juror who would have been excused had the court granted additional peremptory challenges and two jurors whom the defendants could not remove in the absence of evidence showing facts upon which a challenge for cause would lie. They insist that each of the five jurors who was unsuccessfully challenged for cause disclosed a state of mind which would have prevented him "from acting with entire impartiality and without prejudice to the substantial rights of either party". Sec. 1073, Pen.Code. However, the record shows that although the prospective jurors admitted that they had read of or heard about the death of Warden Larkin and believed that the convicts concerned had entered into a conspiracy to escape from prison, each said with positiveness that he could and would decide the case solely upon the evidence introduced in the trial.

[1] One who has formed or expressed an opinion upon the merits of a criminal case is not thereby disqualified from serving as a juror in the trial of the defendant "provided, it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him". Sec. 1076, Pen.Code. Whether the challenged person met the requirements of the law was a question for the decision of the trial judge. The fact that all of the answers of each person under examination were not entirely consistent only raised a conflict in the evidence concerning the state of mind of the prospective juror. Upon such a conflict the determination of the trial judge is conclusive upon an appel-

lant court. People v. Craig, 196 Cal. 19, 25, 235 P. 721; People v. Edwards, 163 Cal. 752, 757, 127 P. 58.

Another point raised by the defendants is that the court erred in denying their motions for separate trials on the issue of insanity. They say that it was difficult, if not impossible, for the jurors and the trial judge to keep the evidence concerning each defendant separate in thought from that relating to the others. Their counsel concede that where several defendants are jointly tried upon their pleas of not guilty, there is no statutory provision or judicial authority for severance of trial upon their pleas of not guilty by reason of insanity. They rely, however, upon the English case of Rex v. Lonsdale, 47 Times L. Rep. 80, in which the court held that a defendant charged with being an habitual criminal should be tried separately upon that issue and not with any other person.

[2, 3] In this state, the court in its discretion may order a separate trial of one or more defendants charged with a public offense. Sec. 1098, Pen.Code. But a separate trial is not a matter of right. People v. Rocco, 209 Cal. 68, 285 P. 704; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951. Even where it appears that evidence will be admissible against one of several defendants which the jury cannot consider as against the others the law does not require separate trials upon demand therefor. People v. Perry, 195 Cal. 623, 234 P. 890; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Erno, 195 Cal. 272, 232 P. 710.

[4-6] The defendants in this case acted together in attacking the officers of the prison. Apparently, they had carefully planned what each should do. What was said and done at that time was evidence for the jury to consider in determining the sanity of each of the defendants. All of them had been inmates of the institution for some time and had been under the same prison discipline. Although the mental and social background of each of them was different, issues of much greater complexity are commonly submitted to a jury. The determination whether a motion for severance of trial should be granted always rests within the sound discretion of the trial judge. There can be no clearly defined rule for determining when a defendant is entitled to a separate trial because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. Only where an abuse of discretion is shown will the ruling of the trial court be disturbed upon appeal. People v. Perry, supra; People v. Tinnin, supra.

[7, 8] In the present case the defendants have failed to show any inconsiderate action. Furthermore, when the motion for severance was made no facts were stated in support of it and, so far as the record shows, the trial judge was not apprised of the nature or extent of the evidence that each defendant expected to offer to prove insanity. An appellate court, in determining the propriety of a ruling upon a motion for severance of trial, will look only to the facts presented to the court at the time the motion was made and not to events that occurred afterward. People v. Erno, supra; People v. Friday, 18 Cal. App.2d 197, 63 P.2d 303; People v. Pierson, 139 Cal.App. 734, 34 P.2d 755. The record fully supports the order which was made.

The defendants next contend that the trial judge committed prejudicial error when he made a statement concerning the defense of insanity which, it is claimed, exceeded the bounds of fair comment. Although he told the jurors that an ingenious counterfeit of mental infirmity should never furnish immunity to guilt he also said that the defense of insanity should be weighed fully, fairly and justly. As a part of his remarks he admonished the jurors that you "are the sole judges of all questions of fact and credibility of the witnesses; you are not to consider any comment of the Court upon the evidence and credibility of witnesses as binding upon you or necessarily to be followed by you. The Court does not intend that the judgment of the Court should be substituted for that of the Jury and you should not consider yourselves bound or influenced against your own judgment by any comment of the Court. Your verdict must represent and reflect your own independent judgment."

[9-11] Taken as a whole the statement amounts to nothing more than fair and general comment which a trial judge is now authorized to make. Art. 6, sec. 19, Calif. Const. Although such remarks should be temperate and unemotional in tenor, he is

not confined to specific comments. The right may be exercised in the manner which the judge deems "necessary for the proper determination of the case", and is not confined to a colorless recital of facts. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211. Even an expression of his opinion concerning the guilt or innocence of a defendant has been held to be within the scope of comment which may be made, provided the province of the jury is not invaded.

[12] The defendant Kessell also urges that the evidence was insufficient to support the verdict that he was sane at the time of the offense and that the court erred in its rulings on certain evidence pertaining to his sanity. This defendant produced eleven witnesses, all fellow-convicts, who testified concerning his conduct during several months preceding the attempted prison break. Against this evidence was not only the presumption of sanity but also the testimony of five medical experts, each of whom stated that in his opinion the defendant was legally sane at the time he committed the offense. It is true that in answer to a hypothetical question embodying the facts testified to by Kessell's fellow-convicts, these experts testified that if a man had such characteristics he would be considered insane. However, the jury was at liberty to refuse credence to the testimony of the lay witnesses. The doctors made careful clinical examinations of the defendant after the crime was committed and none of them found the symptoms referred to by the prisoners who testified in behalf of Kessell.

Several rulings of the trial court concerning the introduction of evidence have also been assigned as error. These have been examined and considered but they do not require detailed discussion. While some of them may be open to question none presents points which would justify a reversal of the judgment. The trial as a whole was conducted with fairness and impartiality, and all counsel were allowed full latitude in the examination of witnesses.

The judgment and the order denying a new trial are, and each of them is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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11 Cal.2d 609

CITY OF LONG BEACH et al. v. MARSHALL (PEOPLE, Intervener).

S. F. 15992.

Supreme Court of California.

July 28, 1938.

Rehearing Denied Aug. 25, 1938.

1. Navigable waters ⚷37(8)

Under statute conveying tidelands to city, conditions limiting use of lands to harbor purposes and forbidding alienation of title to private persons were consistent with conveyance of fee simple since grantee of an estate on condition subsequent takes fee subject only to forfeiture for breach of the condition. St.1911, p. 1304; Civ.Code, § 1105.

2. Navigable waters ⚷36(1), 37(8)

The state became the owner of tidelands in fee simple upon its admission to the Union, holding them subject to public trusts for navigation, commerce and fishing and also became owner of minerals therein, and state has the power to grant such lands to municipalities subject to same trusts.

3. Navigable waters ⚷37(8)

The phrase "by virtue of its sovereignty" within statute granting to city of Long Beach all interest of state held by it by virtue of its sovereignty in tidelands and submerged lands within boundaries of city is merely descriptive of origin of state's title and conveyance is thus of tidelands which came to state upon admission to the Union by virtue of its sovereignty and not by grant from federal government and does not mean that grant to city is only of rights of sovereignty in sense of political or governmental power. St.1911, p. 1304.

[Ed. Note.—For other definitions of "By Virtue of," see Words & Phrases.]

4. Navigable waters ⚷37(8)

Statute granting to city of Long Beach and to its successors "all the right, title and interest" of state held by it by virtue of its sovereignty "in and to all the tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city" and imposing restraint upon alienation of lands to private persons passed fee-simple title to city in such tidelands. St.1911, p. 1304.

5. Statutes ⚷225¾

Where Legislature uses terms already judicially construed, presumption is almost irresistible that it used them in precise and technical sense which had been placed upon them by the courts.

6. Navigable waters ⚿14(1), 37(8)

The city of Long Beach has right to drill for and extract oil from tidelands granted to city by the state, but operations must not be conducted in such manner as to impede the use of the harbor. St.1911, p. 1304; St.1937, p. 2939, § 229x.

7. Constitutional law ⚿70(3)

The court is concerned not with policy of the statute but with its effect.

In Bank.

Petition by the City of Long Beach and Board of Harbor Commissioners of the City of Long Beach on behalf of the city for a writ of mandate to compel D. A. Marshall, as Port Manager of the City of Long Beach to take bids for the furnishing of a derrick and oil well wherein the People of the state of California intervened.

Peremptory writ of mandate issued.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., Henry D. Lawrence, Deputy City Atty., John F. McCarthy, Deputy City Atty., Swaffield & Swaffield, and Roland G. Swaffield, Special Counsel, all of Long Beach, for petitioners.

Markell C. Baer, Port Atty., Board of Port Commissioners of the City of Oakland, and W. Reginald Jones, Asst. Port Atty., both of Oakland, amici curiæ in support of petitioners.

Ray L. Chesebro, City Atty., Clyde M. Leach, Asst. City Atty., and Loren A. Butts, all of Los Angeles, representing the City of Los Angeles, amici curiæ in support of petitioners.

Chandler, Wright & Ward, of Los Angeles, C. C. Stratton, of Long Beach, and Howard W. Wright, O'Melveny, Tuller & Myers, Louis W. Myers, A. L. Weil, Martin J. Weil, and Cassel Jacobs, all of Los Angeles, amici curiæ in support of petitioners.

Frank M. Linnell, of Long Beach, for respondent.

U. S. Webb, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., for intervener.

LANGDON, Justice.

This is a petition by the City of Long Beach and its Board of Harbor Commissioners for a writ of mandate to compel respondent to take bids for the furnishing of a derrick and oil well. The proceeding presents the question whether the mineral rights, particularly those in oil and gas, in tidelands granted to the municipality by the state, are owned by the municipality.

The facts are not in dispute. At various times the state has by legislative act granted tidelands to municipalities, for the purpose of developing harbors and promoting commerce and navigation. The principal grant to petitioner, City of Long Beach, was made in 1911, and subsequent statutes relating to said grant were enacted in 1925 and 1935. In 1937 a rich oil deposit was discovered under these tidelands and adjoining private property. Private owners immediately commenced drilling on the contiguous private land, and are extracting enormous quantities of oil from the pool underlying the entire area. Shortly after the discovery, an amendment was adopted to the Long Beach freeholders' charter, expressly authorizing its Board of Harbor Commissioners to drill for and extract oil or other hydrocarbon substances from any of its land, including tidelands, provided that the board first found that the particular lands are not required and with reasonable certainty will not be required for a period of twenty-five years for the promotion of commerce, navigation or fishing. The section also provides that money derived from such oil development shall be used exclusively for improvement and maintenance of the harbor and servicing and redemption of outstanding harbor improvement bonds. This charter amendment was approved by the legislature on May 14, 1937. The Board of Harbor Commissioners, by resolution on January 31, 1938, found that the tidelands in question were not required for harbor purposes, as required by the said amendment. Thereafter the city commenced to drill wells, but its operations were stopped by a temporary restraining order in a taxpayer's suit on January 20, 1938. This suit was brought on the theory that the rights in oil and other minerals belonged to the state and not to the city. In order to secure a prompt determination of the issue and avoid some of the huge loss of oil through adjacent private drilling, this proceeding in mandate was commenced against respondent port manager, and an alternative writ was issued by this court. The state, through the attorney-general, has intervened in the proceeding, asserting its claim to the mineral rights involved. Numerous amici curiae have appeared on both sides, and the matter has been exhaustively briefed.

The starting point of our discussion is the Act of 1911 (Stats.1911, p. 1304) reading in part: "There is hereby granted to the city of Long Beach * * * and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said city, * * * to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following * * *." It is then stated that "said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor" and the construction of anything necessary or convenient for the promotion of commerce and navigation. It is further provided that "said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever", provided that it may grant franchises for public uses, and leases for limited periods, for purposes consistent with the trusts upon which the lands are held. The final provision reads: "Reserving, however, in the people of the State of California the absolute right to fish in the waters of said harbor, with the right of convenient access to said waters over said lands for said purpose."

[1] Giving this language its ordinary and reasonable meaning, it would seem clear that the state intended to and did convey whatever title or interest it had in these lands to the city, in fee simple, subject to certain conditions and upon certain trusts. A fee simple is presumed to pass by a "grant" of real property. Cal.Civ.Code, sec. 1105. The conditions, limiting the use of the lands to harbor purposes, and forbidding alienation of title to private persons, are entirely consistent with a conveyance of the fee simple title; the grantee of an estate on condition subsequent takes the fee, subject only to forfeiture for breach of the condition. Parry v. Berkeley Hall School Foundation, Cal.Sup., 74 P.2d 738, 114 A.L.R. 562. In short, there is nothing on the face of the statute which suggests that the city did not take the title to the lands, and the assumption that it did has been made in numerous cases hereinafter mentioned, involving tidelands granted by the state to municipalities, before the present controversy over oil rights arose.

The attorney-general and amici curiae supporting his position contend, however, that there was no conveyance of the fee, and that the city received only the governmental power of administration of the lands, together with an easement or right to use them for specified purposes. This argument is largely based upon an interpretation of the statutory phrase "held by said state by virtue of its sovereignty". The state propounds the theory that there is a "dual title" or "split fee" in tidelands, consisting of the jus privatum, or proprietary right, and the jus publicum, or governmental right. The proprietary right, i. e., the ownership or title in the state's proprietary capacity, is subject to the governmental right, embracing the trusts for navigation, commerce and fishing upon which the state itself holds the lands for the benefit of its inhabitants. It is contended that the jus privatum or proprietary right was not intended to pass to the city; that only the jus publicum or governmental right passed; and that the city acquired no more than the authority and political power to establish, operate, govern and maintain a harbor, as a subordinate governmental agency.

[2] We are unable to see any substance in the theory that the state's ownership of tidelands is so radically different from its ownership of other lands that a transfer by the state is not governed by the ordinary rules of interpretation of grants. There is neither logic in, nor practical necessity for the "double fee" doctrine. It is established law that the state became the owner of tidelands in fee simple upon its admission to the union, holding them subject to the public trusts for navigation, commerce and fishing (Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331; Borax Consolidated v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9); that it likewise became owner of the minerals therein (Boone v. Kingsbury, 206 Cal. 148, 170, 273 P. 797); and it should reasonably follow that it has the power to grant these lands to municipalities, subject to those same trusts. See Atwood v. Hammond, 4 Cal.2d 31, 37, 48 P.2d 20; Los Angeles v. Pac. Coast S. S. Co., 45 Cal.App. 15, 17, 187 P. 739; Lloyd v. Redondo Beach, 124 Cal.App. 541, 545, 12 P.2d 1087, and infra. There is nothing startling in the idea of a legislative grant of the fee to a city, subject to limitations

and reservations, and there is no reason why the state, as proprietary owner of these tidelands, may not grant the fee in them, just as it may grant the fee in other lands held in its proprietary capacity.

[3] An examination of the statute itself confirms this view. The title of the act is "An act granting to the city of Long Beach the tide lands and submerged lands of the State of California within the boundaries of said city." The language employed in the body of the act is in entire conformity with a grant of a proprietary interest in real property, and such terms as "grant", "right, title and interest", and "successors" are utterly improper as a means of delegating governmental dominion or control. It is difficult to conceive of the legislature choosing such inept language in dozens of these statutory grants throughout a period of many years, particularly when contemporaneous decisions were, as will be hereinafter seen, interpreting the statutes as vesting title in the municipalities. The phrase "by virtue of its sovereignty" is merely descriptive of the origin of the state's title to these lands; the conveyance is thus of tidelands which came to the state upon admission to the union, by virtue of its sovereignty, and not by grant from the federal goverment, as in the case of many other lands. See People v. Morrill, 26 Cal. 336, 353; Newcomb v. Newport Beach, 7 Cal.2d 393, 400, 60 P.2d 825. Such language cannot be distorted to mean that the grant to the city is only of rights of sovereignty in the sense of political or governmental power. The argument of the state's "double fee" is met by the very statutory language which grants the land, for it conveys "all" the "right, title and interest" of the state. Whatever the state had by way of title or interest, however divided it may have been, it all passed under the plain words of the grant.

[4] The second argument advanced by the state and amici curiae is that if any interest in real property was conveyed, it was at most an easement, and not the fee title. Numerous cases are cited by both sides dealing with the interpretation of grants for specified purposes, with respect to the question whether the fee was conveyed subject to conditions limiting its use, or whether an easement was granted for the specified use. See, e. g., Cooper v. Selig, 48 Cal. App. 228, 191 P. 983; Parks v. Gates, 186 Cal. 151, 199 P. 40. They need not be discussed in detail, for the principles they lay down are not in conflict with our conclusion that the fee title to these tidelands passed to the city. The language granting "all right, title and interest" clearly indicates an intent to transfer the state's fee title. Whether this language is characteristic of a quitclaim deed or a grant deed is immaterial; in either case it would transfer whatever the state had, saving nothing to the state except the right of access expressly reserved. See Schlageter v. Cutting, 116 Cal.App. 489, 498, 2 P.2d 875. A conveyance of the "right, title and interest" of a grantor has been held to carry with it the mineral rights in the land. See MacFarland v. Walker, 40 Cal.App. 508, 511, 181 P. 248. The restraints imposed upon alienation of the lands to private persons are likewise strong evidences of a transfer of the fee. A holder of an easement might purport to transfer his easement or right to use, but could never convey the lands; and the restriction on such alienation is a recognition of the fact that they might otherwise be alienable by the city as owner thereof. Finally, the express reservation of the right of access would hardly have been made if the state deemed itself still the owner in fee; it is indicative, therefore, of a conveyance of the title.

It remains only to point out briefly that the history of tideland grants in this state, and the actions of the various legislatures and the courts in connection therewith, show a general agreement that the tidelands were conveyed to municipalities in fee, subject only to the public trusts and the limitations and reservations specified in the acts; and that until the discovery of these valuable oil rights in the Southern California tidelands no serious doubt was ever expressed as to the title of the municipalities.

In 1911, the time of the grant involved herein, three other statutes were enacted, making tideland grants to Los Angeles, San Diego and Oakland, all of which are harbor cities. The San Diego statute is entitled "An act conveying certain tide lands * * *"; the other three are acts "granting * * * the tide lands * * *." Each of these four granting statutes deals with the "lands"; each grant is to the city "to be forever held by said city, and by its successors"; each is subject to the same condition against alienation to private persons, and each contains the express reservation of the right of access. It has been suggested by amici curiae on behalf of the city that if the legislature had only intended to delegate governmental powers, it would have been simpler and just as effective to do so in a single statute applying to all of the cities concerned, and that these separate statutes were necessary because the intention was to convey title to specific parcels of real property, and to specific grantees thereof, rather than to establish political control by municipalities over certain tideland areas. Similar persuasive evidence of this sort is found in the series of tideland grants to the city of Oakland, eleven in number, commencing in 1852, and each granting a specifically described parcel.

In 1913 another statute (Stats.1913, p. 437) was enacted to provide that any municipality "to which tide lands and submerged lands situated within the boundaries thereof have been granted by the State of California, is hereby authorized and empowered to grant portions of such lands to the United States, for public purposes of the United States * * *." Here we have express statutory recognition of a prior grant of the lands themselves, subject, of course, to the restraint upon alienation already set forth. This later statute is designed to permit one type of alienation. It would be strange indeed, if the state, owning the fee title to the lands, could nevertheless permit the cities to convey them; and it can hardly be conceived that the city, as grantor, could "grant portions of such lands" if it did not own them. A similar recognition is found in section 5395 of the Harbors and Navigation Code (Stats. 1937, chap. 368, p. 917), authorizing grants by a municipality to a municipal port district, of "tidelands", where "the State has granted all its right, title and interest" therein to the municipality. Again, the 1913 grant to the city of Alameda, Stats. 1913, p. 707, mainly in the usual form, contained a special provision giving certain private persons then in possession the right to obtain 25-year leases from a city, together with the right of renewal upon such terms as the city might specify, and thereupon such persons "shall quitclaim to said city any right they or any of them may claim or have to the said lands hereby granted". Clearly this quitclaim was intended to eliminate any possible cloud on the city's title, and is inconsistent with the theory that the title was in the state. The above-quoted section of the Harbors and Navigation Code contains a further significant provision that if the district to which grants are made by the municipality is dissolved, the land "reverts to and is revested in the municipal corporation so granting the same to the district".

The subsequent statutes dealing with the Long Beach lands likewise exhibit a legislative recognition of a grant of the fee. The 1925 act (Stats.1925, p. 235) designed to remove some of the restrictions on the use of the lands and to permit it to be devoted to such uses as "public park, parkway, highway, playground", etc., is in the form of a new grant to the city. The same language is used, granting to the city "and to its successors", all of the right, title and interest of the state, "to be forever held by said city", subject to the restrictions and reservations. The 1935 act (Stats.1935, p. 793) amends the 1925 act so as further to enlarge these purposes, and exactly the same terminology of grant is again employed. The 1937 charter amendment (sec. 229x) approved by the legislature on May 14, 1937 (Stats.1937, p. 2939) expressly confers a right to drill for oil on tidelands, a meaningless authorization if the city wholly lacked title to the lands or ownership of the minerals.

It may be added that at the time of the 1935 act, the possibility of oil underlying tidelands in this general area was known to the legislature, through litigation and discussion of such cases as Boone v. Kingsbury, supra, but no attempt was made to assert title to the minerals or oil rights in the lands theretofore granted. On the other hand, in contemporaneous grants to other cities such as Santa Barbara (Stats. 1931, p. 1742), Ventura (Stats.1935, p. 869), and Santa Cruz (Stats.1935, p. 1876), the legislature expressly reserved to the state the mineral rights in the lands. In other respects, the terms of the legislative grants in these instances were similar to the earlier ones, particularly in the clause granting "all the right, title and interest of the State of California, held by said state by virtue of its sovereignty".

The decisions of this court have been equally uniform in their declaration that the cities by these various grants took title to the tidelands. We had occasion to review them in the recent case of Atwood v. Hammond, 4 Cal.2d 31, 37, 48 P.2d 20, dealing with the San Diego lands, and we there said (page 23):

"Defendants city and county of San Diego contend that the Act of 1911 was not a conveyance of land to the city as sole owner, but only a grant to it of a right to make improvements in the harbor, with the right to lease wharves, piers, and other harbor facilities, and to collect rents therefor. The language of the act refutes this contention. The title of the act describes it as 'An act conveying certain tidelands.' * * * The preamble of the act refers to the power of the state to 'convey to municipalities limited and defined areas of such lands' in the interests of commerce, navigation, and fishing. By its terms the act grants and conveys lands lying between the line of mean high tide and the pierhead line in the bay. Provisions prohibiting alienation of the lands described, and providing for reversion to the state of 'the lands by this act conveyed', upon a violation of any of the provisions of the act, are inconsistent with defendants' position that no lands were granted to the city. * * *

"Grants of waterfront lands similar in form and expression to the Act of 1911 have been interpreted repeatedly as conveyance to municipalities of tidelands subject to the public trust for navigation and commerce [cases cited]. * * * That there may be a delegation of the right to make harbor improvements, without a conveyance of the legal title in the land is recognized in People v. Banning Co., 166 Cal. 630, 138 P. 100. But the grant made to the city of San Diego by the Act of 1911 is not of such nature."

To the same effect are Los Angeles v. Pacific Coast S. S. Co., 45 Cal.App. 15, 187 P. 739; Lloyd v. Redondo Beach, 124 Cal.App. 541, 545, 12 P.2d 1087; Newcomb v. Newport Beach, 7 Cal.2d 393, 402, 60 P.2d 825, and many other decisions cited in Atwood v. Hammond, supra. See, also, Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333, dealing with the tidelands involved herein.

The attorney-general seeks to avoid the force of these decisions by pointing out that nearly all of them were proceedings to which the state was not a party. This would be a proper objection were the decisions deemed to foreclose the state's claim of title in and of themselves. However, they are cited herein not as a conclusive determination against the state, but as sound authority for the construction of the statutory grants, and we have herein approved the reasoning upon which they are based.

[5] It should be noted also, in this connection, that while this long series of decisions declaring that title vested in the municipalities under these legislative grants were being rendered, the legislature continued to make further grants in the same language. The conclusion is very strong that the legislature considered that these decisions correctly stated the purport and effect of the acts, and therefore declared the true legislative intent. And the rule of law is well established that where the legislature uses terms already judicially construed, "the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts". Long Beach v. Payne, 3 Cal.2d 184, 191, 44 P.2d 305, 309; see, also, Anderson v. Jameson Corp., 7 Cal.2d 60, 67, 59 P.2d 962.

[6] The final question is whether the city has the right to drill for and extract the oil from these lands which it owns. Nothing in the grant purports to reserve to the state or to deny to the municipality the minerals or the right to extract them. Moreover, the charter amendment, section 229x, approved by the legislature in 1937, expressly and unequivocally empowers the city to drill, develop, take and dispose of oil on tidelands owned by it. Hence, the ownership of the lands being once established in the city, its authority to do the acts contemplated is placed beyond question by this express charter provision. It is, of course, true that the operations must not be conducted in such manner as to impede the use of the harbor, but there is nothing before us to suggest that drilling will have any such effect. See Boone v. Kingsbury, 206 Cal. 148, 183, 273 P. 797.

The state places considerable reliance on the case of Stone v. Los Angeles, 114 Cal.App. 192, 299 P. 838, where the defendant city's playground department sought to execute an oil lease on tidelands acquired by legislative grant. It was held that the city lacked power to make the lease, the theory of the decision being that the oil in place was part of the realty, and that by its removal the city had effected a prohibited transfer of a part of the freehold, in violation of the restraints on alienation imposed by the statute. It is apparent that the Stone Case is distinguishable from the present proceeding, for the court was dealing only with the city's power to lease, and the opinion is explicit in thus limiting the issue, pointing out that the city itself is not attempting to drill. 114 Cal.App. 198, 299 P. 838. Another basic distinction is that the city in that case was acting without any statutory authorization; here a charter provision, approved by the legislature, expressly authorizes the drilling for and extraction of oil. And it should be noted, finally, that the conclusion reached in the Stone Case to the effect that an oil lease is an unlawful transfer of tidelands is contrary to the holding by this court in the later case of Boone v. Kingsbury, supra, at page 184, 273 P. at page 813.

[7] The complaint that these valuable properties should not be taken from the people of the state and given to one community is one that can have no weight in this proceeding. We are concerned not with the policy of the statute but with its effect; and if the legislature, without knowledge of the hidden treasures in these lands, made improvident grants thereof, it is not within the power of the courts to nullify them.

It follows that petitioners are entitled to the relief demanded. Let a peremptory writ of mandate issue as prayed for.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; EDMONDS, J.; HOUSER, J.; SEAWELL, J.

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12 Cal.2d 27

PEOPLE v. BOGGS.

Cr. 4127.

Supreme Court of California.

Aug. 23, 1938.

Rehearing Denied Sept. 20, 1938.

1. **Homicide** 🔑250

Evidence sustained conviction for murder of wife.

2. **Homicide** 🔑338(5)

In prosecution for murder, where defendant was found guilty of murder in the first degree, alleged error in portion of instruction relating to manslaughter was not ground for reversal. Pen.Code, §§ 187, 189, 192.

3. **Homicide** 🔑294(2)

In prosecution for murder, jury was properly informed that evidence of intoxication could be considered in determining intent with which act was perpetrated.

4. **Criminal law** 🔑808½

In prosecution for murder, instruction repeating applicable statute was not error though allegedly precluding jury from considering alleged intoxication of defendant at time offense was committed. Pen. Code, § 21.

5. **Criminal law** 🔑823(4)

In prosecution for murder, where jury was fully instructed on the essentials of first and second degree murder, portion of another instruction which allegedly failed to inform jury of necessity for malice, express or implied, to constitute murder in the first degree was not erroneous. Pen. Code, §§ 187, 189, 192.

6. **Criminal law** 🔑1172(1)

In prosecution for murder, instruction informing jury of the right of court and counsel to comment on the evidence or the failure of defendant to explain or deny any portion thereof adverse to him was not prejudicial. Pen.Code, § 1439; Const. art. 1, § 13; art. 6, § 19.

7. **Criminal law** 🔑778(5)

In prosecution for murder, instruction that defendant had burden of proving mitigating circumstances after prosecution's proof of commission of offense was not improper as relieving prosecution of burden of proving malice as an essential of murder in the first degree. Pen.Code, §§ 187, 189, 192.

8. **Criminal law** 🔑778(2)

In prosecution for murder, instruction that defendant had burden of proving mitigating circumstances after prosecution's proof of commission of homicide was not objectionable as failing to require proof that homicide was committed "by the defendant."

9. **Criminal law** 🔑829(1)

A refusal to give instructions on a subject which was sufficiently covered in other given instructions was not error.

10. **Criminal law** 🔑829(6)

In prosecution for murder, where subject of intoxication was covered by given instructions, refusal to give requested instructions respecting the effect of intoxication on intent of the perpetrator of an offense was not error, particularly where evidence supported jury's implied finding that defendant was not so intoxicated at time of act as to be incapable of forming specific intent.

11. Criminal law 🔑829(4)

In prosecution for murder, where subject of excusable homicide was covered by instruction in which statute defining excusable homicide was read, refusal of requested instruction on excusable homicide was not error though given instruction did not state that a verdict of acquittal should follow a finding of excusable homicide. Pen. Code, § 195.

12. Criminal law 🔑829(18)

In prosecution for murder, where jury was instructed on the presumption of innocence and definition of reasonable doubt as it appeared in the statute and jury was informed as to the essentials of murder in the first and second degrees, refusal to give a requested instruction on reasonable doubt was not error. Pen.Code, § 1096.

13. Homicide 🔑294(1)

In prosecution for murder, instruction, given on trial of sanity issue, that while defense of insanity, if established to jury's satisfaction, should commend itself to their sense of humanity and justice, nevertheless the defense should be examined with care lest an ingenious counterfeit of mental infirmity should furnish immunity to guilt, was not reversible error, though trial of issues of guilt and sanity were separated.

14. Criminal law 🔑1172(6)

Giving inapplicable instructions, correct in the abstract, is not reversible error.

15. Homicide 🔑340(2)

In prosecution for murder, correct instructions on theory of irresistible impulse and moral insanity were not prejudicially erroneous, though cause was not tried on either theory.

16. Criminal law 🔑808½

In prosecution for murder, instruction which with a few embellishments merely reiterated language of statute relating to intent was not erroneous. Pen.Code, § 21.

17. Criminal law 🔑808½

In prosecution for murder, court's reading of statute relating to appointment and certification of county medical examiners was not prejudicial error as impliedly informing jury that testimony of such medical examiners had the support of the court as against testimony of experts not so appointed. Pol.Code, § 2167a.

18. Homicide 🔑294(2)

In prosecution for murder, where preponderance of evidence pointed to defendant's sanity at time of homicide, refusal to give requested instructions on settled insanity produced by long-continued intoxication was not prejudicial error, notwithstanding evidence of defendant's long-continued use of intoxicating liquor, particularly where jury was fully instructed on the subject of insanity generally.

19. Criminal law 🔑1170(3)

In prosecution for murder, exclusion of opinions of deponents, who had not seen defendant for some time prior to homicide respecting defendant's sanity, offered during course of trial of sanity issue, was not prejudicial error, particularly where contents of depositions relating to deponents' recollection of defendant's conduct were admitted and the opinions of the deponents actually did appear in some manner.

20. Criminal law 🔑452(2)

In prosecution for murder, jailer's testimony as to defendant's conduct and mental condition was not improperly admitted on trial of sanity issue.

21. Criminal law 🔑464

Whether one is an intimate acquaintance and competent to discuss the sanity of another is a matter for the trial court to determine in the exercise of a sound discretion.

22. Criminal law 🔑489

In prosecution for murder, permitting prosecution during cross-examination of an expert witness, to introduce testimony given by defendant in a pending negligent homicide case against him which arose subsequent to the homicide involved in the prosecution, was not error.

23. Criminal law 🔑354

The acts, conduct, and declarations of defendant, not only at the time of, but also within a reasonable time before and after, the commission of an alleged criminal act, are competent on trial of a sanity issue, if they appear to have any tendency to show his mental condition when the crime was committed.

24. Criminal law ⟹1035(1), 1037(2)

Alleged misconduct of trial court and district attorney could not be urged in the Supreme Court, in absence of objection or request for admonition to the jury at the time.

In Bank.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Allan D. Boggs was convicted of murder, and he appeals.

Affirmed.

Rehearing denied; HOUSER, J., dissenting.

Stanford G. Smith, of Santa Cruz, and W. E. Foley, John D. Foley, and James W. Foley, all of San Jose, for appellant.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., Benj. B. Knight, Dist. Atty., of Santa Cruz, and John McCarthy, Asst. Dist. Atty., of Watsonville, for the People.

WASTE, Chief Justice.

In an information filed by the district attorney of Santa Cruz county, the defendant was charged with the murder of Sally Boggs, his wife. He entered a dual plea of not guilty and not guilty by reason of insanity. Upon the conclusion of the trial on the general issue, the jury returned a verdict finding defendant guilty of murder of the first degree, without recommendation. Trial was then had on the issue of defendant's sanity at the time of the commission of the homicide, which issue the jury likewise resolved against him. Defendant was sentenced to pay the extreme penalty, whereupon he noticed this appeal from the judgment and order denying a new trial.

Nowhere in his briefs does the defendant challenge the sufficiency of the evidence on either issue. In fact, the briefs, including those filed on behalf of the People, are singularly free of even a summary of the facts and circumstances surrounding the commission of the homicide. Obviously, the state of the evidence has a material bearing upon whether prejudice resulted from any errors that may be found to have been committed during the trial. However, in our consideration of defendant's several grounds of appeal having to do with the giving and refusing of instructions on each issue and asserted errors in rulings on the evidence during the trial of the sanity issue, the entire transcript, including the evidence and the instructions, has been examined. We do not find therein anything approximating prejudicial error such as is contemplated by section 4½ of article 6 of the Constitution to warrant a reversal. On the contrary, the record discloses an abundance of substantial evidence supporting the jury's impiled findings that the defendant was the perpetrator of a cold-blooded, premeditated murder committed at a time when he was fully capable of distinguishing between right and wrong—the established test in this state of legal sanity. True, there are conflicts in the evidence, but these the jury has resolved against the defendant.

[1] Briefly, the evidence discloses that the defendant had some discussion in the nature of a slight quarrel with his wife during the early part of the day preceding the day of the homicide over her refusal to remain at home and entertain guests he had brought there. She, instead, went on a shopping tour and at the end of the day repaired to a friend's home, where she had dinner and planned to remain overnight. During the course of the evening, there were telephone conversations between defendant, his wife and her hostess, which apparently were not of a friendly or pleasant character. Later in the evening, and after his guests had retired for the night, the defendant left his home and went to a hotel bar, where he imbibed intoxicating liquor. While there he borrowed a pistol and four shells from the bartender. Shortly thereafter he appeared at the home of his wife's hostess. The gate to the grounds being closed, he climbed or jumped over the fence that surrounded the premises. He then entered the house by way of the kitchen and, contrary to the wishes of the butler, whom he first met, he proceeded through the house, passing through or near the occupied bedroom of the hostess and other guests until he arrived at the door of the bedroom then being occupied by his wife and her twelve-year-old son by a former marriage. Defendant was apparently unaware that her son had been brought to the house. After demanding to know who was using the room with her, the defendant fired four shots at his wife, some of which struck their mark and proved fatal. The shooting occurred between 1 and 2 o'clock in the morning. Defendant then apparently attempted to shoot himself but the entire contents of the gun had been discharged at the decedent. He then immediately departed the scene of the shooting and was

arrested later in the morning as he slept in a hotel room.

While on the stand in his own defense, defendant testified that he did not shoot the decedent but that the gun was first accidentally discharged in a scuffle with her over its possession and that it was again accidentally twice discharged as his attention was arrested by other guests. This version of the shooting is diametrically opposed to the defendant's statements freely and voluntarily made at the time of his arrest and later in the office of the district attorney. Upon each of these occasions he definitely stated that he deliberately shot at the decedent. To the arresting officer he declared: "I went up there to kill her and I killed her and that's that. She had it coming for a long time * * *." That defendant intentionally and deliberately shot his wife at a time when there was no scuffling for the gun, is borne out by the testimony of the butler and other persons in the house at the time who were eye-witnesses to the entire episode.

As already indicated, we are satisfied from an examination of the entire evidence that defendant perpetrated a deliberate, premeditated homicide at a time when he was fully capable of appreciating the nature and character of his act. In view of this, and our further conclusion that none of the asserted errors present anything of a prejudicial character, we do not intend to discuss in minute detail the many assignments of error advanced by the defendant.

[2] Defendant first challenges part of instruction number 34 having to do with manslaughter. The language complained of is but part of a long instruction wherein the court, for the guidance of the jury, repeated substantially verbatim the provisions of sections 187, 189 and 192 of the Penal Code wherein are defined the offenses of murder of the first and second degree and manslaughter. The latter portion of the instruction, even if inaccurate, could not have prejudiced the defendant. Particularly is this so, in view of the jury's verdict finding him guilty of murder of the first degree. People v. O'Neal, 67 Cal. 378, 7 P. 790; People v. Ferugia, 95 Cal.App. 711, 718, 273 P. 99. In other words, judging from its verdict, the jury was satisfied beyond a reasonable doubt that the prosecution had established the essentials of murder of the first degree, which essentials were correctly set forth in the instructions. In People v. Hampton, 96 Cal.App. 157, 273 P. 854, relied on by the defendant, the jury found the defendant guilty of the offense as to which the asserted erroneous instruction was given. Prejudice under such circumstances may well be imagined. In People v. Carrillo, 104 Cal.App. 586, 591, 286 P. 493, and People v. Semone, 140 Cal.App. 318, 35 P.2d 379, language similar to that complained of in the instruction here given was approved.

[3, 4] It is next urged that another portion of the same instruction precluded the jury from considering the asserted intoxication of the defendant at the time of the commission of the offense. Obviously, one instruction may not encompass all matters upon which the jury should be informed. Instructions number 37 and 38 properly informed the jury that evidence of intoxication could be considered in connection with a determination of the intent with which an act is perpetrated. Moreover, the language complained of constituted but a repetition of the provisions of section 21 of the Penal Code. In People v. Bernal, 40 Cal. App. 358, 361, 180 P. 825, it was held not to be error to read the section to the jury.

[5] We find no merit in defendant's assault upon another portion of instruction number 34 to the effect that it failed to inform the jury of the necessity for the presence of malice, express or implied, to constitute the crime of murder in the first degree. As stated above, the jury was elsewhere fully and correctly instructed on the essentials of first and second degree murder and that portion of the instruction here complained of could not have misled them.

Instruction number 38 having to do with intoxication and its effect upon the act and intent of a person is not subject to the criticism leveled at it. As already intimated, it correctly informed the jury on the subject. A somewhat similar instruction was approved as early as 1869 in People v. Lewis, 36 Cal. 531, and as late as 1935 in People v. De Moss, 4 Cal. 2d 469, 474, 50 P.2d 1031.

[6] Obviously, no prejudice could have resulted to the defendant from instruction number 9 in which the jury was merely informed of the right of court and counsel to comment on the evidence

or the failure of defendant to explain or deny any portion thereof adverse to him. The instruction was undoubtedly based upon section 13, article 1, section 19, article 6 of the state Constitution and section 1439 of the Penal Code.

[7, 8] Defendant criticizes instruction 46, having to do with the burden on defendant of proving mitigating circumstances following proof by the prosecution of the commission of a homicide. We cannot agree with the defendant that this instruction is capable of an interpretation relieving the prosecution of the burden of proving malice as an essential of murder of the first degree. In effect, it properly informed the jury that when any offense of any degree was proved by the prosecution, as required by law and under the instructions, then the burden of proving mitigating circumstances was upon the defendant. Defendant's further contention in connection with this same instruction that it fails to require or specify proof of the commission of the homicide by the defendant, is specious and lacking in merit. People v. Madison, 3 Cal.2d 668, 677, 46 P.2d 159. We must attribute some reasoning power to a jury. In People v. Post, 208 Cal. 433, 281 P. 618, cited by defendant, the instruction there involved was found to be prejudicial on a ground other than that here urged. People v. Madison, supra.

[9, 10] The defendant's next main contention has to do with the asserted erroneous refusal of the court below to give several requested instructions addressed to the trial of the general issue. We find no error in the refusal to give the three having to do with the effect of intoxication upon the act and intent of the perpetrator of an offense. As mentioned above, this subject was sufficiently covered in the instructions given. In addition, our examination of the record satisfies us that it amply supports the implied finding of the jury that defendant was not so intoxicated at the time of the commission of the act as to preclude the entertainment by him of a specific intent to take the decedent's life. Defendant's vivid recollection of the circumstances surrounding the homicide attests to the clarity of his mind at the time rather than to a bewildered mental state resulting from intoxication. Therefore, even an improper refusal to give the instruction, could not have been prejudicial.

[11] Nor do we think the court erred in refusing the requested instruction on excusable homicide. The subject was sufficiently covered by instruction number 41 given to the jury wherein section 195 of the Penal Code, defining excusable homicide, was read. Here, again, we must ascribe some intelligence to the jury who may reasonably be assumed to know that a verdict of acquittal should follow a finding by them of excusable homicide.

[12] No prejudice resulted from the refusal to give the requested instruction on reasonable doubt. The subject was adequately covered in the trial court's charge to the jury. The jury was instructed on the presumption of innocence and the definition of reasonable doubt, as it appears in section 1096 of the Penal Code, was read to them. When it is considered that the court also informed the jury as to the essentials of murder of the first and of the second degree, it is not unreasonable to assume that the jury could and would ascertain and know from the charge as a whole that either offense, of the greater or of the lesser degree, would have to be established by the prosecution beyond a reasonable doubt. Any other construction would import but little intelligence to the jury.

The subject of the refused instruction as to the effect of intoxication was, as indicated above, sufficiently covered by the court and further comment thereon is unnecessary.

[13] Defendant also urges that the court below erred in the giving and refusing of certain instructions on the trial of the sanity issue, to which assignment we now direct our attention. It is first argued that the court erred in informing the jury that while the defense of insanity, if established to their satisfaction, should commend itself to their sense of humanity and justice nevertheless such defense should be examined "with care lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt". Though such an instruction was approved in some of the earlier cases (People v. Dennis, 39 Cal. 625, 637), the later decisions have frowned upon it (People v. McCarthy, 115 Cal. 255, 265, 46 P. 1073; People v. Ford, 138 Cal. 140, 142, 70 P. 1075). This the attorney-general concedes. However, no case has been called to our attention, and our research has failed to reveal any, wherein the giving of such an instruction

has been held to be prejudicially erroneous. In 8 California Jurisprudence 304, section 358, the subject is summarized as follows: "While this instruction may well be omitted altogether, as the jury may take it as an intimation by the judge of his opinion of the case on trial, it has been so frequently given and approved, that it is now established that it is not prejudicially erroneous." To the same effect see People v. Sloper, 198 Cal. 238, 248–250, 244 P. 362. Nor do we think that a separation of the trial of the two issues under our present procedure calls for any different result. People v. Young, 140 Cal.App. 456, 458, 35 P.2d 354. In our opinion, the preponderance of substantial evidence in the record points to the sanity of the defendant. The alienists appointed by the court testified that in their opinion the defendant was of sound mind.

[14] It is next contended that the cause was not tried on the theory of irresistible impulse or moral insanity and that it was therefore prejudicially erroneous for the court below to instruct thereon. The two instructions contained correct statements of the law. It has been held that the giving of inapplicable instructions, correct in the abstract, is not ground for a reversal. People v. Lawson, 178 Cal. 722, 729, 730, 174 P. 885; People v. Romero, 143 Cal. 458, 459, 77 P. 163.

[15, 16] We find no error in the instruction having to do with intent. With a few embellishments, it merely reiterated the language of section 21 of the Penal Code. We do not think it capable of the dire consequences attributed to it by the defendant.

[17] Nor do we think any prejudice resulted from the trial court's reading of section 2167a of the Political Code, having to do with the appointment and certification of county medical examiners. While the reading of such section was unnecessary, we do not believe it had the effect, as urged by defendant, of impliedly informing the jury that the testimony of such medical examiners had the support of the court as against the testimony of other experts not so appointed.

[18] During the trial, defendant produced evidence of his long-continued use of intoxicating liquor and now contends that it was prejudicial error for the trial court to refuse to give three requested instructions on settled insanity produced by long-continued intoxication. While we are of the view that instructions on the subject might have been given without harm to either side, we are not of the view that the refusal to give them prejudiced the defendant. As stated above, the preponderance of the evidence points to the sanity of the defendant at the time of the homicide. Nor do we find therein any substantial evidence of a settled insanity resulting from the continued use of intoxicants. True, as already mentioned, defendant produced witnesses who testified to his heavy drinking over the years and an expert who testified that the defendant was suffering from a deranged condition of mind and an amnesia, total or partial, produced in part by long use of intoxicants. But, as we have already stated, the preponderance of the evidence, in our opinion, points to his sanity. In addition, the jury was fully and correctly instructed on the subject of insanity generally. Among other things, they were told that insanity "means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged." Other similar charges were given to the jury. Such instructions necessarily include any and all forms of insanity or deranged mental condition, regardless of the inducing cause, which preclude a person from distinguishing between right and wrong. In People v. Keyes, 178 Cal. 794, 797, 798, 175 P. 6, 8, it is declared that: "The court gave the jury full instructions on the subject of the defense of insanity from whatever cause proved. It was not required to designate any particular phase of insanity." There, as here, it was urged that prejudicial error resulted from the failure to instruct on settled insanity resulting from continued use of intoxicants.

[19] Under his next general assignment, the defendant urges that the trial court erred in certain decisions of law during the trial of the sanity issue. His first point is that the court below erred in excluding from evidence the opinions given by five witnesses, whose depositions were taken in the state of Michigan and produced upon the trial, as to the sanity of the defendant. The opinions were excluded on the ground that they invaded the province of the jury. A liberal ruling would have permitted the introduction of the answers or opinions in

evidence. However, there are several circumstances that militate against any prejudice resulting therefrom. Most of the persons had not seen defendant for some time prior to the commission of the homicide and his mental condition at that time was the issue before the jury. In People v. Overacker, 15 Cal.App. 620, 630, 115 P. 756, 759, it is said that "the court had discretion to exclude testimony which was remote in point of time from the date of the homicide". Moreover, practically the entire deposition of each of the five persons was admitted in evidence wherein were detailed by the deponents the circumstances they could recall in connection with defendant's conduct. It frequently has been held that the opinion of an intimate acquaintance has no greater evidentiary value than the reasons underlying it (People v. Coen, 205 Cal. 596, 614, 271 P. 1074), and inasmuch as the reasons were here before the jury, the failure to permit the opinions in the evidence could not have been damaging. In addition, and by way of final disposition of this point, it appears, as matter of fact, that the opinion of each of the deponents as to defendant's sanity was in some manner brought out before the jury, either in answer to some other question or on cross-examination. The deponent McSweeney stated in one place that defendant "acted and spoke in a manner which were not the speech and actions of a man in a sane mental condition". Again, that defendant's "mentality in that respect had definitely faded". On cross-examination the witness answered "yes" to a statement that he had "related several incidents here from which you draw the conclusion that Mr. Boggs is insane, is that correct?"

The deponent Buckheimer stated in one part of his deposition that the defendant was "irresponsible" and that "there was something screwy in his mind".

Among other things, the deponent McCauley stated that defendant "was not of normal mentality".

The deponent Carney stated on cross-examination that defendant "wasn't acting normal" and that he did not think defendant appreciated the difference between right and wrong.

On cross-examination, the deponent Kuhn declared that he thought the defendant "was crazy". For the foregoing several reasons we conclude that no prejudice could have resulted from the rulings above mentioned.

[20, 21] We find no error in the ruling of the trial court permitting the jailer to testify as to defendant's conduct and mental condition. The witness testified he knew the defendant for at least two years. Whether one is an intimate acquaintance and competent to discuss the sanity of another is a matter for the trial court to determine in the exercise of a sound discretion. People v. Niino, 183 Cal. 126, 130, 190 P. 626; People v. Carskaddon, 123 Cal.App. 177, 181, 11 P.2d 38.

[22, 23] We do not find any error in the ruling which permitted the prosecution during the cross-examination of a defense expert witness to introduce testimony given by the defendant in a negligent homicide case pending against him, and which arose subsequent to the homicide here involved. The same was admitted under the rule "that it is 'competent to prove the acts, conduct and declarations of the defendant, not only at the time of, but also within a reasonable time before and after, the commission of the alleged criminal act, if they appear to have any tendency to show his mental condition when the crime was committed' ". People v. Kimball, 5 Cal.2d 608, 610, 55 P.2d 483, 484, citing 8 Cal.Jur., p. 51, sec. 162. It would also serve to test and, if possible, to break down the testimony of the expert witness then under cross-examination.

[24] In conclusion, we do not find that the court below or the district attorney were guilty of prejudicial misconduct in the two respects assigned by defendant. Moreover, in the absence of objection or request for admonition to the jury at the time, the errors, if such, may not now be urged. People v. Harris, 219 Cal. 727, 731, 28 P.2d 906; People v. Weeks, 104 Cal.App. 708, 713, 286 P. 514; 8 Cal.Jur. 510, sec. 522.

Other points not mentioned herein do not call for discussion. Our examination of the cause and the authorities has failed to reveal anything requiring a reversal.

The judgment and order are, and each is, affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; HOUSER, J.; LANGDON, J.

ZEIBAK v. NASSER et al.

S. F. 15659.

Supreme Court of California.

Aug. 19, 1938.

Rehearing Denied Sept. 15, 1938.

1. Joint adventures 🔑4(1)
Partnership 🔑272

Where plaintiff and defendants had formed partnership or joint venture which was to continue until agreement for incorporation could be reached, plaintiff signed an agreement to which defendants orally agreed, but defendants then proposed an additional paragraph to which plaintiff objected, whereupon defendants withdrew the paragraph and signed the agreement, but plaintiff then refused to exchange the copies of the agreement executed by the respective parties, plaintiff's refusal to do so was at least a violation of duty to fellow partners or coadventurers as regards question whether dissolution was caused by wrongful conduct of plaintiff. Civ.Code, § 2432.

2. Joint adventures 🔑5(2)
Partnership 🔑328(3)

In action for dissolution of partnership or joint venture, evidence supported court's finding that defendants at no time refused to give plaintiff sufficient or any information as to the business. Civ.Code, § 2432.

3. Joint adventures 🔑5(2)
Partnership 🔑328(3)

In action for dissolution of partnership or joint venture engaged in theater business, evidence supported court's finding that defendants had been given the right to the general management, administration, and supervision of all activities pertaining to the theaters and to receive as compensation therefor a sum equal to amounts charged elsewhere for like services. Civ.Code, § 2432.

4. Joint adventures 🔑4(1)
Partnership 🔑277

In action for dissolution of partnership or joint venture engaged in theater business, statute relating to rights of partners when dissolution is caused in contravention of partnership agreement was applicable as against contention that statute did not apply to joint ventures. Civ. Code, § 2432.

5. Joint adventures 🔑4(1)

The rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership.

6. Joint adventures 🔑4(1)
Partnership 🔑277

The statute regarding rights of partners when dissolution is caused in contravention of partnership agreement applied to a partnership or joint venture engaged in theater business, which was not entered into for any specific period of time but was to end upon the formation of a corporation and which had leased theatres for a definite period. Civ.Code, § 2432.

7. Joint adventures 🔑1
Partnership 🔑58

Where a joint venture or partnership has leased property for the purpose of carrying on a particular business and no fixed period is set for the duration of the partnership or joint venture, it will be impliedly deemed to continue during the term of the lease.

8. Joint adventures 🔑1
Partnership 🔑277

A partnership or joint venture engaged in theater business, which leased theaters for a definite period although there was no fixed time for termination of the partnership or joint venture, was not "terminable by the express will of any partner" within statute, and statute providing for rights of partners upon dissolution which is caused in contravention of partnership agreement, was not rendered inapplicable. Civ.Code, §§ 2425 (b), 2432.

9. Joint adventures 🔑4(1)
Partnership 🔑277

Where partnership or joint venture of plaintiff and defendants was to end upon formation of a corporation and plaintiff wrongfully refused to execute agreement which would have made incorporation possible, although actual dissolution of partnership was effected by decree, dissolution was nevertheless caused by plaintiff's wrongful conduct "in contravention of the partnership agreement" within statute setting forth partners' rights in such case as against contention that statute did not apply to a dissolution by decree of court. Civ. Code, §§ 2425, 2426, 2432.

10. Trial 🔑404(1)

In interpreting a court's findings, certain language may not be isolated from the entire context where to do so would place an interpretation upon such finding different from that which would follow from a reading of the finding as a whole.

11. Joint adventures ⚷5(1)
Partnership ⚷329

In action to dissolve partnership or joint venture, in determining date of dissolution, court's finding that by reason of plaintiff's conduct in 1932 plaintiff caused the wrongful dissolution of the venture, which clearly indicated, when finding was read in its entirety, that court meant that plaintiff had on that date rendered a dissolution by court equitable, was not a finding that plaintiff had caused a dissolution ipso facto as of that date, especially in view of court's order fixing July 20, 1934, as date of actual dissolution. Civ.Code, § 2432.

12. Partnership ⚷275

The death of a partner, who had but a 20 per cent. interest in the business and who had assumed the status of an investor immediately upon his entry into the venture and who took no active part in the affairs of the partnership, did not work a dissolution of the partnership.

13. Constitutional law ⚷43(1)

In action for dissolution of partnership or joint venture, where court found that plaintiff's wrongful conduct caused dissolution and denied plaintiff his proportionate share of the value of the good will, under applicable statute, plaintiff was precluded from asserting that property was taken without due process of law, since statute is purely remedial and plaintiff consented to such mode of procedure when he entered partnership or joint venture. Civ.Code, § 2432; St.1929, p. 1896.

14. Joint adventures ⚷5(2)
Partnership ⚷328(3)

In action to dissolve partnership or joint venture wherein court found that plaintiff's wrongful conduct caused dissolution, evidence *held* to support court's finding that defendants had shown no damages suffered by reason of plaintiff's conduct. Civ. Code, § 2432.

15. Joint adventures ⚷5(3)
Partnership ⚷329

In action for dissolution of partnership or joint venture because of wrongful conduct of defendants, wherein plaintiff's wrongful conduct was found to have caused the dissolution and appraisers disagreed as to value of plaintiff's interest, question of valuation of plaintiff's interest was for court. Civ.Code, § 2432.

16. Costs ⚷60

In action to dissolve partnership or joint venture, where court found that plaintiff's wrongful conduct caused dissolution and defendants were awarded costs, court did not abuse discretion in charging each party with one-half of the appraisers' fee in the proceedings for appraisal of plaintiff's interest. Civ.Code, § 2432.

17. Appeal and error ⚷984(1)

The discretionary action of the trial court, in charging appraisers' fee in proceeding for appraisal of an interest in a dissolved partnership, will not be disturbed where there is no showing of an abuse of discretion.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Naim E. Zeibak against William N. Nasser and others for dissolution of a partnership between the parties and for an accounting. Judgment was entered dissolving the partnership which recited that dissolution was caused by wrongful conduct of plaintiff, and plaintiff appeals and defendants cross-appeal.

Affirmed.

Sullivan, Roche & Johnson, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellant.

Nat Schmulowitz, George B. Harris, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for respondents.

PER CURIAM.

Plaintiff brought this action for dissolution of a partnership or joint venture, theretofore entered into between him and defendants, for an accounting, and if necessary, a sale of the partnership property.

The pertinent facts involved herein are summarized as follows: On or about December 12, 1931, and prior to January 11, 1932, plaintiff and defendants William N. Nasser, Elias Nasser, L. G. Dolliver and Central California Theatres Company (a corporation, organized and owned by seven Nasser brothers, among whom were William and Elias), entered into an oral agreement whereby they contracted to become joint venturers in the acquisition of a certain theatre business, consisting of the ownership and leasehold interest of the New Fillmore Theatre, the New Mission Theatre and the American Theatre, all of which were then owned by the Estate of Greenfield and located in the city of San Francisco. On January 11, 1932, the members of the venture submitted a written offer to purchase the business, and agreed therein to assume an outstanding indebtedness of the business, and also obligated themselves therein to expend certain sums of money thereafter and within specified times, as and for the repair and alteration of each theatre respectively. This offer was accepted by the estate, subject to the approval of the probate court. The parties further agreed that should they acquire the said theatres, immediately thereafter they would form a corporation under the laws of the state of California to take over the management and operation of the said theatres; that plaintiff would own an undivided one-half interest, Dolliver a 20 per cent interest, and the remaining defendants, jointly, a 30 per cent interest in the corporation; and that each of the parties would contribute his respective share of funds, if such were found to be necessary, for the maintenance and operation of the said theatres.

On January 28, 1932, the plaintiff and the defendants, other than Dolliver, entered into a written agreement entitled "Memorandum of Understanding Reached and to be Reached", wherein it was provided in part, that, "The General Management and Administration of the corporation, * * * the scope of which shall be determined at this time to include management and supervision of the said Greenfield Houses and all activities directly and indirectly pertaining thereto, shall be entrusted to the Nassers, and their compensation for all of said services shall be fixed upon the basis charged to their subsidiaries for like services. * * * Definite understanding shall also be had concerning the manner of and check upon the disbursement of funds, general policies, and the manner and extent to which Zeibak shall participate in the joint operation of the business of the corporation, subject however to the primary general management and administration by the Nassers * * * it being understood that when all details are finally ascertained, formal agreements evidencing the understandings between the parties shall be executed. * * *" On the day following, Dolliver and the other defendants entered into a written agreement whereby Dolliver agreed that the exclusive management and control of the business should be lodged in the Nassers, and thereafter Dolliver appears to have assumed the status of a mere investor in the enterprise.

On February 1, 1932, the probate court having approved the sale of the Greenfield interest in the leaseholds and the business, the agreement of purchase was executed by the parties thereto. The amount of the initial payment, towit, the sum of $50,000 was paid in equal parts by plaintiff on the one hand and the defendants on the other. Thereupon the venture entered upon the operation and management of said theatres. Each of two of the Nasser brothers, other than William and Elias, was given a position as theatre manager of one of the theatres thus purchased. The Nasser brothers also owned other theatres in the city of San Francisco, and the management of the three theatres thus acquired by the venture, was carried on by them in the offices used by Nasser brothers for the management and operation of the other theatres independently owned by them.

Shortly after the business was taken over by the venture, differences arose between plaintiff and the defendants Nasser with regard to the conduct of the business and the respective rights of the parties under the joint venture agreement. These differences continued practically from the date of purchase of the business to the time of the filing of the complaint. No corporation was formed pursuant to the evident intention of the parties, for the reason that the members of the venture could not agree upon certain terms and conditions which respectively they desired to set forth in the supplemental agreement contemplated by the terms of the agreement of January 28, 1932, above referred to. Numerous proposals and counter proposals were offered by the parties, each to the other, during this period of time, relating to the terms and conditions each sought to have incorporated in the said supplemental agreement. The parties could not agree, however, upon any certain draft of agreement submitted by plaintiff on the one hand, or by the Nassers on the other, with the exception of one certain draft of agreement, hereinafter mentioned, which was signed by plaintiff on or about October 3, 1932, and by the defendants on or about November 25, 1932, but the executed copies of which were never interchanged by the parties. Despite the lack of harmonious relationship between or among the members of the venture during this period of time, the record shows that the business (which had been operating at a substantial loss under its prior management) flourished to a marked degree, and that a very considerable profit was realized by the venture from the operation of the said business.

Plaintiff's action was founded upon the principal claim that the defendants had wrongfully taken exclusive possession and charge of the business against his will and without his consent, and had wrongfully excluded him therefrom; and particularly, that they had denied him access to the books of the corporation and had refused to give him sufficient information as to the details of the business to enable him to determine its condition sufficient to protect his interest therein; also that large amounts of money monthly had been paid by the venture as salaries to defendants' relatives, without adequate services having been rendered to the venture by such persons. The defendants, however, by way of affirmative relief, and upon the contention that plaintiff had caused the dissolution of the business wrongfully, asked that they be permitted to continue the business upon payment to plaintiff of the value of his interest therein, as contemplated by the provisions of section 2432, Civil Code. As the basis for this request they contended that plaintiff had refused to cooperate with them in the matter of carrying on the partnership business; that he had refused to comply with certain terms of the joint venture agreement and that contrary to the provisions thereof he had asserted rights and demands on his part not contemplated by the terms of said agreement.

During the course of a long trial, on the issues thus presented, defendant L. G. Dolliver died. With the permission of the probate court so to do, Marie Dolliver, his widow and special administratrix of his estate was thereafter substituted as a defendant in the action in the place of her deceased husband. At this time counsel for plaintiff, by motion, asked the court to enter an interlocutory decree of dissolution and to proceed with the winding up of the affairs of the joint venture upon the ground that the death of Dolliver ipso facto had dissolved the said joint venture. The court denied this motion and proceeded to hear the evidence in the case.

On July 20, 1934, the court made a minute order by which the joint venture was declared dissolved, and therein provided for the appointment of appraisers to appraise the property. It was further ordered that the defendants pay plaintiff the value of his one-half interest and indemnify him against all present and future liabilities; that the business thereafter should be conducted by defendants, including Marie Dolliver, during the remainder of the period of the leases; that an accounting be had and that the profits be divided between plaintiff and defendants. Thereafter it was further ordered that the appraisement be made as of the date December 11, 1932, as well as of July 20, 1934, and that neither of such appraisals should include the good will of the business. The final judgment was in accordance with these orders and recited that the dissolution of the joint venture occurred on July 20, 1934, "plaintiff having wrongfully caused the same by his conduct".

The parties hereto have filed cross-appeals. Defendants appeal from portions of the final judgment only. Plaintiff appeals from the whole thereof, and has also made a motion to dismiss defendants' appeal.

Each of the parties advances several asserted reasons why the judgment should be reversed or modified in accordance with his or their respective views, but the principal question before this court relates to the question of the sufficiency of the evidence to support the findings, which were favorable to the defendants in all material respects.

Plaintiff's first contention is that the evidence was insufficient to support the findings relating to the alleged wrongful conduct of plaintiff. These findings are substantially as follows: That during the period of negotiations following the acquisition of the theatres and while the parties were endeavoring to arrive at "definite understandings" prior to the organization of the proposed corporation, there was finally reached a point when a document purporting to be an agreement between or among the parties (and which had been signed by plaintiff prior thereto) was signed by defendants on November 25, but that "when the time arrived for the interchange of said agreement between the plaintiff and the defendants, the said plaintiff on or about December 11, 1932, failed, refused and neglected to deliver" the copy so signed by him, and has since refused to do so; and that "at all times since on or about December 11, 1932, in contravention of the terms of the agreements and understandings reached between December 12, 1931, and January 11, 1932, and in contravention of the terms and conditions of the agreement of January 28, 1932, the said plaintiff has wilfully and persistently failed and refused to proceed with the performance thereunder, but on the contrary * * * has wilfully and persistently repudiated the aforementioned agreements and understandings" and has sought to revise the said agreements and understandings and to negotiate new terms and conditions under which the theatres should be maintained and supervised; and that "said plaintiff has been guilty of such conduct as has tended to affect prejudicially the carrying on of the business and has otherwise so conducted himself in matters relating to the partnership business that it is not reasonably practicable for the defendants to carry on the business in partnership with the plaintiff".

[1-3] The record discloses the fact that the evidence was amply sufficient to support these findings, notwithstanding it was conflicting in some respects. With regard to the incident of December 11, referred to in said finding, the evidence showed that on or about October 3, 1932, plaintiff signed a proposed final agreement, to the provisions of which all of the partners had orally agreed. Thereafter, however, and before the defendants executed a duplicate copy thereof, they proposed the addition of another paragraph, to the provisions of which plaintiff objected. Disputes thereupon arose between the respective parties relative to this paragraph and other matters, which resulted in the defendants' withdrawal of the offending paragraph from the agreement, thus rendering the document free from the objections raised by plaintiff thereto. A copy of the agreement thus restored to its original status, to which all the parties had agreed was then signed by the defendants on or about November 25, 1932, and on or about December 11, 1932, as recited in the findings, plaintiff refused to exchange the copies of the agreement executed by the respective parties. Considering the fact that had he done so his action would have removed the obstacle to the formation of a corporation, an object which all the parties had originally intended to carry out, his failure to do so, after the objectionable matter had been removed from the agreement was at least a violation of the duty he owed his fellow partners of cooperating with them to effectuate the purposes for which all had joined. The evidence also showed that plaintiff had refused to pay his proportionate share of a deficit incurred by the venture in 1932; and that he had failed to join the other members of the venture in the execution of plans for repairs and alterations to be made to the New Fillmore Theatre within the time agreed upon by them in their offer of purchase to the Greenfield estate. The court also found that "Defendants have at no time refused to give to the plaintiff sufficient or any information as to the details of the business so that he would be enabled to determine the condition thereof and protect his investment therein, but on the contrary the defendants have at all times supplied to the plaintiff all information which is available to the defendants themselves concerning the details of the business." In this regard the evidence showed that the venture had employed a firm of certified public accountants, which at regular intervals had audited the books, and that copies of such audits had been delivered to plaintiff; that in addition thereto he had made copious notes from the books and other memoranda relative to the business; that he was permitted to and did make frequent inspection of the books and records of the venture. The bookkeeper employed by the venture testified that the defendants had instructed her to give to plaintiff any and all information he might ask for relative to the business, and that she had complied therewith. The court further found that the defendants had been given the right, under the agreements of the parties, to the general management, administration and supervision of all activities pertaining to the theatres and to receive as and for their compensation a sum equal to the amounts charged to their subsidiaries for like services. These findings are likewise fully supported by the evidence. The testimony of George Nasser was, in part as follows: That he and his brothers had been negotiating for the Greenfield theatres before anything was said to them about plaintiff's wishing to join them in their acquisition; that plaintiff wanted a fifty per cent interest; that "We did not want to give him that at first, but we gave it to him because there was no quarrel about him giving us the management and administration;" that "We told Mr. Zeibak that I would be the manager of one of the theatres and that James (Nasser) would be the manager of one of

the other theatres;" that plaintiff was told the salary of house manager would be $100 a week, which would be the amount James and (the witness) would receive for such services; that plaintiff made no objection or protest whatever when told of this arrangement; that "about a week after we decided on Mr. Zeibak's participation I took him to the three theatres * * * told him what was necessary in the nature of changes", but that after the purchase of the property, and on May 27, 1932, when an estimator of costs for repairs to the New Fillmore Theatre came out and brought a sketch with the itemized cost of different changes from the present structure, "We discussed the plan with Mr. Zeibak * * *" and that the latter "had taken the position that unless certain demands were met, he would not put up a dime, and had so stated to us" and that the plan was stopped, notwithstanding the fact that the Nassers wanted "to proceed with the proposed repairs and remodelings on both the New Fillmore and New Mission theatres" and told plaintiff that many times. It was also shown that within one week after the defendants had taken over the management of the three theatres plaintiff made the demand that he be installed as manager of one of the theatres at a salary of $100 a week; that the defendants refused this demand because of the fact that plaintiff had had no experience in managing a theatre, and that in their opinion he was not qualified to do so. It was further shown that George and James Nasser were experienced in this branch of the theatre business; that one of them had resigned from a position as manager of a theatre outside San Francisco at a salary of $100 a week to take over the management of the New Fillmore Theatre at the time of its acquisition by the venture, and that the salary paid by the venture for the position of theatre manager was comparable to that paid by other theatre owners for like services. The evidence further showed that the Nasser brothers had had wide experience in the motion picture field for many years prior to the acquisition of the theatres concerned in this action and that their reason for desiring the management of these theatres was because they believed that due to their knowledge and experience in this particular industry they could put these theatres back upon a paying basis, an object which was subsequently accomplished.

Plaintiff also contends that section 2432, Civil Code, was erroneously applied to the facts of this case because, he asserts, that section relates to partnerships only, and not to joint ventures. That section provides as follows:

"* * * (2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

"(a) Each partner who has not caused dissolution wrongfully shall have:

"* * * II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

"(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property; provided, they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of this section, and in like manner indemnify him against all present or future partnership liabilities.

"(c) A partner who has caused the dissolution wrongfully shall have:

"* * * II. If the business is continued under paragraph (2b) of this section the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered."

[4, 5] Plaintiff's contention that this section was not intended to apply to joint venture agreements, of the nature of the one in question here, cannot be upheld. The rule is that the rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership. Lerner v. Sander-

son, 126 Cal.App. 481, 14 P.2d 564; Ford & McNamara, Inc., v. Wilson, 119 Cal.App. 475, 6 P.2d 996; Arnold v. Humphreys, 138 Cal.App. 637, 33 P.2d 67; Elliott v. Murphy Timber Co., 117 Or. 387, 244 P. 91, 48 A.L.R. 1043, and Keiswetter v. Rubenstein, 235 Mich. 36, 209 N.W. 154, 48 A.L.R. 1049.

[6, 7] Nor is the claim to be upheld that section 2432, Civil Code, is inapplicable to the situation here presented because it contemplates a partnership for a fixed term, whereas the joint venture agreement here involved failed to specify a certain length of time for its duration. Notwithstanding the fact that the trial court found the venture was not entered into for any specific period of time, but was to end, in so far as it was legally possible for it to end, upon the formation of a corporation, this was never done, and the parties voluntarily continued their status as joint venturers under the oral agreements between themselves, and those entered into by them with the Greenfield estate. The following authorities illustrate the rule that where a joint venture or partnership has leased property for the purpose of carrying on a particular business and no fixed period is set for the duration of the partnership, it will be deemed, by implication, to continue during the term of such lease. In the case of Zimmerman v. Harding, 227 U.S. 489, 33 S.Ct. 387, 57 L.Ed. 608, two persons entered into a partnership to operate a hotel under a lease. The agreement was never reduced to writing and there was no stipulation as to its duration. After the parties had taken possession difficulties arose between them, which resulted in an attempted dissolution of the partnership by one of the partners. There the court said (page 389), "* * * We agree with the court below that although there was no express stipulation as to the duration of the partnership agreement, it was by implication to continue during the term of the lease of the hotel property." Also, in the case of Beller v. Murphy, 139 Mo.App. 663, 123 S.W. 1029, wherein certain persons had agreed as partners to conduct a mining business on land leased by them, and the question later arose as to whether it was a partnership for a fixed period or merely a general partnership with no time fixed for its duration, the court said (page 1031), "The purpose of this partnership was to conduct a mining business upon the land leased, and the parties must have understood that the business was to continue during the life of the lease, and this made it a partnership contract for a definite period, to wit, 10 years."

[8] Plaintiff further contends that, assuming the application of section 2432, Civil Code, to joint ventures, it does not apply here because the venture was one which could have been lawfully dissolved by the "express will" of a member thereof, under section 2425 (b), Civil Code. This section reads as follows: "Dissolution is caused: * * * (b) By the express will of any partner when no definite term or particular undertaking is specified * * *." This contention likewise cannot be upheld for the reason that the venture here was not one which could have been lawfully dissolved by the *express will* of a member thereof. Here there was a definite, and "particular undertaking", voluntarily assumed by each of the partners, and as hereinabove stated, the term of the venture, at least impliedly, was of similar duration as the term of the leases under which the theatres were operated. In the case of Bates v. McTammany, Cal.Sup., 76 P.2d 513, this claim was also made. There the court found that the partnership was formed for the purpose of conducting a radio station "so long as the license therefor could be obtained from the federal government" (page 514). The defendant contended that the partnership was one at will and that he was entitled to a dissolution under certain sections of the Civil Code, including section 2425 (b). The court there said, "The finding that the partnership was formed for a definite undertaking * * * and so long as the federal license therefor could be procured, is fully supported by the record, and negatives any conclusion which otherwise might be drawn that the partnership was one at will."

[9] Plaintiff has advanced other asserted reasons why section 2432, Civil Code, should not be considered applicable to the facts of the instant case—based upon the contention that that section only contemplates a dissolution *by a partner* and not by decree of court under the provisions of sections 2425 and 2426, Civil Code. Section 2432, Civil Code, provides that, "When dissolution is caused in contravention of the partnership agreement" the rights of the partners shall be as follows: "* * * A partner who has caused the dissolution wrongfully shall have," etc. Although the actual dissolution in the instant case was effected by the decree of court, neverthe-

less such dissolution was caused by the wrongful conduct of plaintiff "in contravention of the partnership agreement", as is clearly contemplated by the provisions of section 2432, Civil Code. That section provides the rights and remedies of both the offending and nonoffending partners where, as here, a dissolution has been effected because of the wrongful conduct of one of the partners. There is no language to be found in that section which expressly or impliedly precludes its application to the facts of the instant case, where it was found that not only had plaintiff's conduct been "in contravention of the partnership agreement", but that the court had decreed the dissolution because of such wrongful conduct.

[10, 11] Defendants and cross-appellants contend that the court erred in fixing the date July 20, 1934, as the date upon which the value of plaintiff's interest should be determined because of certain language contained in finding number nineteen which indicates, they assert, that the dissolution was caused by plaintiff on December 11, 1932, and hence that his interest must be determined as of that date. This finding is as follows: "* * * by reason of the wilful and persistent failure and refusal on the part of the plaintiff to proceed with the performance of his agreements and understandings with the defendants entered into on and prior to January 11, 1932, and on January 28, 1932, and *by reason of the conduct of the plaintiff on or about December 11, 1932,* as hereinbefore found, *by virtue of which said conduct the said plaintiff caused the wrongful dissolution of the venture* in which the plaintiff and the defendants engaged, and by the aforesaid conduct the said plaintiff has been guilty of such conduct as tends to affect prejudicially the carrying on of the business of said venture, and further by reason thereof the court finds that it is not reasonably practicable for the defendants to carry on the business in partnership with the plaintiff, and there being other circumstances as hereinbefore found and as established by the evidence which renders a dissolution between the parties in the aforementioned venture equitable, the court hereby further specifically finds that the defendants in the above entitled action have not caused the dissolution of said venture wrongfully and that the said plaintiff has caused the dissolution of said venture wrongfully". (Italics ours.) Although the words in this finding, "and by reason of the conduct of the plaintiff on or about December 11, 1932, as hereinbefore found, by virtue of which said conduct the said plaintiff caused the wrongful dissolution of the venture", considered separately might be said to support defendants' contention, nevertheless, under rules relating to the interpretation of findings, certain language may not be isolated from the entire context, where to do so would place an interpretation upon such finding different from that which would follow from a reading of the finding as a whole. The finding in question here is expressed in the conjunctive and clearly indicates, when read in its entirety, that the trial court meant that the plaintiff, by a course of conduct upon different occasions, prior to December 11, 1932, as well as upon that date, had rendered a dissolution by the court equitable, and not, as defendants contend, that the court considered that by his conduct on December 11, 1932, plaintiff had caused a dissolution ipso facto as of that date. The court stated that it intended no such meaning as is contended for by defendants to be given to this finding, when, in replying to an argument of defendants' counsel relative to this contention, it made the following remark: "I will say to you very frankly that unless I am convinced that in fixing the date of July 20, that the court is not correct, why of course, I would not want any other proof except the proof which is before me; and my order was made in that respect upon the theory that no matter what these gentlemen did, that the actual dissolution did not take place until the court made its order dissolving the partnership, and that is why I fixed the date as July 20, 1934. Now I may be wrong upon that theory but I included the other date (December 11, 1932) at your (defendants') instance, * * * because of the fact that it was upon that date that the court construes that the (partnership) contract was actually breached * * * that is, that was the date when Mr. Zeibak notified your clients that he would not go through with the contract after they had notified him that the contract, which finally they might all have agreed upon, that they had agreed to; as I say, it is wholly upon that theory that the court has fixed in its own mind that the valuation of the property should be made as of the date which the court actually dissolved the enterprise, and unless I am wrong in that respect why I think I shall adhere to that date." Although this finding might well have been more clearly phrased, any apparent ambi-

guity therein is completely dispelled by the words of the trial court just referred to. Throughout the findings, conclusions of law, and into the final judgment the trial court consistently adhered to the date July 20, 1934, as the date upon which plaintiff's interest should be ascertained. Furthermore, it may be said that after December 11, 1932, the acts and conduct of the defendants were wholly inconsistent with a recognition upon their part that they considered the venture had been dissolved ipso facto as of that date. Notwithstanding the fact that on one occasion the defendants informed plaintiff that they considered he had breached the partnership agreement by his failure to sign the agreement upon that day, up to the date of trial, the parties continually negotiated, each with the other, looking to a settlement of their differences, and during the entire time, to all intents and purposes they resumed and continued the partnership relation. In the case of Beller v. Murphy, 139 Mo.App. 663, 123 S.W. 1029, the claim was also made that the wrongful conduct of some of the partners in excluding one partner from the business of the firm caused a dissolution of the partnership ipso facto. In negativing this contention the court said (page 1031), "In the case of Hartman v. Woehr, 18 N.J.Eq. 383, it was said: 'If part of the capital of an agreed partnership has been paid, accepted, and used, and the business has been commenced in the name of the firm, he is an actual partner until the partnership is legally dissolved, and a mere exclusion of such person by the others from the business of the firm by illegal acts on their part is not a legal dissolution, but is a ground for an application to a court of equity for a dissolution upon his part, and, until such dissolution is had, he is entitled on an accounting, to his share of the profits.'" Also, in the case of Carrey v. Haun, 111 Or. 586, 227 P. 315, it was held that a partner who was wrongfully excluded from control of the partnership property, was not entitled to an accounting as of the date of such wrongful exclusion, so as to avoid his share of loss, subsequently occurring, where he then took no steps to dissolve the partnership and obtain an accounting. The court said (page 317): "Even if we consider the dissolution of the partnership to have occurred on April 6, 1922, yet it remains in force for the purpose of winding up its affairs. * * * The dissolution, whenever occurring, did not change the interest of either partner in the property of the firm until the final closing up of its affairs."

[12] Plaintiff also makes the claim that the death of L. G. Dolliver worked a dissolution of the partnership. We cannot concur in this view. Here the parties themselves had by their several agreements and undertakings created a situation wherein the death of Dolliver could not defeat the obligations voluntarily assumed by him and his copartners. In the case of Beller v. Murphy, 139 Mo.App. 663, 123 S.W. 1029, hereinbefore referred to, one of the partners died before the expiration of the term of the lease and it was there contended that his death had dissolved the partnership. The court said (page 1032): "As a general proposition the death of one partner does dissolve the partnership; but, even in those cases, the dissolution caused by death does not affect existing contracts. 30 Cyc. 620; Hughes v. Gross, 166 Mass. 61, 43 N.E. 1031, 32 L.R.A. 620, 55 Am.St.Rep. 375. Since this partnership had contracted to mine this land and pay royalties for 10 years, its contract must be fulfilled." Here also, as above noted, Dolliver had but a twenty percent interest in the business, and immediately upon his entry into the venture, he assumed the status of an investor, and took no active part in the affairs of the partnership. In the case of Schenk v. Lewis, 125 S.C. 228, 118 S.E. 631, the court, in considering the effect of the death of a partner, stated that (page 636): "While it is true, as a general rule, that the death of a partner effects an immediate dissolution of the partnership, it is not always so. If there was any special skill or capacity in the deceased partner, the partnership would, of course, cease to exist from the time of his death. But if the business was for the purpose of keeping the dead partner's capital invested in the partnership, there is no reason why his death would necessarily terminate the relation. 2 Story Eq.Jur. (14th Ed.), sec. 916. In this particular case the small interest of Lewis in the partnership does not indicate any special skill or capacity; and the course of dealing suggests the purpose of keeping his capital invested, in which event the Lewis estate would be entitled to his share in the profits of the continued business." See, also, 47 C.J. p. 1112.

[13] Plaintiff also contends that the application of section 2432 Civil Code to the facts of this case, under which section he

was denied one-half the value of the good will, was a taking of his property without due process of law,—and further that this section provides for "double penalties" in making provision for the assessment of damages against an offending partner in addition to denying him any portion of the good will of the business. This view disregards the fact that the code section is purely remedial in that it provides for a mode of procedure which plaintiff must be deemed to have consented to when he entered into his undertakings with defendants. Plaintiff was afforded the right to have his cause tried and determined under the same rules of procedure that are applied to similar actions brought pursuant to the Uniform Partnership Law, St.1929, p. 1896. This right having been accorded him, when considered together with the fact that he invoked the process of the law himself, precludes him now from asserting that his property was taken from him without due process of law, under the provisions of the Uniform Partnership Act, as adopted by this state. In the case of Gray v. Hall, 203 Cal. 306, 265 P. 246, it was said (page 252): "It is the right of a litigant to have his cause tried and determined under the same rules of procedure that are applied to other similar cases, and when this is afforded to him he has no ground to complain that due process of law is not being observed." See, also, 5 Cal.Jur. p. 864. In the case of Dow v. Beals, 149 Misc. 631, 268 N.Y.S. 425, which was an action for dissolution of a partnership, and which involved the construction of a section in all material respects similar to that of section 2432 Civil Code, in discussing the constitutionality of this section the court said (page 427): "Such power to dispense with a judicial sale is given by the provisions of the partnership law. * * * The portions of these sections referring to the procedure to be adopted in this action are clearly remedial in character. They do not impair any contract rights, and they fix only the method of procedure. * * * In so fixing value the good will of the business should not be considered."

[14] Defendants and cross-appellants also contend that the trial court erred in not awarding them damages as prayed for. The trial court found that defendants had failed to show that they had suffered any damages by reason of plaintiff's conduct. The evidence fully supports this finding.

[15] The finding of the trial court with regard to the appraisement is as follows: "The court finds that the defendants have, in pursuance of the aforementioned interlocutory order * * * rendered to the above entitled court a full and complete accounting of all transactions of the said joint venture, including all profits arising therefrom from the beginning of said venture up to and including the dissolution thereof on July 20, 1934." Although both parties to the action have challenged the fairness of the amount found to be the interest of plaintiff on the date of dissolution each claiming in accordance with his respective views, that the amount of certain items of expenditure should have been added to or deducted from the amount found to be the going concern value,—the evidence discloses the fact that a full and fair accounting was had between the parties. The value of the assets as entered upon the books of the venture was shown to have been the basis upon which the value of plaintiff's interest was computed. All three of the appraisers agreed upon a certain sum as representing the value of plaintiff's one-half interest, but two of the appraisers submitted concurring reports in which each arrived at entirely different figures with respect to the "going concern" and "good will" value, respectively. The question of the valuation of plaintiff's interest was a matter for the trial court, and upon the divergent views thus submitted by the appraisers, the finding of the trial court may not be disturbed. Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431; Ratto v. Ratto, 206 Cal. 661, 275 P. 784; McAtee v. McAtee, 105 Cal.App. 555, 288 P. 114.

[16, 17] Defendants and cross-appellants were awarded costs in the action proper, but upon the appraisal proceedings each party was charged with the payment of one-half the appraisers' fee. Defendants contend it was error for the court to have taxed them for a portion of this fee. This was a matter within the discretion of the trial court, and the action of such tribunal will not be disturbed, where as here, there is no showing of an abuse of discretion.

Judgment affirmed. Motion to dismiss appeal denied.

BACCIOCCO et ux. v. CURTIS et ux.

Sac. 5094.

Supreme Court of California.

Sept. 1, 1938.

Rehearing Denied Sept. 29, 1938.

1. Fraudulent conveyances 🔑299(12)

In action to set aside as fraudulent a conveyance from defendant-husband to defendant-wife and to subject the property to plaintiffs' judgments, evidence sustained finding that conveyance was a valid conveyance for good consideration without intent to defraud, followed by a sufficient and continued change of possession. Civ.Code, §§ 3439, 3440, 3442.

2. Landlord and tenant 🔑184(2)

Where there is an absolute payment of rent in advance for some portion of term, or where there is a payment of a certain sum as a "bonus" or "consideration" for execution of lease, lessor may retain it on termination.

3. Landlord and tenant 🔑184(2)

Where payment by lessee to lessor is a deposit as security for performance of terms of lease, it is treated as a provision for a penalty, and the lessor cannot keep the sum on lessee's breach.

4. Landlord and tenant 🔑184(2)

In determining whether payment by lessees to lessors was a "bonus" which lessors were entitled to retain on lessees' breach, or a deposit for security for performance, which lessors could not keep, court was justified in considering circumstances surrounding making of lease and giving of deposit in order to determine what meaning and effect should be given to language of lease.

5. Landlord and tenant 🔑184(2)

Evidence as to circumstances of making lease and giving of deposit by lessees sustained trial court's interpretation of deposit as a deposit for security for performance which lessors could not keep, rather than a "bonus" which lessors were entitled to retain on lessees' breach, particularly in view of receipt for deposit which stated that money had been received as security for payment of rent under lease.

6. Judgment 🔑585(3)

The fact that lessors had previously obtained a judgment against lessees in unlawful detainer proceeding did not preclude lessees, under doctrine of res judicata, from thereafter recovering from lessors amount of deposit as secuity for performance of lease after breach by lessees.

* * *

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by L. A. Bacciocco and Romelda Bacciocco, his wife, against W. H. Curtis and Clara E. Curtis, his wife, to set aside as fraudulent a conveyance from defendant husband to defendant wife and to subject property to plaintiffs' judgments, and W. H. Curtis filed a cross-complaint. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

For prior opinion, see 72 P.2d 148.

Preston & Preston and J. Elmer Barricklo, both of San Francisco, and L. C. Smith, of Redding, for appellants.

Carter, Barrett, Finley & Carlton, of Redding, for respondents.

PER CURIAM.

On this rehearing, we adopt that part of our former decision setting forth the facts and issues, as follows:

"This is an action to set aside as fraudulent a conveyance from defendant husband to defendant wife and to subject the property to plaintiffs' judgments. The trial court denied any relief to the plaintiffs and awarded to the defendant W. H. Curtis judgment in the sum of $6,400 on the fourth cause of action pleaded in his cross-complaint. The plaintiffs have appealed from the entire judgment.

"In February, 1923, Reuben Kern leased to A. G. Steelman property in San Francisco to be used for a garage and Steelman executed a chattel mortgage to secure the covenants of the lease covering all the equipment and fixtures placed in the premises by the lessee or his assigns. Thereafter the plaintiffs purchased the property from Kern, and on November 30, 1926, leased the premises to defendant W. H. Curtis for a period of ten years, at a total rent of $114,000, payable $950 per month. To secure performance of the lease Curtis acknowledged the existence of the chattel mortgage on the fixtures of the garage and also the payment to plaintiffs under paragraph XVII of the lease of the sum of $5,000, denominated a 'bonus for the lessor's execution of this lease'. The lease provided that so long as there was no default by the lessee, the lessors would allow him semi-annually a sum equal to interest at the rate of 6 per cent per annum on the said $5,000, and that in the event of full performance the $5,000 would be credited on the rent for the last five odd months of the term.

"On June 22, 1930, upon written consent of plaintiffs, the lease was assigned by Curtis to Steelman and Pike, Curtis expressly agreeing to remain liable on the covenants thereof. On February 25, 1931, with plaintiffs' written consent, the lease was assigned by Steelman to Pike, the assignor expressly agreeing to remain liable on all covenants. For the months of April, May and June, 1931, neither Curtis, Steelman nor Pike made any rental payment.

"On November 12, 1930, Curtis secured, as lessee, a 15-year lease on two lots in Redding, Shasta county, which property he improved and operated as the 'A–1 Motor Court.' On June 16, 1931, Curtis conveyed to Claire E. Curtis, his wife and codefendant herein, all his interest in the A–1 Motor Court, including the leasehold and improvements. It is this conveyance which plaintiffs, by this action, would set aside as in fraud of their rights as creditors.

"One day after the conveyance was made, on June 17, 1931, plaintiffs served on Curtis, Pike and Steelman, with respect to the San Francisco garage, the three-day statutory notice to quit, and on June 22, 1931, plaintiffs gave written notice of termination of the lease. The next day, June 23, 1931, plaintiffs filed in the San Francisco superior court an action in unlawful detainer against W. H. Curtis, Pike and Steelman, seeking restitution of the garage premises, rent for April, May and June, and attorney's fees. Separate answers were filed by W. H. Curtis and the other two defendants, alleging special defenses, such as the existence of the chattel mortgage given to secure performance of the lease, an agreement of sale dated July 25, 1930, whereby W. H. Curtis transferred to his codefendants all his interests in the personal property located in the garage, and an agreement of plaintiffs to release W. H. Curtis of all liability under the lease in consideration for the transfer to plaintiffs of the unpaid balance due on this contract of July, 1930. Trial of the action resulted in a judgment for plaintiffs, which became final on January 5, 1932.

"On June 29, 1932, plaintiffs commenced a second action against the same defendants, Curtis, Pike, and Steelman, for foreclosure of the chattel mortgage. Curtis defaulted, and on September 1, 1932, a decree of foreclosure was entered for plaintiffs as against all of the defendants, in the sum of $3,095.48 plus $250 attorney fees, interest and costs. A foreclosure sale was had at which plaintiffs bought in the property for about $25, and on September 21, 1932, a deficiency judgment was filed in their favor and against defendants for $3,564.80, with interest. On March 29, 1933, Steelman was adjudicated a bankrupt, with estate of no value, and on February 9, 1934, a writ of execution against Pike was returned unsatisfied. On July 6, 1933, writ of execution against Curtis directed to the sheriff of Shasta county was likewise returned wholly unsatisfied.

"On June 18, 1934, plaintiffs commenced this present action against Curtis and his wife to set aside his conveyance to her on June 16, 1931, of his interest in the A–1 Motor Court at Redding. The complaint, based on sections 3439, 3440 and 3442 of the Civil Code, alleged that the conveyance was unaccompanied by any real change of possession, made without filing of the statutory notice of transfer required by section 3440 of the Civil Code, and with intent to defraud creditors at a time when Curtis was financially impotent and knew that he had already been indebted to plaintiffs for three months and that the unlawful detainer suit was about to be instituted by plaintiffs, and that no relief could be secured from Pike and Steelman. The prayer of the complaint was that the transfer be declared fraudulent and void; that defendants be restrained by injunction from interfering with the property or its proceeds (in January, 1934, the Curtises had sold a portion of their interest in the motor camp to the Shell Oil Co.) except under direction of the court, and that plaintiffs' judgments be satisfied out of it, and for general relief.

"To plaintiffs' complaint defendants Curtis and wife filed an answer setting up a number of affirmative defenses, an amended answer, amendments thereto, and

W. H. Curtis filed a cross-complaint alleging four causes of action, the fourth cause being later amended to conform to proof. On the subject of fraud, defendants averred that the wife paid the husband, as consideration for the transfer, $5,480 from her separate assets which sum he used to pay creditors; also that the conveyance was accompanied by an immediate change of possession. Another separate defense was that for a valuable consideration plaintiffs had agreed with and promised defendant Curtis that they would not attempt to enforce against him the judgment obtained by them in the prior unlawful detainer action. The gravamen of the charge in the four causes of cross-complaint was that at the time plaintiffs secured judgment in the prior action in unlawful detainer, they converted personal property of Curtis worth $5,000 and also held unforeclosed the chattel mortgage given to secure performance of the lease covering $5,000 worth of other property in the garage, which property they took possession of and converted to their own use, and yet when they purported by the second action to foreclose the chattel mortgage and to sell the property at a purported foreclosure sale to themselves for $25.50, they allowed Curtis no credit on account of the indebtedness under the lease, or in satisfaction of the judgment obtained in the first action, notwithstanding the value of the property was sufficient to satisfy in full both said indebtedness and said judgment. Furthermore, the cross-complainant alleged (fourth cause of action as amended to conform to proof) that when on June 30, 1931, the lease was terminated by mutual consent with $2,825 due for unpaid rent thereunder, and Curtis permitted plaintiffs to have possession of said $5,000 worth of personal property, thus discharging the $2,825 obligation. Curtis thereupon became entitled to receive back from plaintiffs the $5,000 which he originally deposited with them upon execution of the lease."

A number of questions are raised and argued in the briefs, but in our opinion two of them are determinative of the case and these alone need be discussed here.

[1] The first point is that the alleged fraudulent transfer was not, in fact, in fraud of creditors. The trial court found that it was a valid conveyance for a good consideration without intent to defraud, and followed by a sufficient and continued change of possession. This finding is amply supported by the evidence. The record shows that when defendant W. H. Curtis was unable to discharge obligations of the auto court, his wife, defendant Clara E. Curtis, borrowed $3,500 from her relatives, and added $2,000 of her own separate funds. The assignment to her of the auto court lease was in consideration of her agreement to assume and pay $5,480 of obligations then listed against the premises. After the assignment Mrs. Curtis ran the business. She secured a new license, in her own name, made all the purchases, paid all the bills, and had sole authority to sign the checks. Upon such a record the conveyance cannot be successfully attacked by charging a fraudulent intent on the part of W. H. Curtis. The alleged fraud was not proved, and the showing of a valuable consideration conclusively answers the charge. See Bandle v. Commercial Bank, 178 Cal. 546, 174 P. 44; Atkinson v. Western D. Syndicate, 170 Cal. 511, 150 P. 363; Security Trust Co. v. Silverman, 210 Cal. 578, 292 P. 636.

[2-5] The second point relates to the fourth count of defendants' cross-complaint, seeking the recovery of a $5,000 deposit paid by the former lessee at the time of execution of the lease. The lease in this connection states that "as a bonus for the lessor's execution of this lease, the lessee has paid him, unconditionally upon execution thereof the sum of five thousand dollars ($5,000.00)," to be credited on the last five months' rent. It is settled in California that where there is an absolute payment of rent in advance for some portion of the term, or where there is a payment of a certain sum as a "bonus" or "consideration" for the execution of the lease, the lessor may retain it upon termination. See A-1 Garage v. Lange Inv. Co., 6 Cal.App.2d 593, 44 P.2d 681. But if it is a deposit as security for the performance of the terms of the lease, it is treated as a provision for a penalty, and the lessor cannot keep the sum upon the lessee's breach. Redmon v. Graham, 211 Cal. 491, 295 P. 1031; Sullivan, Inc., v. Johnson, 116 Cal.App. 591, 3 P.2d 72. These rules are established, and the only problem is one of application. Plaintiffs contend that the lease is unambiguous in its declaration, and that therefore the payment must be deemed a

bonus. The trial court found, however, that it was not a bonus but a deposit as security, and while the matter is not free from doubt, we think there was evidence to support this interpretation. The lease itself contains two additional provisions which are not easily reconcilable with the idea of an absolute transfer to the lessor of funds in which the lessee retains no further rights. One is the provision that in the event of termination of the lease by destruction of the building, the lessor "will pay the lessee so much of the said sum of Five Thousand Dollars ($5,000) as shall not theretofore have been so credited upon the rent." The second provision is that as long as the lessee is not in default in payment of rent or performance of other covenants of the lease, "the lessor shall allow him, semi-annually, a sum equal to interest at the rate of 6 per cent per annum upon said sum of five thousand dollars ($5,000.00) or on that part thereof not actually credited as aforesaid." These provisions suggest that the lessee retains substantial rights in the fund until the end of the term; and the provision for regular interest for the whole term if the lessee properly performs seems to indicate that the fund was chiefly intended as security for performance rather than as a bonus for execution of the lease or an absolute advance payment of rent. At any rate, these inconsistent statements in the lease itself are an answer to the contention that the unambiguous characterization of the sum as a "bonus" removes the matter from the court's power of construction. In our opinion the court was justified in considering the circumstances surrounding the making of the lease and the giving of the deposit in order to determine what meaning and effect should be given to the language. And these circumstances fully support its conclusion. When the $5,000 was paid, plaintiff gave Mr. Curtis a receipt, reading: "Received of W. H. Curtis Five Thousand and no-100 Dollars deposit as security for payment of rent under lease dated 12–1–26. Aetna Garage. L. A. Bacciocco." This declaration of the parties on the controverted issue must be held to turn the scale in favor of the finding of the trial court, which properly looked at the substance rather than the form of the transaction. See Sullivan, Inc., v. Johnson, supra.

[6] Nor do we think that the doctrine of res judicata is an obstacle to the judgment on the cross-complaint, for an action to recover a deposit paid by the lessee, after a prior unlawful detainer proceeding by the lessor, has been recognized as proper in this state. See Green v. Frahm, 176 Cal. 259, 168 P. 114.

In view of the above we do not find it necessary at this time to consider the evidence presented by defendants to show that plaintiffs orally agreed, for consideration, not to seek enforcement of their money judgment for rent, although it should be noted that the lower court found this evidence convincing and held that plaintiffs were estopped from enforcing the same.

No other points require discussion.

The judgment is affirmed.

27 Cal.App.2d 240

WIRES v. LITLE.

Civ. 11793.

Supreme Court of California.

Aug. 22, 1938.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

On petition for hearing in the Supreme Court.

Hearing denied.

Prior opinion 80 P.2d 1010.

Morris Lavine, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

PER CURIAM.

The petition for hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division Two, is denied. However, such denial is not to be taken as indicating approval by this court of the discussion concerning matters of common knowledge which, it is said, a jury may properly consider in an action for malpractice.

HONSER, Justice (concurring).

I concur in the general order by which a hearing of the cause by this court is denied; but I am not in accord with that part of the order which is to the effect that the denial of the petition for hearing in this court "is not to be taken as indicating approval by this court of the discussion concerning matters of common knowledge", etc.

The language which occurs in the opinion of the District Court of Appeal to which the order has reference is as follows (80 P.2d page 1012): "It might be *well argued* that it is a matter of common knowledge that a needle accidentally embedded in the finger of a seamstress *might* cause infection if not promptly extracted; that a *clear* X-ray picture would be of *assistance* to the surgeon; and that if an *indistinct* picture be secured from a dental office *an effort should be made* to secure a *clear* picture from those equipped with apparatus for that purpose." (Emphasis added.)

It is obvious that an order of denial of hearing which contains express language that "such denial is not to be taken as indicating approval by this court" of specified discussion which appears in the opinion of the District Court of Appeal, is the equivalent, and is but another way of stating, that the criticized portion of the opinion is *disapproved.*

At the outset, it may be observed that it is questionable whether this court is constitutionally empowered or authorized as an incident to the instant proceeding, either specifically to approve or to "disapprove" of any declaration of law that has been made by the District Court of Appeal.

Of course, it must be conceded that the constitutional provisions are the source of power of the Supreme Court. Apparently sections 4 and 4c of article 6 of the Constitution contain the only provisions that have a bearing upon such assumed authority. In the former section, it is provided that "the said court shall * * * have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, *which shall be ordered by the supreme court to be transferred to itself for hearing and decision,* as hereinafter provided"; and the pertinent provision of the latter section is that "the Supreme Court shall have power * * * to order any cause pending before a district court of appeal to be heard and determined by the supreme court". (Emphasis added.)

With respect to the instant inquiry, the jurisdiction of the Supreme Court is thus established, and is as fixed as is the jurisdiction of any other court. The constitutional provisions in that regard contemplate only that either a hearing of a cause shall be granted, or that it shall be denied. No middle course is available. If a hearing be granted, manifestly the cause is then before the court for determination; and in that event such a decision and opinion may be rendered as may accord with the views of a majority of the members of the court. But should the petition for a hearing be denied, by no constitutional provision is it implied or even suggested that the court possesses any power other than to make its unqualified order to that effect. In that regard, neither direct nor implied authority is conferred upon the Supreme Court either to modify an opinion theretofore rendered by a District Court of Appeal, or to exercise any sort of supervisory control with reference thereto. It is obvious that without and in the absence of a regular hearing of a cause, if the Supreme Court has authority to *modify* such a decision or opinion in any particular, it should follow that the court may so modify the decision or the opinion as to render it of no effect; in other words, it might "modify" an opinion of the District Court of Appeal out of existence; and at the same time, in the place of such "modified" opinion, either expressly or impliedly, substitute an opinion and decision which might be to the same effect as that theretofore rendered by the District Court of Appeal, or, at its pleasure or option, expressly reach an opposite conclusion, accompanied by an appropriate opinion—all without any hearing having been granted.

But even assuming the existence of the constitutional power in this court which herein has been exercised, it is not clear that the "discussion" to which the order herein has made reference, and regarding which "approval by this court" is withheld, does not constitute a fair and correct expression of the law in the matter to which it relates.

Directing attention to the opening words of the "discussion" which apply to each of the several statements thereafter following, it will be noted, not that a positive declaration is made with reference thereto, but only that *"it might be well argued* that it is a matter of common knowledge", etc. Otherwise stated, the opinion does not purport to declare that either in fact or in law it *is* a matter of common knowledge, but only that whether such conditions exist may be *debatable.* In that light, I fail to discern any ground for "disapproval" by this court. Although not admitted, even should it be conceded that by the criticized language of the District Court of Appeal, an impression was sought to be conveyed that the specified statements actually constituted and were "matters of common knowledge", again I must confess my inability to detect any error therein. Is it not a fact that practically every one knows that either a needle or any other foreign substance which may become "embedded (either) in the finger", or in any other part of the body *"might* (may) cause infection if not promptly extracted"? And in these more advanced days, is there any responsible person who does not know that in treating a patient who has been so unfortunate as to have a broken needle embedded in a finger joint, "a clear X-ray picture (of such joint) would be of *assistance* to the surgeon"? Furthermore, would not common sense indicate that if in the first instance a *poor* or "indistinct picture be secured", either from a dental office or from any other source, "an *effort* should be made to secure a *clear* picture from those equipped with apparatus for that purpose"? A denial of the existence of such knowledge on the part of the average layman amounts to a refusal to accredit to him any observation whatsoever relating to the most common and ordinary conditions that surround transactions and happenings of our daily life. (Emphasis added.)

Nor in my judgment may it properly be declared that either of such assumed statements regarding that which may constitute "judicial notice" was erroneous. In 23 C.J., pages 58, 59, 61, it is declared that "The term 'judicial notice' means no more than that the court will bring to its aid and consider, without proof of the facts, its knowledge of those matters of public concern which are known by all well-informed persons. * * * Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence." And as affecting a situation such as here is in question, in 15 Ruling Case Law, pages 1101 and 1130 (where many judicial illustrations are cited) it is respectively stated that "Courts will take judicial notice of those facts relating to human life, health, habits and acts known to men of ordinary understanding * * *; the general rule is that it is the duty of a court to take judicial cognizance of all matters affecting the public health which are of certainty to general or scientific knowledge. * * *" Within cited cases where it has been held that the court may "take judicial notice" of facts which may include and affect the physical condition of persons, the following several rulings appear: The size of an ordinary man is a matter of common knowledge, which extends not only to height and thickness of the body as a whole, but also to the measurement of the various parts; a man could not accidentally fall through a hole of a certain size; the destruction of the sight of one eye impairs the general power of vision; the instinct of self-preservation will be judicially noticed; also the effect of fright or exposure on the nervous system; the habits and qualities of the more common animals; certain strains and breeds of animals of the same species are more valuable than others; certain objects or events are or are not such as to frighten horses of ordinary gentleness; Texas cattle have some contagious or infectious disease, communicable to native cattle outside that state; certain animals are the natural enemies of others; epilepsy tends to weaken mental force, and often descends from parent to child, or entails upon the offspring of the sufferer some other grave form of nervous malady; man's susceptibility to certain diseases; means or method by which disease spreads from one victim to another; diseases of the skin may be spread in barbershops; reclamation of swamp and overflowed lands may concern the public health; considerations of public health necessitates that streets be kept clean of refuse; hogs kept within thickly populated cities tend to create a condition hazardous to the public health; a high, rank growth of weeds in a thickly populated district tends to injuriously affect the health of the inhabitants; the manufacture of wearing apparel in unsanitary and overcrowded working quarters may promote or spread disease; and that long hours in certain employments are injurious to health.

As a conclusion, it is clear to my mind that that part of the order to which reference hereinbefore has been had, is erroneous.

GABRIELLI v. KNICKERBOCKER et al.

Sac. 5207.

Supreme Court of California.

Aug. 31, 1938.

Rehearing Denied Sept. 29, 1938.

1. Constitutional law ⟹84, 211, 255

The expulsion of grade school pupil, who refused on religious grounds to comply with rule of board of education requiring pupils to salute United States flag and to pledge allegiance thereto, was not a denial of constitutional rights of religious liberty, equal protection of the laws, or due process of law. School Code, § 5.544; Const. Cal. art. 1, §§ 4, 11, 13, 21; U.S.C.A.Const. Amend. 14, § 1.

2. Courts ⟹97(6)

State courts in interpreting provisions of the State Constitution are not necessarily concluded by an interpretation placed on similar provisions in the Federal Constitution, although cogent reasons must exist before a state court in construing a provision of State Constitution will depart from the construction placed by United States Supreme Court on a similar provision in Federal Constitution.

3. Constitutional law ⟹255

Religious liberty is included within the term "liberty" in Fourteenth Amendment to the Federal Constitution prohibiting the states from depriving any person of life, liberty, or property without due process of law. U.S.C.A.Const. Amend. 14, § 1.

[Ed. Note.—For other definitions of "Liberty," see Words & Phrases.]

4. Courts ⟹107

United States Supreme Court's dismissal, on ground of want of a substantial federal question, of appeals from state court judgments upholding validity of regulations requiring the salute and pledging of allegiance to United States flag as applied to public school pupils objecting on religious grounds, constituted a ruling that flag saluting requirement did not violate any federal constitutional rights of pupils objecting on religious grounds. U.S.C.A.Const. Amend. 14, § 1.

5. Constitutional law ⟹84

The exactions of the state of social and patriotic duties of the citizens and such other civic duties as may have reasonable relations to the maintenance of good order, safety, and the public welfare of the nation are not infringements of the religious freedom clauses of either the State or Federal Constitution. Const.Cal. art. 1, § 4; U.S.C.A. Const. Amend. 14, § 1.

6. Constitutional law ⟹73

Courts entertaining a different opinion from that of school boards as to the wisdom or expediency of social regulations adopted by boards can annul such regulations only where the regulations are clearly shown to be in violation of the fundamental law.

◆

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus proceeding by Charlotte Gabrielli, a minor, by Joseph J. Gabrielli, her guardian ad litem, against Dorothy C. Knickerbocker and others to compel the reinstatement of Charlotte Gabrielli as a pupil of the Fremont School, a public school of the elementary grades in the City of Sacramento. From a judgment directing the issuance of the peremptory writ, the respondents appeal.

Reversed and writ discharged.

Prior opinion, 74 P.2d 290.

Rehearing denied; HOUSER, J., dissenting.

Wayne M. Collins, of San Francisco, for appellants.

Otis D. Babcock, Dist. Atty., and William A. Green, Asst. Dist. Atty., both of Sacramento, for respondent.

SEAWELL, Justice.

Charlotte Gabrielli, a minor nine years of age and a former student of the Fremont School, a public school of the elementary grades in the City of Sacramento, applied through her guardian ad litem to the superior court in Sacramento County for a writ of mandate addressed to the authorities of the Fremont School and the Superintendent of Schools and Board of Education of the City of Sacramento School District to compel her reinstatement as a pupil of the Fremont School. She had been expelled by the respondent authorities for persistent refusal to participate in a ceremony of saluting and pledging allegiance to the flag of the United States. Her refusal was based upon the ground of religious objection to the ceremony. The respondents have appealed from a judgment directing the issuance of the peremptory writ.

The essential facts have been agreed upon. Petitioner and her father and guardian ad litem, Joseph Gabrielli, are citizens of the United States and reside in the city of Sacramento School District. Petitioner was duly and regularly admitted to and was in attendance upon the Fremont School until her expulsion, which was for the sole reason that she refused to salute the flag of the United States and pledge allegiance thereto, although she was willing to stand quietly and respectfully during the performance of the ceremony by the other children. Participation in this ceremony is required of all students in public elementary schools in the city of Sacramento, although in some of the public schools of elementary grades in the County of Sacramento compliance is not required of students who have religious objections thereto. Petitioner and her father are members of a religious organization known as "Jehovah's Witnesses", which teaches that the saluting of and the pledge of allegiance to the flag and government of the United States constitute a form of idolatry and the ascription of spiritual powers of salvation to a man-made symbol and are forbidden by the Bible; hence such acts imperil the salvation of the participant. There is no suggestion that petitioner's objections are not made in good faith.

In support of her contention that she has been illegally excluded from the Fremont School petitioner argues that her expulsion has deprived her of her right to attend the public schools without due process of law (in violation of amend. 14, sec. 1, Fed. Const., U.S.C.A.Const. Amend. 14, § 1, and art. 1, sec. 13, Cal.Const.); that it constitutes a denial of the religious liberty guaranteed to petitioner by the California Constitution (art. 1, sec. 4) and protected by amendment 14, section 1, of the Constitution of the United States; and, finally, that it is a denial to petitioner of the equal protection of the laws, forbidden by both state and federal constitutions (Cal.Const., art. 1, secs. 11 and 21; U.S.Const., amend. 14, sec. 1).

[1] Since the judgment of the trial court in the instant case the Supreme Court of the United States has twice dismissed appeals taken from state court judgments upholding the validity of regulations requiring the salute and pledge of allegiance to the flag as applied to pupils objecting on religious grounds. Leoles v. Landers, 302 U.S. 656, 58 S.Ct. 364, 82 L.Ed. ——; Hering v. State Board of Education of New Jersey, 303 U.S. 624, 58 S.Ct. 752, 82 L.Ed. ——. In view of these decisions it cannot be held that application of the regulation requiring the salute to the flag to members of the group known as Jehovah's Witnesses is in violation of rights guaranteed by the federal constitution. In dismissing the appeal taken from the judgment of the Supreme Court of Georgia in Leoles v. Landers, 184 Ga. 580, 192 S.E. 218, the Supreme Court of the United States rendered the following decision: "Per Curiam. The motion of the appellees to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. Coale v. Pearson, 290 U.S. 597, 54 S.Ct. 131, 78 L.Ed. 525; Hamilton v. Regents of University of California, 293 U.S. 245, 261, 262, 55 S.Ct. 197, 203, 79 L.Ed. 343." 302 U.S. 656, 58 S.Ct. 364, 82 L.Ed. ——.

A similar decision was rendered in dismissing an appeal (303 U.S. 624, 58 S.Ct. 752, 82 L.Ed. ——) from the judgment of the Court of Errors and Appeals of New Jersey in Hering v. State Board of Education of New Jersey, 117 N.J.L. 455, 189 A. 629; Id., 118 N.J.L. 566, 194 A. 177. The court cited Leoles v. Landers, supra. In Nicholls v. Mayor and School Committee of Lynn, Mass., 7 N.E.2d 577, 110 A.L.R. 377, and People v. Sandstrom, 167 Misc. 436, 3 N.Y.S.2d 1006, state courts upheld the requirement of saluting the flag as applied to pupils objecting on religious grounds. Contra, Gobitis v. Minersville School Dist., D. C., 21 F.Supp. 581.

[2] By reason of the above decisions of the Supreme Court of the United States the question as to whether the flag saluting requirement violates the due process clause of the Fourteenth Amendment to the federal constitution, or any other provision of the federal constitution, is no longer open. The due process clause of the Fourteenth Amendment to the federal constitution and the due process clause of the state constitution (art. 1, sec. 13) both prohibit the state from depriving any person "of life, liberty, or property, without due process of law", which provisions are claimed to have been violated in the instant case. State courts in interpreting provisions of the state constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal constitution. Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584, 587; People v. Budd, 117 N.Y. 1, 22 N.E. 670, 674, 682,

5 L.R.A. 559, 15 Am.St.Rep. 460; Watson v. State, 109 Neb. 43, 189 N.W. 620, 621; State of New Mexico v. Henry, 37 N.M. 536, 25 P.2d 204, 207, 90 A.L.R. 805; 11 Am.Jur., sec. 105, p. 741; 12 Am.Jur. 259. But these decisions declare that cogent reasons must exist before a state court in construing a provision of the state constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal constitution.

[3] In addition to the due process clause, our state constitution contains an express guaranty of freedom of religion (art. 1, sec. 4). The federal constitution does not contain a similar express provision protecting "religious" liberty from encroachment by state action. However, the absence of such an express provision does not weaken the force of the federal court decisions, supra, as indicating the rule to be applied in the instant case, for religious liberty is included within the "liberty" protected by the due process clause of the Fourteenth Amendment. Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343. In the cited case, the court upheld a regulation that students at the state university take a course in military science and tactics as applied to petitioners who objected to enrollment in such a course on religious grounds.

[4] It must be accepted as a postulate, by reason of the subject matter involved in the dismissal of the above cited appeals, that every argument relied upon by respondent in the instant case, both for and against the power of appellant to enforce its action of expulsion as an asserted violation of the religious freedom clause of the federal constitution; and, further, that every argument and reason urged in the many decided cases of the several courts of the country in which the precise question was presented with respect to the violation of said religious freedom clause, came to the cognizance of the United States Supreme Court and was duly weighed by it in the process of reaching the conclusion that no substantial federal question was involved in said appealed cases. The action taken by said court in disposing of said appeals can not be taken in any other sense than that no violation of respondent's constitutional right in the instant case has been committed by the act of excluding respondent from attendance at said public school until she shall comply with the rule which she refuses to obey.

We are further of the view that the United States Supreme Court, before making its orders of dismissal, had in mind the principles which were previously enunciated in Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637, a searching and exhaustive review of the question before us, from which we make the following brief quotation (page 300):

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. * * * With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."

To the same end may be cited the earlier case of Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244, and Hamilton v. Regents, etc., supra, as furnishing further reasons supporting the action of dismissal. The decision in the Reynolds Case points out the omission of the constitution to define the word "religion". In answering its own question as to what is meant by the religious freedom guaranteed by the constitution, the court reverts to Mr. Jefferson's comment made at the time of the adoption of the first amendment to the federal constitution, U.S.C.A.Const. Amend. 1, whereby the Congress was forbidden to make any law "respecting an establishment of religion, or prohibiting the free exercise thereof." The decision incorporates Mr. Jefferson's comment as an aid to the interpretation of the meaning of said clause, phrased in the following words (page 164):

"* * * I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties."

The decision concludes in these words:

"Coming as this does from an acknowledged leader of the advocates of the measure [Jefferson], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

[5] Giving due consideration to the precise constitutional question presented in the cases from which the appeals were taken and the historical background upon which are marked by the supreme law of the nation the limits beyond which the field of religious freedom may not be invaded by unwarranted encroachments of state, it clearly appears that the exactions of the state of social and patriotic duties of the citizens and such other civic duties as may have reasonable relations to the maintenance of good order, safety and the public welfare of the nation, may not be interpreted as infringements of the religious freedom clauses of either the state or federal organic law. We are, therefore, of the view that the rule prescribed by the board does not abridge any of respondent's constitutional rights by excluding her from attendance at the Sacramento city public school until such time as she shall comply with the rule which she refuses to obey.

[6] The legislature has conferred upon school boards broad plenary powers to make all reasonable regulations that will in the reasonable exercise of judgment promote the efficiency of the school system in performing public welfare duties, which are limited not merely to the development of the mind in academic fields, but the sphere is much broader and extends to those subjects which will tend to develop and quicken the civic conscience in ways of attachment for home and country. It is only where its regulations are clearly shown to be in violation of the fundamental law that the courts, even though entertaining a different opinion from that of the governing boards as to the wisdom or expediency of adopting social regulations, may annul them. Many authorities may be cited sustaining the action of school boards in matters in which the wisdom of the board's action may be so highly controversial that reasonable minds might well be divided as to the wisdom of the board's action. In such cases, its action is conclusive.

We see no violation of any article of the federal or state constitutions in its exercise of power in the instant case. The training of school children in good citizenship, patriotism and loyalty to state and nation is regarded by the law of the state as a means of protecting public welfare and is directed by the School Code of the state. (Sec. 5.544.) The simple salutation to the flag and the repetition of the pledge of allegiance, in the judgment of the proper governing body, tend to stimulate in the minds of youth in the formative period of life sentiments of lasting affection and respect for and unfaltering loyalty to our government and its institutions.

The judgment is reversed and the writ is discharged.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.; SHENK, J.

12 Cal.2d 48

RAILROAD COMMISSION OF CALIFORNIA v. RILEY, State Controller.

S. F. 16033.

Supreme Court of California.

Aug. 24, 1938.

Statutes 🔑33

The Governor's veto of the Legislature's allocation of a specified sum for a particular purpose in its general appropriation for the support of the Railroad Commission did not reduce the amount of the general appropriation by the amount of the item which the Governor eliminated. Const. art. 4, §§ 16, 34.

In Bank.

Mandamus proceeding by the Railroad Commission of the State of California, petitioner, to compel Harry B. Riley, as Controller of the State of California, to make a certain sum available on the accounting records of the Controller's Department for the support of the Railroad Commission.

Writ granted.

Ira H. Rowell, Roderick B. Cassidy, and George E. Howard, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Pursuant to the provisions of section 34 of article 4 of the Constitution of the state of California, the governor of the state submitted to the 52nd session of the legislature, the state budget for the biennium commencing July 1, 1937, and ending June 30, 1939, accompanied by an appropriation bill itemizing proposed state expenditures for such biennium, known as the budget bill, which included item No. 35 pertaining to support for the railroad commission of said state. Said budget bill originally contained the following words and figures relating to said item No. 35:

> "Item 35—For support of Railroad Commission of the State of California, eight hundred fifty-seven thousand six hundred one dollars ....$857,601.00"

The legislature, after making various changes, passed said bill, which was thereupon submitted to the governor for consideration. Said budget bill, as amended by the assembly and passed by the legislature, contained the following words and figures pertaining to item No. 35:

> "Item 35—For support of the Railroad Commission of the State of California, eight hundred fifty-seven thousand six hundred one dollars, of which the amount of thirty-four thousand one hundred sixty dollars shall be expended for support of the Safety Section of the Railroad Commission of the State of California.....$857,601.00"

Pursuant to the power vested in the governor by sections 16 and 34 of article 4 of the Constitution, the governor signed said budget bill as passed by the legislature and appended thereto a statement of the items therein contained to which he objected, together with his reasons therefor. Reference was made in said statement to said item 35 in the following language:

> "1. I object to and eliminate the item on pages 6 and 7, under the heading, 'Administrative', reading as follows: 'of which the amount of thirty-four thousand one hundred sixty dollars shall be expended for support of the Safety Section of the Railroad Commission of the State of California,' for the reason that I consider the Railroad Commission of the State of California and the Department of Finance better equipped to make such allocations, and vested with ample authority to provide through fiscal year budgets, for the needs, when known, of such functions."

Thereafter the assembly reconsidered the budget and appropriation bill, taking up separately each of the items objected to by the governor, but failed to override the governor's objection to item No. 35, wherein the legislature had provided that of the sum of $857,601, appropriated to the support of the railroad commission, $34,160 of said sum should be expended for the support of the safety section of the railroad commission of the state.

On the 22nd of March, 1938, petitioner made demand upon respondent, Harry B. Riley, the controller of the state of California, to set up on the books of his department the sum of $857,601 for the support of the Railroad Commission for the fiscal years of said biennium, that is to say, for the 89th and 90th fiscal years, but respondent refused and still refuses to comply with said demand, and refuses to set up on the books of his department for the support of the Railroad Commission for said fiscal years any greater amount than the sum of $857,601, less the sum of $34,160, or the sum of $823,441.

Petitioner contends that the correct amount to be set up on respondent's books for the support of the railroad commission for each of said fiscal years is the sum of $428,800.50, or one-half of said sum of $857.601, while respondent has only set up for said purposes on his books the sum of $411,720.50 for each of said fiscal years, said sum of $411,720.50, being one-half of said sum of $823,441. In its petition, petitioner prays for a writ of mandate to be issued out of this court directed to respondent as such controller commanding him to make available upon the accounting records of his department for the support of the railroad commission the sum of $428,800.50 for each of said fiscal years, constituting the total sum of $857,601 for such biennium. On the filing of said petition, an alternative writ of mandate was issued, the same having been prayed for in said petition. The respondent has appeared and filed a general demurrer to the petition.

The legal questions presented by the petition herein do not differ in any respect from those which we considered and decided in the case of Reardon v. Riley, 10 Cal. 2d 531, 76 P.2d 101. In that case the governor in his budget and budget bill provided for an appropriation of $1,297,185 for the support of the department of industrial relations for the 89th and 90th fiscal years. The legislature increased this appropriation to the sum of $1,625,185 and provided that $348,000 of said appropriation should be used for two certain specified purposes. The governor signed the bill, but objected to that portion of the bill which provided that said sum of $348,000 should be used for special purposes on the ground that the state officials charged with the duty of disbursing said funds were best qualified to direct these expenditures. He, however, reduced the appropriation from $1,625,185 to the sum of $1,397,185. The bill with his objections was then sent to the assembly, and that body failed to pass the same over the governor's veto. It was then claimed by the respondent controller that the amount thus appropriated was the sum of $1,625,185 less the sum of $348,000, or $1,277,185. The respondent in that case argued, as he does now, that the amount of the appropriation as fixed by the bill as originally passed by the legislature was reduced by the amount of the items to which the governor objected. If that argument had prevailed, then the amount of the appropriation would have been $1,277,185. But the court declined to accept that argument and held that the amount of the appropriation in the bill passed by the legislature, that is the sum of $1,625,185 was not reduced by the amount of these two eliminated items, and was only reduced by the action of the governor in cutting the appropriation from $1,625,185 to $1,397,185. That this is a correct interpretation of the decision in Reardon v. Riley, supra, we think plainly appears from the express language of the court used at that time which we will proceed to quote. In considering the problem then before the court, it was stated that three possible results were suggested under the facts before it. The second of these results was stated as follows (page 102): "That the action of the Governor reduced the sum of $1,625,185 originally fixed by the Legislature, by the aggregate of the 'eliminated' items ($328,000 plus $20,000 or $348,000), leaving the sum of $1,277,185—the total amount claimed by the respondent controller to be available to the department of industrial relations." As to this second result, the court held: "We are not inclined to accept the second result above indicated, and contended for by the respondent controller, as the applicable solution of this proceeding. In support thereof he contends that by the 'elimination' of the specific and included items of $328,000 and $20,000, respectively, the Governor ipso facto reduced the general or gross appropriation to the Department of Industrial Relations by the aggregate of said 'eliminated' specific items, or to $1,277,185, and that the Governor could not then increase the 'reduced' general appropriation by $120,000 (the amount here in dispute), or to $1,397,185, without prior legislative action. The result contended for by the respondent controller is required neither by law nor reason. It stultifies and improperly restricts the power vested in the Governor by sections 16 and 34 of article 4 of the Constitution, which sections authorize the Governor to 'reduce or eliminate any one or more items of appropriation of money while approving other portions of the bill.' In other words, the second result above suggested, and here contended for by the respondent controller, would permit the Governor to 'reduce or eliminate' the specific and included items of further 'appropriation,' but would preclude him from 'approving,' as authorized, such other portion of the bill as contained the general 'appropriation' for the department and would likewise preclude the Governor from 'reducing,' as was his obvious intention here, the general appropriation by an amount less than the aggregate of the 'eliminated' specific and included items. Such a result is not to be favored."

The court accordingly rejected the second proposed result, and approved the third result which was stated by the court as follows: "That the action of the Governor 'eliminated' the specific and included items of $328,000 and $20,000 but did not affect the general appropriation of $1,625,185 for said department, which latter item was affected only by the express reduction thereof by the Governor to $1,397,185—the amount claimed by petitioner for his department and conceded by the respondent director of finance as being available therefor."

Applying the language thus used by the court to our present problem, our conclusion is that the action of the governor eliminated the specific item of $34,160, but did not affect the general appropriation of $857,601 for the support of the railroad commission, which last stated amount is available to the commission for the 89th and 90th fiscal years.

Respondent concedes that the decision in the Reardon Case holds that the governor may eliminate the specific and included items without affecting the general or main item in which the specific item is included, but contends that such holding was not necessary to the decision of that case for the reason that the governor in his message reduced the main appropriation from $1,625,185 to $1,397,185, which latter amount was all that petitioner was seeking. But it was not all that the respondent was seeking. Respondent contended that the main appropriation of $1,625,185 was reduced by the two eliminated items amounting to an aggregate of $348,000 which would have left only $1,277,185, as the appropriation for the department for said biennium. The court rejected this contention and it was necessary for it to do so in order for it to arrive at the amount of $1,397,185 as the amount appropriated. This same contention is now made the sole claim of respondent in justification of his refusal to set up on his books of account the sum of $857,601 as the appropriation for petitioner's support for the present biennium. Upon the authority of the case of Reardon v. Riley, supra, this contention cannot be sustained. In view of this former decision of this court upon the very question here involved, it becomes unnecessary for us to consider much of the argument of respondent, which attempts to show that our former decision was erroneous.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; LANGDON, J.; HOUSER, J.; SHENK, J.; SEAWELL, J.

* * *

SOUTHERN SERVICE CO., Limited, v. LOS ANGELES COUNTY (CITY OF LOS ANGELES, Intervener).*

L. A. 16598.

Supreme Court of California.

Aug. 31, 1938.

Rehearing Granted Sept. 29, 1938.

1. Counties 🔑191
Schools and school districts 🔑103(4)

The word "cents," in statute providing that the county board of supervisors should fix the rates of county and school district taxes by designating the number of cents levied for each fund upon each $100 of assessed value, was used as an expression of value and included fractions or multiples of the unit of value, as well as the unit itself. Pol.Code, § 3714, subd. 5.

[Ed. Note.—For other definitions of "Cents," see Words & Phrases.]

2. Counties 🔑191

The statutory requirement that tax levy should be made by county board of supervisors "to raise the amount of the estimated expenditures" cannot reasonably be fulfilled by levying an even number of cents for each fund instead of fractions of cents expressed in several decimal places, where the application of such an even cent formula will produce an unreasonably excessive sum above the estimated expenditures. Pol.Code, § 3714, subd. 5.

3. Counties 🔑191

Under statute requiring county board of supervisors to fix tax rates by designating the number of cents levied for each fund upon each $100 of assessed value to raise the amount of the estimated expenditures, the rate, whether expressed in terms of even cents or carried to three, four, five, or more decimal places, will result in a valid levy if the application of the rate expressed will produce approximately the budget requirement with no more than a slight excess allowable to cover the limitations of the formula, and will result in an invalid levy if its application will produce a material and unreasonable excess over the estimated requirement. Pol.Code, § 3714, subd. 5.

4. Counties 🔑196(8)

In determining validity of tax rate fixed by county board of supervisors, what amount constitutes an allowable slight excess over budget requirements, and what amount constitutes a material and unreasonable excess, are questions of fact for the trial court. Pol.Code, § 3714, subd 5.

5. Schools and school districts 🔑103(4)

An even cent school district tax rate resulting in a levy which was excessive to an unreasonable and material degree was illegal to the extent of such excess. Pol.Code, § 3714, subd. 5; School Code, § 4.374, as added by St.1931, p. 2493.

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*For subsequent opinion see 97 P.2d 963.

6. Counties ⚷191

The words "total amount," in statute authorizing county board of supervisors levying tax to set aside a portion of each fund to be known as "unappropriated reserves" not exceeding 10 per cent. of the total amount of the fund exclusive of surplus, meant the sum total of the items of the fund prior to computation and inclusion of the 10 per cent. Pol.Code, § 3714, subd. 3.

7. Counties ⚷191

In computing unappropriated reserves for tax purposes, the maximum should be computed as 10 per cent. of the appropriations plus general reserves after deduction of surplus. Pol.Code, § 3714, subd. 3.

8. Counties ⚷191

Schools and school districts ⚷103(4)

A tax levy on realty roll of county or school district was void to the extent that tax levies for the same fund and same year on solvent credits, securities, and unsecured personal property were in whole or in part excluded from the computation of such levy, and taxpayer was entitled to refund of tax assessed by reason of excessive tax rate resulting from such omissions.

9. Counties ⚷191

A taxpayer's failure to appear at hearing on preliminary budget and protest omission of solvent credits, securities, and unsecured personal property taxes in computing levies for county funds did not preclude taxpayer from later raising the issue that in such respects the levy was excessive, where the taxpayer's challenge was directed to the use of an alleged erroneous formula in computing the tax rate rather than to error in preparation of the budget.

10. Counties ⚷191

Schools and school districts ⚷103(4)

The county board of supervisors must consider revenue to be derived from taxes on unsecured personal property, solvent credits and securities in fixing the tax rate for county and district school levies. Pol. Code, § 3714, subds. 1, 5; § 3627a; Const. art. 13, §§ 9a, 16.

11. Counties ⚷191

In computing tax rate, county board of supervisors must apply a correct formula in which it has not only made allowance for estimated revenues from sources other than taxation as expressly required by statute, but has also met the implied requirement to consider and account for all estimated tax income and revenue from all known tax sources, so that the amount of the levy will be limited to the needs of the county as fixed by the budget. Pol.Code, § 3714, subd. 5.

12. Taxation ⚷543(6)

A taxpayer seeking a refund of excess payment made by reason of excess levy need not trace his payment into the various funds in order to determine whether any excess revenue resulting from application of the excess rate existed as a surplus or trust fund available to meet claims for refund.

13. Taxation ⚷305

The legality of a tax rate is determined as of the date of levy.

14. Taxation ⚷535

A taxpayer was entitled to refund of excess payment made by reason of excess levy, notwithstanding that there was an under-realization in cash of budget requirements of the year of levy and that no actual excess was produced by reason of the excess levy, since consideration should have been given to the specific or assumed allowance for anticipated delinquencies at time of preparation of budget.

15. Municipal corporations ⚷977

An ordinance requiring the filing of claims against city was not applicable to claims for refunds of city taxes where taxes levied by city were collected by the county for the city. Pol.Code, § 3804.

16. Municipal corporations ⚷977

A city authorizing the county to assess and collect city taxes impliedly authorized the county to allow refunds without the presentation of any claim to city officers. Pol.Code, § 3804.

17. Municipal corporations ⚷977

The failure of taxpayer to file claim against city for refund of city taxes did not preclude taxpayer from obtaining refund of city taxes, where taxes levied by city were collected by the county for the city and taxpayer filed refund claim with the proper county authorities. Pol.Code, § 3804.

18. Municipal corporations ⚷968(1)

The purpose of requiring preparation of a budget as a condition precedent to levy of a valid city tax is to show taxpayers the needs which must be met by taxation, the purposes for which funds will be expended, and the true condition of the public finances.

19. Municipal corporations 🔑968(1)

In preparing its budget, the city council must account for all income and revenue from every known material source.

20. Municipal corporations 🔑956(2)

A provision in charter authorizing city of Los Angeles to levy a tax at a rate sufficient to raise amount appropriated in the annual budget prohibited a levy which would produce an excess over budget requirements, even though the maximum rate specified in charter was not exceeded.

21. Taxation 🔑2

The needs of government always mark the limitation of the taxing power.

22. Municipal corporations 🔑968(1), 977

The elimination from Los Angeles budget of item of income to be received from Los Angeles department of water and power was unauthorized and resulted in an excessive levy so as to entitle taxpayer to refund of excessive payment made by reason of excessive levy, where city council knew that department had appropriated in its proposed budget and in its final departmental budget a sum of money to be paid to city.

23. Municipal corporations 🔑968(1)

A taxpayer's failure to appear before budget session of city council and protest elimination of item of income from proposed budget did not preclude taxpayer from thereafter asserting invalidity of tax because of such elimination, where no notice of removal of item was given prior to budget session.

24. Municipal corporations 🔑968(1)

A taxpayer's duty to present his objections at the preliminary budget hearing does not mean that he must protest alleged errors or irregularities which have not yet been committed, are not known, and cannot reasonably be foreseen at that time.

25. Counties 🔑190(2)

The "annual tax" authorized by Constitution for payment of interest on indebtedness of county and for creation of sinking fund for payment of principal thereof is limited to interest and sinking fund installments falling due in the year of levy. Const. art. 11, § 18.

[Ed. Note.—For other definitions of "Annual Taxes," see Words & Phrases.]

26. Counties 🔑150(2)

The constitutional provision prohibiting county from incurring any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year without the assent of two-thirds of qualified electors was limited in its operation to obligations voluntarily assumed by municipality and was not applicable to obligations imposed by law. Const. art. 11, § 18.

27. Counties 🔑150(2)

A county acts voluntarily, so as to be subject to constitutional prohibition against incurring voluntary obligations exceeding the income and revenue for one year unless two-thirds of electors consent thereto, both when it acts through its governing board with or without the consent of the electors, and when it acts through the electors themselves. Const. art. 11, § 18.

28. Counties 🔑154½

An unincumbered surplus remaining at the close of one fiscal year can be carried forward by county to meet the obligations of the succeeding fiscal year.

29. Counties 🔑192

The practice by counties of carrying forward the unincumbered surplus remaining at the close of one fiscal year to meet the obligations of the succeeding fiscal year does not authorize an express levy in one fiscal year for the creation of fund to be carried over to the next fiscal year to meet an obligation not maturing until the next fiscal year. Const. art. 11, § 18.

30. Constitutional law 🔑70(1)

The courts cannot by judicial construction change the constitutional rule prevailing in California limiting municipal indebtedness in any one year to the income and revenue for such year. Const. art. 11, § 18.

31. Counties 🔑190(2)

Under constitutional provision limiting municipal indebtedness in any one year to the income and revenue for such year, a county levy made in the fiscal year 1933–34 covering interest and sinking fund payments falling due in the fiscal year 1934–35, was invalid. Pol.Code, § 4088; Const. art. 11, § 18.

32. Counties ⚿192

An unauthorized levy by county cannot be made valid merely by placing it under the head of "general reserve" in the fund in which it is carried, thus permitting the accomplishment by indirection of that which is forbidden to be done directly. Pol.Code, § 3714, subds. 3, 6.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Southern Service Company, Limited, against the County of Los Angeles, a body corporate and politic, for refund of taxes paid by plaintiff on ground of invalidity of the tax levy. The City of Los Angeles intervened. From the judgment, both the plaintiff and the defendant appeal.

Reversed and remanded, with directions.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, S. V. O. Prichard, and A. Curtis Smith, Deputies Co. Counsel, all of Los Angeles, Harold Huls, City Atty., of Pasadena, and Dayton L. Ault, City Atty., of San Diego, for plaintiff.

Allard, Holbrook & Whyte, of Pomona, Stater & Dawson and Holbrook & Tarr, all of Los Angeles (Bailie, Turner & Lake, of Los Angeles, Cruickshank, Brooke & Dunlap and Evans & Boyle, all of Pasadena, and Meserve, Mumper, Hughes & Robertson, Overton, Lyman & Plumb, Loyd Wright, and W. Sumner Holbrook, Jr., all of Los Angeles, of counsel), for Southern Service Co.

Ray L. Chesebro, City Atty., Leon Thomas David, Asst. City Atty., and Frederick Von Schrader, Asst. City Atty., all of Los Angeles, John Holmes, Deputy City Atty., of Pasadena, and Randolph Karr, of Los Angeles, for intervener.

PER CURIAM.

Plaintiff Southern Service Company, Ltd., and defendant County of Los Angeles have each appealed from portions of a judgment determining the validity of various items of the Los Angeles tax levy for the fiscal year 1933–1934.

On March 4, 1935, the board of supervisors of Los Angeles County denied a claim for refund which had been presented by plaintiff pursuant to section 3804 of the Political Code, and which was predicated upon alleged invalidity of the 1933–34 levy for three separate funds of the Los Angeles City School District, four funds of the Los Angeles City High School District, and one fund of the Los Angeles Junior College District; also for the General Fund of the City of Los Angeles and four funds of the County of Los Angeles. This action for refund followed, based upon the claim which was incorporated as an exhibit to the complaint.

Defendant county answered. Later both complaint and answer were amended and, over protests of plaintiff, the City of Los Angeles was permitted to intervene and to defend the second cause of action, which attacked the city levy. Upon these pleadings the cause went to trial. At the close of trial the court allowed plaintiff to file an amended complaint to conform to proof, and separate answers thereto were filed by defendant county and intervener city. Although the complaint as amended to conform to proof also incorporated plaintiff's claim, the allegations of that pleading asserted rights to refund different from those set up in the claim. However, upon this appeal counsel for all the parties have waived any technical objection to the form of the claim.

The trial court found for plaintiff with respect to all issues save two, one of which concerns a levy for bond interest to accrue in an eighteen months period and the other the levy made by the city. All items of levy except these two the court adjudged to be in part illegal, excessive, and void, and it ordered the county to refund to plaintiff the sum of $50.16 and costs. It further declared the city tax to be valid, and ordered that the city recover costs from plaintiff. The county appealed from all of the judgment except that portion relating to the two levies mentioned. Plaintiff appealed from the latter portion of the judgment.

The first question presented by the appeal of the county is this: Were the school district rates illegal because the levy was made in even cents per hundred dollars of assessed valuation, instead of in cents and fractions thereof, expressed in several decimal places. The facts with reference to this contention are illustrated by the following table:

Fund for District	Amount required to be raised by levy	Rate of levy as made	Rate sufficient to raise amount required	Excess amount levied	Excess rate	Percentage of excess to need
Los Angeles City School General purposes	$ 4,595,844.36	.38	.3779	$ 25,539.98	.0021	.5 %
Los Angeles City High Sch. General purposes	3,612,570.58	.29	.2836	81,548.17	.0064	2.25%
Los Angeles Jr. College General purposes	850,106.79	.07	.0668	40,774.09	.0032	4.79%
Los Angeles City Sch. 1925 Oper. Bonds	1,995,248.46	.17	.1623	104,146.48	.0077	5.18%
Los Angeles City Sch. Non-oper. Bonds	873,229.32	.08	.0711	120,267.63	.0089	13.77%
Los Angeles City High Sch. 1910 Oper. Bonds	10,870.20	.01	.0008	149,330.20	.0092	1382.00%
Los Angeles City High Sch. 1925 Oper. Bonds	1,234,462.18	.10	.0959	58,096.87	.0041	4.83%
Los Angeles City High Sch. Non-oper. Bonds	901,556.00	.08	.0701	140,160.92	.0099	15.55%
Total	$14,073,888.13	1.18	1.1285	$719,864.34	.0515	

Ratio of total excess to total need, about 5.14%

It will be noted that application of the even cent rate resulted in an excess levy of $0.515 per $100 of assessed valuation, or an estimated return of $719,864.34 more than would have been produced by application of a rate carried to four decimal places. While the above table shows a total ratio of excess to need of 5.14%, the extent to which application of an even cent rate might result in a highly exorbitant levy is well illustrated by the sixth item relating to the levy for the Los Angeles City High School 1910 operative bonds. A tax rate of $0.0008 upon the assessed valuation amounts to $10,870.20. Making the levy in terms of an even cent, $0.01, resulted in an excess levy of $0.0092, producing an estimated excess revenue of $149,330.20, or a 1382% excess. It may be added that the figures which have been stated show only the probable excess levy caused solely by the even cent rate, without considering the effect of the further alleged excess levy caused by understatement of the taxes on securities and solvent credits, which presents another question for decision. Under the findings of the trial court on that issue, the excess levy caused by application of the even cent rate was larger than the amounts presented in the foregoing table.

The trial court found with respect to each of the school district items that the even cent levy on property on the realty roll "was in excess of a rate wholly sufficient to produce" the budgeted requirement to the extent, upon each $100 of assessed valuation, of the difference between the even cent levy and the four decimal point levy which would have met the requirement. By the judgment plaintiff was awarded a refund of tax to the extent of the assessment resulting from the excess levy so caused.

The School Code provides for the determination of school district tax rates in section 4.374, as added by St.1931, p. 2493, which reads: "The board of supervisors must determine the rate of district tax necessary to be levied as follows: They must deduct ten per cent from the equalized value of the last general assessment-roll for the district and the amount required to be raised, divided by the remainder of the assessment-roll is the rate to be levied." The section does not specify the application of either an even cent or of a closer formula. It merely requires that the rate be found by dividing the requirement by ninety per cent of the assessed valuation. Section 3714 of the Political Code also relates to this subject. Subdivision 5 provides for the fixing of county rates in general, including school district rates, as follows: "Levy of taxes. The county board of supervisors shall, not later than the first day of September, fix the rates of county and district taxes designating the *number of cents* levied for each fund upon each one hundred dollars of assessed value of the county for the current fiscal year *to raise the amount* of the estimated expenditures as finally determined, less the total of the estimated revenues * * *."

[1] The county contends that section 3714 is controlling and requires application of an even cent formula in the fixing of school rates; that the word "cents" as used in the section means one hundredth of a dollar, not including fractions of cents. Plaintiff, on the other hand, asserts that the word "cents" is used as an expression of value and includes fractions or multiples of the unit of value, as well as the unit itself. The latter construction of the word is the correct one.

[2] The statute requires that the levy be made "to raise the amount of the estimated expenditures * * *." This requirement can not reasonably be fulfilled by application of an even cent formula which produces an unreasonably excessive sum above the estimated expenditures. It is of course true that no formula can be applied to produce the exact estimate to the penny. Even with a rate fixed in terms of four decimal places, there is usually a slight excess, and this is allowable. But certainly there is no justification for so enlarging the rate by fixing it in even terms of the specified unit of value without including fractions, that a material and unreasonable surplus is produced. This court, in the case of Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633, said (page 637): "It seems clear that after the valuations are fixed, and the sources of income and the amounts thereof are known, and after the board determines the amount to be spent, the fixing of the tax rate involves no discretion at all. After all the factors are known, the fixing of the rate is merely mathematical calculation. The board has no 'legislative' or other kind of discretion to make this calculation other than the science of mathematics dictates. Nor has it 'discretion' to make a mathematical error. Nor has it power to raise by taxation *materially more than is required for expenditures except as permitted by law.* It is true that any tax rate, made up as it is of various items each assessed separately, and expressed in a rate of four decimal places, will not produce exactly the amount of all the appropriations. There is usually a slight excess—but that is made necessary because of the limitations of the formula applied, and to the extent of that excess the levy is valid."

This holding, and the construction of the word "cents" as used in section 3714, supra, to include fractions of that unit of value, does not mean that any levy other than one made by application of a rate carried to four decimal places, is necessarily excessive. To what decimal place the rate of levy should be extended is nowhere prescribed, and a rate in any of several extensions of the fraction may be proper. The exhibits produced upon the trial of this cause show that over a period of years levies have been made through the application of rates fixed in terms of anywhere from two to five or more decimal places. Such levies are referred to in many decided cases without question as to the propriety of the rate formula. In Esberg v. Badaracco, 202 Cal. 110, 259 P. 730, the rate had been fixed in terms of five decimal places. The case of Otis v. Los Angeles County, supra, considered a levy extended to four decimal points. The issue presented in Pasadena Junior College Dist. v. Board, 216 Cal. 61, 13 P.2d 678, arose over a tax assessed with a three decimal point rate.

[3-5] It would seem that under the statute the rate, whether expressed in terms of even cents, or carried to three, four, five or more decimal places, will result in a valid levy if the application of that rate will produce approximately

the budget requirement, with no more than a slight excess allowable to cover the limitations of the formula. Otis v. Los Angeles County, supra. But the rate will be held to result in an invalid levy if its application will produce a material and unreasonable excess over the estimated requirement. What amount constitutes the allowable slight excess, and what amount constitutes a material and unreasonable excess, is always a question of fact for the trial court. In the present case the trial court found as to each item that the even cent rate "was in excess of a rate wholly sufficient to produce" the budgeted requirement, and it fixed a sufficient rate in terms of four decimal places. This action was proper and the findings will not be disturbed, supported as they are by evidence that application of the even cent rate resulted in a levy which was excessive to an unreasonable and material degree.

[6] Several of the further questions presented by the appeal of the county concern issues identical with or similar to those determined in Otis v. Los Angeles County, supra, a case involving the validity of levies for the fiscal year 1933-34, wherein this court reviewed some of the very county levies which are here under attack. One of these questions relates to the proper method of computation of the legal maximum of the unappropriated reserves of the county general fund. Section 3714 of the Political Code provides: "The county board of supervisors may, if it deem advisable, set aside a portion of each fund, other than school funds, to be known as 'unappropriated reserves' which shall not exceed *ten per cent of the total amount of said fund* exclusive of surplus * * *." Subdivision 3. The question is whether, in figuring "ten per cent of the total amount", the unappropriated reserves allowance should be included in the base from which the 10% is taken. Plaintiff contends, and the trial court adopted this view, that it is apparent from the context of the statute that "the total amount" means the sum total of the items of the fund prior to computation and inclusion of the ten per cent. This construction is correct. The point is determined in the Otis Case in the following language:

"The defendant * * * contends that both the 'unappropriated reserves' and the 'general reserves' should be added to the 'appropriations' in arriving at the percentage for 'unappropriated reserves.' The contention cannot be sustained as to the inclusion of the 'unappropriated reserves.' While it is true that the 'unappropriated reserves' is a budget item, and therefore properly included in the budget for the purpose of fixing the tax levy, it is not an item which enters into the computation of the 10 per cent. of the several funds in arriving at the amount of the 'unappropriated reserves.' The weakness of the defendant's position in this respect is that, according to its contention, the fund upon which the statutory 10 per cent. limitation is to be computed includes the very amount which the computation aims to disclose. Under no construction of the statute would it be permissible to add to the definite amount which forms the basis of the ascertainment of the permissible 10 per cent. the 10 per cent. itself. The 'unappropriated reserves' should therefore not have been included in the base for the ascertainment of that very fund."

The county, in the present case, has asked us to reverse this holding. We have re-examined the question in the light of the further arguments presented in the briefs herein, but have found nothing which would cause us to alter our former conclusion.

[7] In the computation of the unappropriated reserves, the trial court in the present case followed the same method as was used by the trial court in the Otis Case, and figured the maximum as ten per cent of the appropriations, less surplus, without including the general reserves. This was erroneous. The maximum should have been computed as ten per cent of the appropriations plus general reserves after deduction of surplus. The point is also decided in the Otis Case, where it is said: "It is clear that the 'general reserves' should have been included in the base for the ascertainment of the 10 per cent. for 'unappropriated reserves.' The 'general reserves' constitute a budget item. The fair and we think the only reasonable construction of the statute requires that the fund or funds upon which the 10 per cent. for 'unappropriated reserves' is to be figured include all of the budget items to be raised by taxation for county general fund purposes. Included therein would be the fund of 'general reserves,' the amount of which is subject to the reasonable discretion of the board of supervisors, and is not dependent upon a limitation otherwise, nor upon a percentage of any other

fund or combination of funds. The result of the inclusion of this fund would be that the base for the ascertainment of the percentage should be increased by the amount of the 'general reserves,' and the refund to the plaintiff decreased accordingly." The application of this holding in the present case will require a decrease in the amount of the refund allowed plaintiff by the trial court.

[8] We may also look to the Otis Case to find the proper determination of another question, to wit: Is not a tax levy on the realty roll of a county or school district void to the extent that tax levies for the same fund and same year on solvent credits, securities, and unsecured personal property were in whole or (as here) in part excluded from the computation of such levy?

The trial court answered this question in the affirmative. It found (after making allowance for the portion of taxes which were considered in the respective levies) that solvent credits, securities, and unsecured personal property taxes in the following net amounts had been disregarded in computation of the following levies:

Levies for four county funds (General fund, Salary fund, Farm and Hosp. I & S fund, and New Hall of Justice I & S fund)	$ 829,017.16
Levies for three school district funds (L. A. City Sch. Dist.; L. A. City High Sch. Dist.; L. A. Junior College Dist.—not for interest and sinking fund purposes.....	272,030.07
Levies for five school dist. interest and sinking funds (L. A. City Sch. Dist.; oper. 1925 I & S; L. A. City Sch. Dist. non-oper. I & S; L. A. City High Sch. Dist. oper. 1910 I & S; L. A. City High Sch. Dist. 1925 oper. I & S; L. A. City High Sch. Dist. non-oper.)	235,136.73
Total	$1,336,183.96

The trial court found that these omissions resulted in a combined excessive tax rate of more than $0.08, and it awarded plaintiff a refund of the tax assessed by reason of such excess. This award was proper. The holding in Otis v. Los Angeles County, supra, with respect to the impropriety of disregarding taxes levied on securities and solvent credit rolls in computing the county tax rate is directly in point. Applied to the facts of this case that holding supports the trial court's conclusion that it was improper to exclude in whole or in part, from computation of the levies here in question, tax levies for the same funds and the same year on securities and solvent credits and also on unsecured personal property as well. See discussion in Otis v. Los Angeles County, supra, at pages 635–640, from which the following is quoted: "This [1933–34 county] levy was made on real and secured personal property. In addition to this levy the county had other sources of income such as certain estimated miscellaneous receipts. Also under article 13, section 9a, of the Constitution as added in 1924, a special rate was fixed for unsecured personal property, and pursuant to the 1928 constitutional amendment of article 13, section 16, of the Constitution, there was a special statutory rate on solvent credits and securities. Political Code, § 3627a (as amended by St.1931, p. 2479), as it read at the time here involved, fixed this rate at one mill per dollar of valuation on solvent credits and two mills per dollar of valuation on stocks and bonds. The proceeds of the taxes levied on solvent credits and securities are divided between the various tax agencies as provided in section 3627a. On the present appeal, as far as the point under discussion is concerned, we are interested only in the proceeds of the tax on solvent credits and securities. * * * It is * * * an admitted fact that in fixing the levy on real and secured personal property the board of supervisors gave no consideration to and did not include the revenue anticipated from the levy on solvent credits and securities. It is obvious that after the amount of all appropriations was fixed by the board of supervisors, so that the amount of money to be raised from all sources was known, a tax levy raising this amount solely on real and secured personal property, and completely disregarding such a known material source of revenue, necessarily resulted in an excessive levy on the real and secured personal property."

[9, 10] The county asserts as a special defense that the above doctrine (even if conceded to be correct and applicable to the eight school levies) should not be applied in this cause to the four levies for county funds because plaintiff lost its right to attack those levies when it failed to ap-

pear and protest the preliminary budget in the manner provided by section 3714 of the Political Code. Admittedly plaintiff did not appear at the hearing on the preliminary budget and admittedly also that budget showed no items of revenue to be derived from taxes on unsecured personal property, solvent credits, or securities. Failure to protest the omission, however, did not preclude plaintiff from later raising the issue that in these respects the levy was excessive. This is so because plaintiff's challenge is directed to the use of an alleged erroneous formula in computing the tax rate rather than to error in preparation of the budget. Section 3714 does not require the preliminary budget to contain an estimate of tax revenues to be derived from taxes on unsecured personal property, solvent credits, or securities. This estimate may not be available on or before July 10th when the proposed budget items are filed with the county auditor (sec. 3714, subd. 1). The section, by express terms, requires only an estimate in the budget of probable revenues "from sources other than taxation". The duty of the board to make allowance for anticipated revenues from the taxable sources here in question arises in connection with its computation of the tax rate. At the time the rate is fixed, which is not later than September 1st (sec. 3714, subd. 5), the board knows the valuation of unsecured personal property, the tax base thereon specified by article 13, section 9a of the Constitution, and the estimated amount of taxes to be received from this source. The board also knows the valuation of solvent credits and securities, the rate thereon fixed by statute (Pol.Code § 3627a; art. 13, sec. 16, Constitution), and the estimated amount of taxes to be received. This income must be considered in fixing the tax rate for county and district levies.

[11] The duty to account for it arises by operation of law from the provisions which bring it into being. In computing the rate the board must apply a correct formula in which it has not only made allowance for "estimated revenues from sources other than taxation", as expressly required by section 3714, subd. 5, but has also met the implied requirement to consider and account for all estimated tax income and revenue from all known tax sources, so that the amount of the levy will be limited to the needs of the county as fixed by the budget. As stated in Otis v. Los Angeles County, supra: "In the present case the board properly exercised its discretion in fixing the amount of the appropriations. It knew the assessed valuation of real and secured personal property. It knew the amount of surplus and the amount of miscellaneous revenue. It also knew the valuations of the solvent credits and securities in the county, and it knew that the rates in reference to them were fixed by statute on a state-wide basis. Obviously, to compute the proper tax rate, all that was required was for the board to take the total of all appropriations, deduct surplus, deduct all anticipated revenue, including the known anticipated revenue on solvent credits and securities, and the balance represented the amount to be raised by taxation on real and secured personal property. It is also obvious that, by omitting to deduct from the amount to be raised by the levy on real and secured personal property the known amount to be raised by the levy on solvent credits and securities, the properties on the realty roll, to that extent, were compelled to bear an undue portion of the burden." These statements apply equally to tax revenues from unsecured personal property.

It is clear that the action of the board of supervisors in fixing the rates of county and district taxes by the use of an incorrect formula, which excludes known anticipated revenues from solvent credits, securities, and unsecured personal property taxes, is not an error which may be foreseen at the time of proceedings for preparation of and hearing on the preliminary budget. Therefore, a taxpayer is not barred from raising the issue by a failure to appear or object at the budget hearing.

[12-14] As a second special defense the county urges that if it be conceded that the tax rate was excessive and illegal at the time of levy, nevertheless it would be inequitable to permit plaintiff to obtain a refund for the following reasons: The record shows that because of nonpayment of taxes levied on the realty roll, there was an under-realization in 1933-34 of income sufficient to cover the requirements shown on the face of the budget, even after allowing full credit for the actual tax revenues which were collected (in a sum exceeding estimates) from solvent credits, securities, and unsecured personal property. The county contends that a taxpayer claiming a refund based upon an alleged excessive tax rate, applicable alike to all taxpayers, should receive only his just proportion of

the *actual* excess produced by application of the invalid rate and that this actual excess must be shown to exist as a surplus or trust fund from which refunds may be made; that if there is no actual excess, then the taxpayer has but paid his fair share of the cost of government, and it is inequitable to award him a refund which taxpayers of later years must carry the burden of paying. The answers to this contention are many. An under-realization *in cash* of budget requirements of the year of levy is not proof that application of the illegal rate will not produce an actual excess, because consideration must be given to the specific or assumed allowance for anticipated delinquencies made at the time of preparation of the budget. To compel the taxpayer who has paid promptly and made timely claim for refund not only to litigate the validity of the levy but also to trace his payment into the various funds in order to determine whether any excess revenue, resulting from application of the excess rate, exists as a surplus or trust fund available to meet claims for refund, would be highly inequitable and it would also discriminate in favor of the delinquent taxpayer. This is obvious. Admittedly the legality of the tax rate is determined as of the date of levy. An excessive and invalid tax rate results in the payment of a sum which the county is not entitled to retain. The county cannot escape liability to make a refund, regardless of whether it has expended the excess revenue or has put it aside as a surplus. Plaintiff here was only awarded a refund of the excess payment made by reason of the invalid levy, that is, the amount produced by applying the difference between the rate actually levied and what was found to be the correct rate. Therefore, there is no foundation for application of the doctrine of equitable offset.

[15-17] Taking up the points presented by plaintiff's appeal from the judgment, it appears that the City of Los Angeles was permitted to intervene and contest plaintiff's claim, alleged in the second cause of action of the complaint, that the city tax levy for 1933-34 was invalid to the extent of $0.105999 per $100 of assessed valuation, an aggregate of about $1,250,000, and that plaintiff should recover from the county the proportion of tax which the county collected by reason of such illegality. The trial court sustained the validity of the city's levy and the plaintiff appealed from this portion of the judgment. The city asserts that so far as its levy is concerned, even if it were invalid plaintiff is precluded at the outset from procuring relief, because it neglected to file a separate claim for refund with the city in accordance with provisions of the city charter and to sue thereon.

The determination of this question requires an examination of the provisions of section 3804 of the Political Code, which is an integral part of the county system of taxation, and of pertinent charter provisions and ordinances of the city. In the year 1917 the city, which had previously maintained its own separate system of taxation, passed an ordinance adopting the county system, and contracted with the county to assume and discharge the city functions relating to taxation. Thereafter the present city charter was adopted, and it provided for a continuance of use of the county system.

In this action the trial court found, and the findings have full support in the evidence, that payment of tax by plaintiff was made to the county tax collector acting for and on behalf of the respective entities concerned, and acting, in so far as the city was concerned "under and by virtue of the consolidation of the assessment and collection as more particularly provided by contract between the County of Los Angeles and the City of Los Angeles, on or about the year 1917, and codified in the provisions of" city ordinance No. 40302 N.S. and expressly ratified and adopted subsequently as part of the fiscal method of the city by section 342 of the city charter. The court found that under said contract, ordinance and charter, it had been the practice of the city and county since approximately 1917, and at all times since 1921, "to refund through and by reason of a claim filed with the county auditor of the County of Los Angeles, acting for and on behalf of the board of supervisors of the County of Los Angeles, as to that portion of such consolidated taxes illegally collected on behalf of the City"; and that since 1921 it has been the custom to make refund of taxes illegally collected on behalf of the city, upon a single claim filed by the taxpayer with the county auditor, and passed upon by the county board of supervisors, and at no time has it been the practice for a taxpayer to file a separate claim for such portion of the consolidated taxes paid by him on behalf of the city tax rates with the city council or other board or official of the city. From these findings the trial court concluded that plaintiff's claim, so far as the form thereof was concerned, was sufficient and was properly filed with the county auditor, even though it included a charge of illegality of taxes levied by the city but collected by the county for and on behalf of the city, and that the claim in all respects complied with the provisions of section 3804 of the Political Code, the city charter, and the ordinances of the city so far as referable thereto.

Assuming that the city is in a position to challenge this conclusion, its objections cannot be upheld. Section 342 of the city charter, as adopted January 22, 1925, and later amended, reads: "Until otherwise provided by ordinance, the city shall continue to use, for purposes of municipal taxation, the county system of assessment and tax collection. Should the city resume the work of assessment and tax collection, in that case the mode and manner of assessing property for purposes of municipal taxation and the levying and collecting of taxes for municipal purposes, the nature of the lien therefor and the manner and method of enforcing the same, and of the redemption of property sold for nonpayment of taxes, and all proceedings relating to said matters shall be fixed by ordinance and, so far as applicable, shall be substantially the same as may be provided at the time by law for such matters in relation to county taxes in the county of Los Angeles, except that in relation to the city taxes the proper officers of the city shall discharge the duties imposed by law upon the corresponding officers of said county. * * *" Since the enactment of this section, the city has never "otherwise provided by ordinance", but has continued to use the county system of assessment and tax collection. Construing the section in the light of legislative history (Stats.1917, chap. 3, p. 1686; ordinance 40302 [N.S.] adopted May 13, 1920 as amended by ordinance 45027 [N.S.], approved November 14, 1922), and of the charter provisions as a whole, it is apparent that it in effect accepted the benefits of the procedure authorized by section 3804 of the Political Code as well as other statutes governing the assessment and collection of county taxes, and that the city's continuance of use of the county system included the handling by the county of claims for city refund. For example, ordinance 40302 as amended by ordinance 45027 (N.S.), supra, provided: "Any taxes, together with any penalties thereon heretofore or hereafter paid for the use of or on behalf of the City of Los Angeles may be refunded by the County Auditor in all cases where a refund of county taxes and penalties thereon is provided for under the provisions of Part 3, Title 9 of the Political Code of the State of California." Section 3804 of the Political Code is found in part 3, title 9 thereof.

The city argues that the adoption of the county system included only the assessment and collection of taxes, not the refund procedure; that the functions with respect to the refund of taxes were retained by the city and are governed by sections 360-376 of the charter, which require the filing of a claim for refund with the city within six months; and that these sections are a limitation upon the power of the city council to contract with the county for the collection of taxes. This position is untenable. Section 342, which appears under the heading "Finance", prescribes a complete method of tax procedure by adoption of the county system, whereas sections 360-376, which appear under the heading of "Disbursements and Liabilities" prescribe the procedure for the handling of general governmental claims against the city, not including tax refund claims. This is evident from the wording of the several sections, particularly sections 360 and 361 which provide that no claim will be paid until "there has been presented to or secured by the Controller adequate evidence that the demand has been approved by every board, officer or employee required by this charter to approve the same", and "that the supplies, materials, property, or services for which payment is claimed have been actually delivered or rendered * * *; that the prices charged are just and reasonable; that the quantity, quality and prices correspond with the original specifications, orders or contracts. * * *" These requirements obviously bear no relation to claims for the refund of taxes while the city allows the county to assess and collect taxes levied by it, assuming that they would otherwise apply.

In the case of Birch v. County of Orange, 186 Cal. 736, 200 P. 647, a question similar to the present one arose with respect to construction of the general claims provisions of the Political Code. The action was brought against the county to procure a refund of taxes, payment of which has been protested under section 3819 of the Political Code. It was contended that plaintiffs should have presented their claim or demand to the board of supervisors under the provisions of section 4075 of the Political Code before commencing suit. This court held that sections 4075, et seq. (analagous to sections 360-376 of the charter) prescribed only the procedure for the handling of general claims against the county, and were inapplicable to tax refund claims. "Section 4075", said the court, "does not purport to declare what claims shall be presented to the board of supervisors as a prerequisite to bringing suit, but prescribes the manner in which certain claims shall be itemized and presented before the board may pass upon them. It requires that the board shall not —'credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and when, character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor.' *These are not particulars which would seem to relate to the sort of demand sued on in this action.* * * * In addition to the foregoing reasons for holding that the presentation of a claim to the board of supervisors is not necessary, attention may be called to the fact that section 3804 of the Political Code, amended in 1913 by the same Legislature that amended section 3819 of the Political Code (Stats. 1913, p. 228, § 3804, and Stats. 1913, p. 948, § 3819) provided two different methods for the recovery of taxes paid. * * * The fact that in section 3804 express provision is made for the filing of a verified claim for the recovery of taxes so paid is an indication that the Legislature did not consider that section 4075 included such a claim." (Page 650.)

Support for the view that adoption of a general scheme for the assessment and collection of taxes may include the handling of refunds is found in the case of Hellman v. City of Los Angeles, 147 Cal. 653, 654, 82 P. 313. There the plaintiff sought to recover taxes for the year 1900-1901, payment of which he had protested in conformity with section 3819 of the Political Code. This court said (page 314): "In 1895 the Legislature, revising the subject of the revenue and taxes of the state (St.1895, p. 335, c. 218), amended section 3819 of the Political Code, providing for the payment of taxes under protest, to read, 'and when so paid under protest the payment shall in no case be regarded as voluntary payment,' and in case of suit may be 'recovered back.' The charter of the city of Los Angeles, in section 46, declares: 'The mode and manner of collecting such municipal taxes * * * shall substantially be the same as the mode and manner * * * for the collecting of state and county taxes.' Charter of Los Angeles, St.1889, p. 471, c. 1. It is quite plain that section 3819, found in chapter 7 of the Political Code, under the title of 'Collection of Property Taxes,' is a part of the 'mode and manner' of collecting state and county taxes, and is none the less a part of that mode and manner in that it deals with the right of the taxpayer to pay under protest. It would be absurd to say that the mode and manner of collecting taxes was limited solely to the right of the state and its tax collectors, and had reference only to the duties of the taxpayer, and no pertinency whatever to the taxpayer's correlative rights. It is a provision definitely declaring a certain mode and manner in which the taxpayer may pay his taxes and preserve his rights, in case the assessment and levy should be found void." See, also Keyes v. City and County of San Francisco, 177 Cal 313, 173 P. 475.

The city relies upon the case of Farmers & Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795. That decision, rendered in 1907, involved taxes paid under protest for the fiscal year 1902-1903. This was prior to the adoption of the present city charter and before the city contracted with the county for the latter to collect its taxes. While the case was decided upon the point that the then charter required a prior presentation of the plaintiff's claim, the opinion went no further than to express doubt as to whether section 3819 was applicable to the city of Los Angeles. This fact was commented upon in Keyes v. San Francisco, supra, at page 323, 173 P. 475. Reference should also be made to Birch v. County of Orange, supra, in this connection.

It seems clear that when the city authorized the county to assess and collect its taxes it also authorized the county to allow refunds without the presentation of any claim to city officers. The question concerning the levy made by the city must, therefore, be considered on the merits.

Plaintiff contends that the city improperly struck from its proposed budget an income item of $1,250,000, to be received from the Los Angeles Department of Water and Power, and that adoption of the budget without this item of income caused the tax levy to be excessive and void to the extent of $0.105999 per $100 of assessed valuation. The proposed budget showed the following items: Estimated tax revenues (estimate fixed by applying the maximum rate of $1.01 to the ad valorem valuation for city property, less the estimated delinquency on tax collections, plus estimated payments on account of taxes for prior fiscal years, including estimated unsecured personal property and solvent credits tax collections for the then current fiscal year), $12,675,000; other estimated income (itemized) $4,325,000; and estimated income from "Water and Power", $1,250,000: Total, $18,250,000. Estimated expenditures (itemized), $17,000,000, and estimated expenditure for "Water and Electricity (Department of Water and Power)", $1,250,000: Total, $18,250,000. When the final budget was adopted both the estimated income and estimated expenditure items of $1,250,000 were stricken and the budget was balanced at $17,000,000.

Plaintiff does not question the city's right to strike the $1,250,000 expenditure item, but it asserts that the elimination of the $1,250,000 item of income was illegal and fraudulent, motivated by a desire to create an unbudgeted surplus revenue in that amount. Plaintiff states that if the city council did not desire to make the proposed appropriation of $1,250,000 for water and power purposes, then it was proper to remove the item of expenditure, but in such event the income item should have been retained and applied to reduce the amount to be raised by taxes, and the general tax rate; that is, instead of levying the maximum rate to raise $12,675,000 from taxes, a lower rate sufficient to raise $11,425,000 should have been fixed. The particular question is this: Was the $1,250,000 in fact a *known item of estimated income* at the time it was stricken from the budget? If it was, then under the charter limitations upon the city's taxing power (hereinafter discussed), the elimination of that item of income was unauthorized and resulted in an excessive levy.

The trial court found that the city council "had the power to strike from the proposed budget any proposed revenues which, in its opinion, would not be received by it with certainty during the said fiscal year 1933-34, and including revenues to be received from the Department of Water and Power". It also found that "the said City Council might properly have anticipated that the city would not receive in its general fund the sum of $1,250,000, or any other sum, from the Department of Water and Power, during said fiscal year 1933-34, on account of * * * advances to such department by said city * * *". The plaintiff's appeal presents for decision the question of the sufficiency of the evidence to support the latter finding.

It appears that for a number of years prior to 1933 the Los Angeles Department of Water and Power had received advances from the city; as the trial court found, "that said Department * * * is and was, for a long time prior to the fiscal and tax year 1932-33, the recipient from the city * * * of amounts of money paid by the City * * * on account of principal or interest on general obligation bonds issued by the City * * * but for and on account of municipal works of the said Department * * * and to which the power revenue fund * * * and the water revenue fund of said Department * * * pertain". During the fiscal years 1931–1932 and 1932–1933 the Department had repaid $1,616,000 to the city. On May 11, 1933, it still owed the city $28,356,196.97. It was authorized by section 221 of the charter to appropriate money from the water revenue fund and power revenue fund for the repayment of this sum. The section allows appropriations from these funds for operating and maintenance expense; for payment of principal and interest on indebtedness issued against revenues; for expense of construction; for the pension system; for a reserve fund to insure payment of bonds; for transfer of surplus to the city's reserve fund; and *"to return* and pay *into the general fund* of the City, from time to time, upon resolution * * * from any surplus money in either such revenue fund (water and power), any sums paid by the City from funds raised by taxation for the payment of principal or interest of any municipal bonds issued by the City for or on account of the municipal works to which such revenue fund pertains, or of liability arising in connection with the construction, operation or maintenance of the municipal works to which said fund pertains".

On May 11, 1933, the department, desiring to make a payment on the indebtedness to the city, duly adopted resolution 943, which reads: "Whereas, there has been transferred from the Power Revenue Fund to the General Fund of the City during the past two years a total of $1,616,000, which was made available in part for direct relief through the Social Service Commission and in part available for relief to property owners and taxpayers; and, Whereas, during the coming fiscal year there is great need for funds supplementing contributions available for direct relief and a fund supplementing those available from taxation for meeting requirements of departments of the City dependent on tax funds; Now, Therefore, Be It Resolved, that the Board of Water and Power Commissioners, in conformity with the recommendation of the Chief Electrical Engineer and General Manager of the Bureau of Power and Light, will transfer from the Power Revenue Fund to the General Fund of the City, from time to time during said year, amounts totaling $1,250,000, $450,000 of which may be made available for direct relief work and $800,000 of which may be made available as an aid in balancing the budget for the benefit of the requirements of other departments of the City and that street lighting required for police purposes need not be curtailed." The department also made provision in both its proposed and final departmental budget for this payment.

On May 12, 1933, a copy of resolution 943 was transmitted to the clerk of the city council. On May 29th, the then city mayor, pursuant to section 344 of the charter, transmitted the proposed city budget to the city council. This proposed budget showed the sum of $1,250,000 both as an item of income and as an item of appropriation. It also contained a copy of the departmental budget, as required by section 345 of the charter, showing the proposed appropriation of that sum by the department for payment to the city. In a letter transmitting the proposed budget to the city council, the mayor commended the timely nature of the department's action saying: "The amount of $1,250,000, which is to be made available during the fiscal year under consideration, should be sufficient to provide the water and electricity to be furnished to the general government by the Department. * * * I am of the opinion that the return of this money to the general government should be the first step in a definite plan to repay completely all advances for bond redemption and interest made from the general funds of the City."

On June 15th, the city council adopted the final budget, eliminating from the one proposed both the estimated revenue of $1,250,000, and the proposed appropriation of that sum, and making no appropriation for charitable purposes. Following the provisions of section 356 of the charter, the final budget also contained a copy of the final budget of the department, showing that it had made an appropriation of $1,250,000 for payment to the general fund of the city.

During the period between submission of the proposed city budget and adoption of the final city budget, there was considerable discussion between department officials and city officials over the use to be made by the city of the $1,250,000. However, so far as the evidence shows the discussion about this appropriation concerned only the manner in which the money was to be used by the city. There is no intimation that the department's officers ever contemplated withdrawing the appropriation. The department could place no legal restriction upon the use of money paid by it to the city in reduction of amounts which had been advanced to it. However, the department's officers apparently felt that any payment to the city was an act of grace rather than one which a fair consideration of the city's finances required, and they claimed the right to dictate how this money should be spent. Nevertheless, even while the respective officials were still conferring, the department passed a resolution authorizing an immediate payment of $8,000 to enable the city to carry on its accustomed relief work for sixty days, pending arrangements for federal aid. This resolution did not authorize the payment as a new and independent appropriation but referred to the desire of the city council for a transfer of funds pursuant to the resolution of May 11th (Resolution 943).

On July 14th the city council approved the following report of the finance committee: "* * * This committee recommends that inasmuch as the allocation of $1,250,000 from the (Department) * * * as set forth in the resolution adopted by said board, had been tentatively approved in the Mayor's Budget, and inasmuch as there has been some difference in understanding as to the *use* of said sum, the Water and Power Committee of the City Council contact the * * * Department * * * and ascertain what items, as set forth in the proposed budget, are satisfactory to said Board, in order that the city budget for the current year may be adjusted accordingly." According to this report the difference of opinion related merely to the city's proposed use of the money, no question being raised concerning the payment of it. The recommendation of the committee seems to have led to an early close of the discussion. On July 25th the department reiterated its "expectation and wish" in providing for the $1,250,000 transfer to the general fund of the city that "$450,000 of the amount be appropriated as transferred from time to time, for direct relief purposes; that $800,000 be available in the General Fund of the City for use by the City Council in meeting the general expenses of the City under its Budget; and that the City Council provide in the General City Budget items estimated to total $747,000, for compensation during the year to the Bureau of Power and Light for street lighting, general lighting and power service. * * *" Shortly thereafter the department commenced payments to the city which were continued from time to time throughout the fiscal year. These payments aggregated in excess of $1,250,000, which amount was expended by the city substantially in the manner indicated in the department's resolution 943.

[18-22] This evidence and the other data in the record in our opinion afford no support whatsoever for the trial court's finding that the "city council might properly have anticipated that the city would not receive in its general fund the sum of $1,250,000 or any other sum, from the Department of Water and Power, during said fiscal year 1933-34". On the contrary the nature of the revenue and the certainty of its receipt was definitely established. The evidence shows without contradiction that the city council knew that the $1,250,000 payment had been appropriated by the department in its proposed budget and also in its final departmental budget. We are referred to no statement or act of the department which might reasonably have raised any question concerning the payment of the money to the city. The discussion which the city insists was an actual existing controversy affecting the certainty of the payment, had to do solely with the proposed use of the money. If this discussion can be said to have created any uncertainty at all, it was an uncertainty as to whether the city should accede to the department's request and wish with respect to expenditure of the money, and not an uncertainty as to whether it would be received, assuming that the department could have revoked the appropriation made by its final budget. Furthermore, revenues listed in a city budget as estimated income are necessarily always anticipatory to some degree; money actually received is no longer estimated revenue but surplus. The evidence in the present case establishes as a matter of law that the $1,250,000 was a "known item of estimated income".

It is not necessary to this conclusion to decide whether the department was, as plaintiff contends, a separate entity against which the city could have enforced payment of the promised sum by writ of mandate. It is likewise immaterial (assuming the correctness of the trial court's finding that the department was not a separate entity from the city) whether in the last analysis a transfer from the department to the city would constitute a departmental transfer from one city fund or department to another. For purposes of the tax levy, the appropriations made by the department to the city constituted estimated revenue for which the city was required to account. that the proposed payments were more than mere book entries from debit to credit side or vice versa of the water, power and general funds is apparent from the fact that the city made partial use of the funds for general purposes, such as relief work. The appropriation by the department from its water and power revenues was made for the purpose of repaying money belonging to the taxpayers which had been advanced for the payment of principal and interest on bonds issued to secure money for construction of the utility plant. This appropriation was estimated revenue which the city anticipated receiving and the city was without power or discretion to omit the amount from the budget. The purpose of requiring preparation of a budget as a condition precedent to levy of a valid tax is to show taxpayers the needs which must be met by taxation, the purposes for which funds will be expended, and the true condition of the public finances. If a tax levying body could disregard the plain provisions of the city charter and omit items of estimated revenue from its budget, it would have large unbudgeted sums at its disposal during the tax year, a result which the law clearly prohibits. It is the duty of the city council to account for all income and revenue from every known material source. Otis v. County of Los Angeles, supra. The plaintiff very fairly states in its brief that in the tax years subsequent to 1933–34, the final budget adopted by the city council has included estimated revenues from the department.

In this connection the city urges that even if it had retained the $1,250,000 in the final budget as an item of income, after excluding the item of expenditure, it would not necessarily have had to balance the budget in the manner contended for by plaintiff (applying the item of income to reduce the general tax requirement), but that it could have adopted any one of several courses. For example, after striking the appropriation item, the budget could have been maintained in balance by adding $1,250,000 to the unappropriated balance, or by carrying the sum in the estimated reserve (charter sec. 344 [9]), or the city council might have created new appropriations in lieu of the stricken item of expenditure. Also the mayor might have vetoed the cancellation. However, assuming that these things might have been done, the question at issue concerns only what was done and the rights of one whose property has been levied upon to meet the tax needs of the city as shown in the final budget which was adopted.

The city further urges that striking the item of income did not result in an excessive levy for the reason that there was no limit on the power of the city council to levy any rate of tax it desired, so long as it levied a sufficient tax and did not exceed the maximum rate. In this connection, section 352 of the charter provides: "On or before the last day of August of each year, the council shall adopt an ordinance levying upon the assessed valuation of the property of the city * * a rate of taxation upon each * * * $100 of valuation, which, with the total amount estimated by the controller to be received from fines, licenses, and other sources of revenue, will be sufficient to raise the amount appropriated in the annual budget, provided that the amount of such tax shall not exceed the limit elsewhere in this charter provided." Reviewing the legislative history of this section and comparing it with the rule embraced in section 3714 of the Political Code, the city asserts that although it imposes a duty to levy a sufficient tax to meet requirements, it does not prohibit a levy which is more than sufficient and will produce an excess over requirements, provided the specified maximum rate is not exceeded. The city further asserts that under the charter provisions the fixing of the tax is not a "mathematical calculation" but is a matter of "discretion" or "legislative policy", and that therefore language found in Otis v. Los Angeles County, supra, construing the Political Code provisions dealing with the same subject, is not controlling. This position cannot be sustained. In addition to the elementary rule that the needs of government always mark the limitation of its taxing power, the charter provisions relating to the tax levy (secs. 343–356) clearly impose a taxing limitation substantially identical with that found in section 3714 of the Political Code. The language of the Otis Case defining that limitation has been quoted in part. The taxing body is "required to account for all income and revenue from every known material source", and "the amount of the levy is limited to the needs". Furthermore, "after all the factors are known, the fixing of the rate is merely mathematical calculation", and there is no "power to raise by taxation materially more than is required for expenditures except as permitted by law". The principle is stated in Madary v. City of Fresno, 20 Cal.App. 91, 128 P. 340, and quoted with approval in the Otis Case as follows: "The power of government to exact from the citizen a part of his property in way of taxation is indeed vast, but it is not unlimited. It may be exercised only for the public good and for a public purpose. Cooley's definition of taxes as 'enforced contributions levied for public needs' states concisely both the nature and illimitation of taxes. Taxes are the property of the citizens demanded and taken by the government to enable it to discharge its functions. In his work on Tax Titles, Blackwell defines taxes as 'burdens imposed by the legislative power upon persons or property to raise money for public purposes.' The needs of the government constitute then both the occasion and limitation of the taxing power. To take from the citizen a dollar beyond the needs of government is not taxation; it is extortion."

[23, 24] Lastly the city asserts as a defense that plaintiff's right to relief is barred by reason of its failure to appear before the budget session of the city council and protest the change in the proposed budget. This defense is untenable because the record shows that the resolution of the city council for modification of the proposed budget did not indicate that the item of income would be removed. The resolu-

tion, after noting among other modifications the elimination of the item of expenditure, stated: "change to conform to the foregoing modifications". This was not sufficient to constitute a notice of removal of the revenue item. It would have been as reasonable for a taxpayer to assume from the clause that the budget would be balanced in the manner contended for by plaintiff (retention and application of revenue item to reduce amount to be raised by taxes) as to assume that it would be balanced by elimination of the revenue item, or by any of the methods suggested by the city. A taxpayer's duty to present his objections at the preliminary budget hearing does not mean that he must protest alleged errors or irregularities which have not yet been committed, are not known, and cannot reasonably be foreseen at that time.

Our conclusion that the evidence establishes that the city levy was invalid to the extent of the excess caused by the improper removal of the $1,250,000 item of anticipated revenue from the final budget will require an amendment of the findings of the trial court, and an according increase in the amount of refund awarded plaintiff.

The second and final major question presented by plaintiff's appeal concerns the validity of levies made for principal and interest on bonds to accrue over a period of eighteen months. The trial court held this levy to be valid, and plaintiff has appealed from that portion of the judgment.

The issue arises from the fact that with respect to two funds—The Farm and Hospital I & S Fund and the New Hall of Justice I & S Fund, the county included in its budget an appropriation sufficient to pay interest and sinking fund requirements not only for the fiscal year 1933-1934, but also for the first six months of the subsequent fiscal year, 1934-1935. In other words, the county made an eighteen months' levy, rather than a twelve months' levy, for interest and sinking fund purposes. Plaintiff contends that the appropriations for payment of interest and principal coming due after the close of the fiscal year 1933-1934 were invalid. The facts relating to the challenged levies are as follows:

(1) Farm and Hospital I & S Fund: The budget included an appropriation of $807,433.05. Of this amount $431,725 was for interest and principal maturing and payable between July 1, 1933, and June 30, 1934, and $337,500 was for principal and interest maturing and payable on July 1, 1934. The balance consisted of a 10% allowance for delinquency in tax collections and for general reserve. The county levy by reason of this appropriation was $0.0204 upon each $100 of assessed valuation. Plaintiff claims that the appropriation for principal and interest payable in the fiscal year 1934-35, and amounting to the sum of $337,500, was illegal, thus causing an excessive levy of $0.0163, and resulting in the collection from plaintiff of an excessive and invalid tax in the sum of $6.14.

(2) New Hall of Justice I & S Fund: The budget included an appropriation of $323,598.33. Of this amount $172,525 was for interest and principal maturing and payable between July 1, 1933, and June 30, 1934, and $135,000 was for principal and interest maturing and payable on July 1, 1934. The balance consisted of a 10% allowance for delinquency in tax collections and for general reserve. The county levy by reason of this appropriation was $0.0086 upon each $100 of assessed valuation. Plaintiff claims that the appropriation for principal and interest payable in the fiscal year 1934-35, and amounting to the sum of $135,000, was illegal, thus causing an excessive levy of $0.0065, and resulting in the collection from plaintiff of an excessive and invalid tax in the sum of $2.45.

The trial court found, with respect to the questioned appropriations, that "it was reasonable for the board of supervisors * * * to make provision in the preceding fiscal year for interest and sinking fund requirements of the succeeding fiscal year and coming due in the first six months of such succeeding fiscal year", and that the appropriations were "legal and authorized, as within the power and discretion of the board of supervisors so to anticipate interest and sinking fund requirements of a succeeding fiscal year in a prior fiscal year".

Contending that these conclusions are erroneous and that a valid levy could not be made in the fiscal year 1933-34 to cover payments falling due in the fiscal year 1934-35, plaintiff relies upon the fundamental principle of fiscal practice in this state that public expenditures are to be made upon a cash, or pay as you go basis, with the revenues of each year used to take care of the expenses of that year but not of future years, and upon the debt limitation clause of the Constitution which reads: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same * * *." Const. art. 11, sec. 18. Plaintiff urges that the provision for collection of an "annual tax", to pay interest "as it falls due" and to constitute a sinking fund, means that interest and sinking fund payments maturing each year can be paid only from the year's revenue, and that there can be no levy of a tax in any one fiscal year to meet requirements which are not a present or existing liability for that year but which will fall due in a following fiscal year.

The constitutional provision was construed as early as the year 1882 in the case of San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, which was an action wherein the plaintiff sought to compel an audit of certain bills for gas furnished the city of San Francisco. The answer pleaded the defense that the revenue for the year in which the indebtedness was incurred had been exhausted at the time the bills were presented. In deciding the issue this court held: "We think it clear that when the framers of the present Constitution said, as they did by Section 18 of Article 11 of that instrument, that [quoting the section] * * * they meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, board of education, or school district. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year. The system previously prevailing in some of the municipalities of the State, by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. The change was eminently wise. * * * We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it * * * do so with reference to the law, and must see that limit is not exceeded."

Later the effect of the provision on long term contracts was considered. In 1896, in the case of McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191, applying the section to a contract of the city of Fresno to pay a specified sum annually for sewerage disposal, this court reaffirmed its prior declaration as to the intent and purpose of the restriction, saying (page 359): "In the constitutional provision under consideration, the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. In San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, and in Shaw v. Statler, 74 Cal. 258, 15 P. 833, the question is discussed, and the interpretation of the constitutional provision laid down, and the reasons for it given. Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of municipalities are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever-increasing volume from year to year." Upon this premise the court held that the liability created by the continuing contract was not a present liability for the aggregate amount of the payments, but was only an existing liability in each year to the extent of the installment due upon the contract for that year, and that each year's installment must be paid out of the year's revenue. The court said: "There need be here no struggles with the niceties of definitions given to 'debt' or 'liability.' * * * We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed." See also Bradford v. City and County of San Francisco, 112 Cal. 537, 44 P. 912; Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698; Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725, and cases cited; section 3714, subdivision 5, Political Code.

The question before the court in the present case concerns the effect of the limitation as applied to a bonded debt incurred by a county with the assent of two-thirds of the qualified electors thereof. Is the power to levy for interest and sinking fund purposes, like general governmental levies, limited to requirements which have accrued or will accrue within the fiscal year of levy, or is the power to levy for such purposes (in the absence of fraud) limited only by the full amount of the debt which remains unpaid? For purposes of the tax levy, do maturing installments become an existing liability only as of the year in which they fall due, payable out of that year's revenue?

Plaintiff contends that the second clause of section 18, which states that the debt shall not be incurred "unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity", must be read in connection with the first clause of the section, and must be construed in the light of the declared fiscal policy of this state; that when the section is so read and construed it plainly appears that the "annual tax" for interest and sinking fund purposes is, like the governmental annual tax, limited to annual expenses, i. e., interest and sinking fund instalments falling due in the year of levy.

[25] This position is a sound one. There is no substantial difference between a bonded debt and a long term continuing contract, so far as the constitutional provision is concerned. To approve a levy for indebtedness maturing in future fiscal years, would be to do violence to the intent of the constitutional framers as well as to endanger the stability of the structure which has been carefully guarded to bear the public debt. A power to tax for payments maturing in future years would make possible a levy in one year sufficient to discharge the full unpaid balance of the indebtedness, with the attendant danger of diversion of the funds and their expenditure for other purposes before the liability ever matured. This danger was recognized in the case of Connelly v. City and County of San Francisco, 164 Cal. 101, 127 P. 834, wherein plaintiff taxpayer questioned the validity of a city levy for interest and sinking fund purposes of bonds which at the time of the tax levy had been issued but not sold or contracted to be sold. This court said (page 836): "* * * It is made certain by the charter provisions, as it is under general law, that only for those bonds which have become an obligation of the city may a tax be levied. Were the construction contended for by respondent to prevail, it might result—and we are advised in this case it has resulted—in grave injustice to the taxpayer. The city might levy taxes year by year for bond interest and bond redemption and never sell a bond. At the end of each year it might transfer this fund to its general fund and use it for other purposes. At the end of any number of years of such practice, if the bonds eventually should be sold, the taxpayer would still have to pay into the treasury the full amount for interest and redemption. Aside from the hardship to the taxpayer, this would be to countenance a flat though indirect violation of the charter itself. The supervisors might make a general tax levy to the full amount permitted by the charter, and by the indirect method of this unauthorized bond tax levy secure from the taxpayer large sums of money for the sole purpose of transferring

it to the general fund, and so by indirection defeat the express mandate of the law."

[26, 27] The county contends that section 18 should be limited in its operation to voluntary contractual indebtedness created by the governing bodies of counties, and the other named entities, and that it has no application to a bonded debt incurred by action of the electors, as distinguished from the action of such governing bodies. It is true that the section is limited in its operation to obligations voluntarily assumed by the municipality, and that it does not apply to those imposed by law. American Co. v. City of Lakeport, 220 Cal. 548, 32 P. 2d 622. Nevertheless a county, or other entity, is acting voluntarily both when it acts through its governing board, with or without the assent of the electors, and when it acts through the electors themselves; in a true sense, when the electors act they are the "county" and not an outside agency.

[28, 29] The county argues that while section 18 prohibits the incurring of indebtedness payable out of the income and revenue of future years it does not prohibit the payment of current obligations out of the revenue of former years. It is, of course, a fact, that no annual tax levy will produce to the exact cent the amount needed for the year's expenditures, and it is a proper practice to carry forward the unencumbered surplus remaining at the close of one fiscal year to meet the obligations of the succeeding fiscal year. Otis v. Los Angeles County, supra. However, this practice does not authorize an express levy in one fiscal year for the creation of funds to be carried over to the next fiscal year to meet an obligation which will then (and not until then) mature.

The main difficulty which has been encountered in the practical operation of municipal affairs by reason of the debt limitation clause is that the constitutional framers failed to provide a method for meeting obligations which might accrue during the period following the close of one fiscal year and prior to the realization of tax revenues for the succeeding fiscal year. Thus in the present case the eighteen months levy was designed to cover payments for the twelve months of the 1933–34 fiscal year and payments for the first half of the 1934–35 fiscal year falling due July 1, 1934, several months prior to the collection of tax revenues. The county urges that the levy for the 1934–35 fiscal year must be sustained upon the following grounds: (1) Provision for payment of interest as it falls due and of principal as it matures is a constitutional condition to the incurring of a bonded debt. Section 18 is mandatory and self-executing, requiring a tax levy sufficient to meet bond obligations as they mature. This requirement must be read into every statute authorizing the creation of a bonded debt. (2) Express statutory authority for a levy such as that made in the present case is conferred by section 4088 of the Political Code, which provides for the levy of a tax by the board of supervisors "at the time of making the next general tax levy after incurring the indebtedness of any bonds", and annually thereafter, for the purpose of paying the bonds and interest, and that "such tax must not be less than sufficient to pay the interest on said bonds, and such portion of the principal, if any, as is to become due before the time for making the next general tax levy * * *." (3) Independently of either constitutional or statutory provision, the power to tax to meet bonded debt obligations when due is granted by necessary implication from those express statutory provisions conferring authority to incur such debt, and that as far as the duty to exercise this implied power is concerned, there is no difference between the obligation to pay promptly installments accruing during the year of levy and those accruing during succeeding months.

Plaintiff replies that the county's first and third contentions have been completely answered by prior decisions. Connelly v. City and County of San Francisco, supra; Johnson v. Williams, 153 Cal. 368, 95 P. 655; American Co. v. Lakeport, supra, and other cases hereinafter cited. As to the second contention, plaintiff points out that even if the clause of section 4088, "before the time for making the next general tax levy" refers to the date of levying the tax, rather than to the commencement of the new fiscal year, nevertheless the statute must bow to the constitutional mandate, which supplants all legislation in conflict with its provisions and must be read into all legislative enactments pertaining to the same subject. Furthermore, plaintiff asserts that even if it be conceded that there is a duty to prevent default in the payment of bonded indebtedness, an eighteen months' levy is not the proper method of meeting this duty, but the proper mode, which is the measure of the county's power to act in the premises, is through the use of advances from the general fund, general reserve of the general fund, or other general reserve of a governmental fund, as authorized by sections 3714, 4041.2, and 4054a of the Political Code. However, whether these sections provide the proper mode is not an issue in this case as the levy here in question was made directly for the payment of an indebtedness to accrue in a subsequent fiscal year, and not for a reserve fund of the current year.

In the case of Johnson v. Williams, supra, decided in the year 1908, the court was confronted with the problem of a bond issue with maturity dates so arranged that payment of obligations first falling due could not be provided for by revenues of the current year or paid when due from revenues of the succeeding year. The contention that provision for payment of installments as they fell due was a constitutional condition to the incurring of a valid bonded debt was there considered as well as a number of the other claims advanced by the county in this case. Although the holding announced has reference to a possible automatic default in a bond issue in its first year, the language is equally applicable to a possible delay in payments maturing in the first few months of a fiscal year. The court said (page 657): "The only remaining objection is one made to all the bonds, based on the provisions of section 18, of art. 11, of the Constitution. [Quoting from section 18 and also from section 4088 of the Political Code.] * * * The petition * * * shows that the board of supervisors did, at the time of making the order prescribing the form of bonds and coupons, etc., October 7, 1907, adopt an ordinance providing for the levying of an annual tax commencing with the general tax levy to be made in September, 1908, sufficient for the purposes stated, as well as for the purpose of paying all interest accruing on such bonds. This ordinance was adopted subsequent to the general tax levy for the year, 1907, which by law is required to be made in the month of September of each year, and the provisions therein for an annual tax fully complied with the requirements of the Constitution and the statute as to the principal, and as to all interest falling due after the first half of the year 1908. But the proposed bonds were to bear date December 10, 1907, with interest payable semiannually, and the first interest coupon on each bond would, by its terms, be due and payable on June 10, 1908, if such bond had been sold and delivered prior to that date. The result would be that the tax to be levied for the purpose of paying interest would not be available at the time the first installment of interest became due. It is upon this fact alone, as we understand it, that the claim of the defendant that the constitutional requirement has not been complied with rests. We are of the opinion, however, that there was a substantial compliance with the requirement of the constitutional provision. The provision was adopted in the light of the rule which has always existed in this state for an annual general tax levy. No levy at any other time than that of the general tax levy was contemplated. The object was simply to insure provision annually, at the time of such general tax levy, for such money as would be necessary to pay interest and principal falling due before the time of the next general tax levy, and to place in the sinking fund for the payment of the principal the amount required by law. That the payment of interest might be deferred for a short time pending proceedings for the collection of a tax for that purpose already levied, or that the payment of the first installment of the interest on the bonds might be deferred until a general tax levy and collection thereunder because it fell due prior to the first general tax levy after the incurring of the indebtedness, were not matters being guarded against by the framers of the Constitution. The important thing was that a tax sufficient to pay the interest and principal falling due, and to make up the necessary sinking fund, should be levied and collected annually, and this we are satisfied was all that was intended by the provision under discussion. Under this construction of such provision, the proceedings for the incurring of the indebtedness were in compliance with the constitutional requirement." See, also, Connelly v. City and County of San Francisco, supra.

A like construction of a constitutional provision almost identical with section 18 has been made by the courts of Oklahoma. See O'Neil Engineering Co. v. Incorporated Town of Ryan et al., 32 Okl. 738, 124 P. 19; St. Louis & S. F. R. Co. v. Thompson, 35 Okl. 138, 128 P. 685; Protest of Trimble, 151 Okl. 74, 300 P. 406; Breeding v. Excise Board, 180 Okl. 379, 69 P.2d 638. In the case of Coggeshall & Co. v. Smiley, 142 Okl. 8, 285 P. 48, considering the point here under discussion, the court said (page 57): "Where a bond is dated July 2, 1929, the first possible levy for the payment of interest would be July 1, 1930, and the tax so levied would not be due until November

1, 1930. If the municipal authorities provide for the maturity of the first interest coupon thereon prior to November 1, 1930, they do so with full knowledge that there will be no fund for the payment of that interest at maturity, and the purchaser of the bond does so with the same knowledge. We cannot change the law with reference to fiscal affairs to suit the convenience of individuals. We cannot approve a reservation of funds derived from a tax for a fiscal year for the purpose of paying a liability that will not arise until the next fiscal year."

[30] Defendant county cites Illinois cases as supporting its contentions and urges an adoption by this state of the Illinois rule and fiscal policy. East St. Louis v. Amy, 120 U.S. 600, 7 S.Ct. 739, 30 L.Ed. 798; People v. Day, 277 Ill. 543, 115 N.E. 732; People v. Scott, 300 Ill. 290, 133 N.E. 299; People v. Louisville & N. R. Co., 300 Ill. 312, 133 N.E. 340; People v. Chicago & N.W.R. Co., 331 Ill. 544, 163 N.E. 355; Gates v. Sweitzer, 347 Ill. 353, 179 N.E. 837, 79 A.L.R. 1151; People v. Westminster Bldg. Corp., 361 Ill. 153, 197 N.E. 573; People v. 110 South Dearborn St. Corp., 363 Ill. 286, 2 N.E.2d 68. These holdings, however, are grounded upon a constitutional provision unlike that of this state. The California provision adopts the annual limitation rule limiting indebtedness in any one year to the income and revenue for such year, while the Illinois provision adopts the percentage limitation, forbidding indebtedness in any one year in excess of a certain per cent of the value or assessed value of the taxable property of the municipality. These different methods of debt limitation have required different fiscal policies in the two states. The annual limitation rule provided by the California Constitution prevails in this state and the courts have no power to change it by judicial interpretation.

[31, 32] The county points out that the $337,500 levy was carried as part of the general reserve of the Farm and Hospital Sinking Fund, which aggregated $382,443.05, and that similarly the $135,000 levy was included in the general reserve of the Hall of Justice Interest and Sinking Fund, which aggregated $153,598.33. It argues that the levy, therefore, constituted a reserve "to meet the cash requirements of any fund to which the county's credit may be legally extended for that portion of such fiscal year prior to the receipt of taxes therein", as authorized by subdivision 3 of section 3714, supra, particularly when that provision is read in connection with subdivision 6 of the same section, which states in part: "The unencumbered balance remaining in any fund at the end of the fiscal year shall be carried over to the credit of such fund for the next fiscal year, and shall be deducted from the amount finally determined as necessary to be expended by that fund, for such fiscal year." The answer to this contention is that it is directly contrary to supported findings of the trial court. There is no showing that the sums in question were appropriated as reserves, after ascertainment of cash requirements, in conformity with section 3714. The trial court found "that the total requirements for interest and sinking fund purposes of said farm and hospital bonds * * * were fixed in the budget * * * at $807,443.05 * * *;" that said appropriation "included an appropriation of $337,500 for principal and interest maturing and payable between July 1st, 1934, and December 31st, 1934, to-wit, July 1st, 1934"; and that "the balance of said appropriation consisted of a 10 per cent allowance for delinquency in tax collections and for general reserve of said fund". A similar finding was made with respect to the $135,000 item of the New Hall of Justice fund. An unauthorized levy cannot be made valid merely by placing it under the head of "general reserve" in the fund in which it is carried, thus permitting the accomplishment by indirection of that which is forbidden to be done directly.

The judgment is reversed and the cause remanded with directions to the trial court to compute the amount of refund to which the plaintiff is entitled in accordance with the views expressed in this opinion, amending the findings as may be required, and to render judgment accordingly; on the appeal of the county each party to bear its own costs; plaintiff to recover costs on its appeal.

12 Cal.2d 54

SCHWARTZLER v. LEMAS et al.
(VIERRA, Intervener).
Sac. 5105.

Supreme Court of California.
Aug. 24, 1938.

As Modified on Denial of Rehearing
Sept. 20, 1938.

1. Chattel mortgages 🔑**225(1)**

A person who purchased one-half interest in property with knowledge that property was subject to chattel mortgage executed by seller, and who became a partner with the seller in the business, was not personally liable to mortgagee, but his interest in mortgaged premises was subject to mortgagee's right to foreclosure under a renewal of chattel mortgage executed by seller after the sale of the half interest.

2. Appeal and error 🔑**1099(3)**

A former decision, determining that intervener purchased an interest in mortgaged property and that chattel mortgagee had knowledge thereof prior to mortgagors' execution of renewal mortgage which mortgagee was seeking to foreclose, was controlling as the "law of the case."

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. Appeal and error 🔑**1099(3)**

A former decision, affirming as to mortgagors a judgment foreclosing renewal chattel mortgage, became the "law of the case," and was controlling on subsequent appeal by intervener purchasing an interest in mortgaged property after execution of original chattel mortgage and prior to execution of renewal chattel mortgage.

4. Chattel mortgages 🔑**225(1)**

A purchaser of undivided one-half interest in property subject to chattel mortgage took title subject to lien of mortgage.

5. Chattel mortgages 🔑**241**

A second chattel mortgage executed to renew note secured by first mortgage did not create new obligation, but merely perpetuated existing lien, and so did not impair rights of purchaser who took title to one-half interest in property subject to lien of first mortgage, notwithstanding that mortgagee had knowledge of purchase when second mortgage was executed.

6. Partnership 🔑**142(2)**

Ordinarily, a mortgage executed against partnership property by one partner only to secure his individual debt, and without consent of associate partners, conveys no title and creates no lien upon property of the partnership or against nonconsenting partners.

7. Partnership 🔑**234**

Where chattel mortgagor mortgaged property when he and his wife were exclusive owners thereof, and a partnership was subsequently created with a buyer purchasing a one-half interest in mortgaged property with knowledge that property was subject to mortgage, a second chattel mortgage executed by mortgagor in renewal of original mortgage merely extended the lien which then existed.

◆

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action to foreclose a chattel mortgage on dairy cattle and equipment by P. J. Schwartzler against M. Lemas and another, wherein M. C. Vierra intervened. From a judgment for the plaintiff, the intervener appeals.

Affirmed.

Prior opinion, 73 P.2d 280.

Hjelm & Hjelm, of Turlock, for appellant.

George L. Klug, of Merced, for respondent.

PER CURIAM.

This is an appeal by the intervener Vierra from a judgment in favor of the plaintiff foreclosing a chattel mortgage on dairy cattle and equipment. The trial court found that the intervener had agreed to purchase a one-half interest in the property covered by the mortgage and had become a partner of the owners in the conduct of the dairy business, but that the intervener's interest was so acquired after the execution of the chattel mortgage and a renewal thereof, and was subject and subordinate to the plaintiff's right of foreclosure. Judgment was accordingly entered against the defendants Lemas decreeing a foreclosure with a deficiency, if any, against said defendants. No personal judgment was rendered against the intervener, the court merely adjudging that he acquired his interest subject to the existing debt.

This is a second appeal in the same action. The former judgment determined that the intervener's interest was subject to the existing debt and was reversed for the principal reason that it could not be ascertained from the record whether the personal property included in the original mortgage was the same as that included in the renewal mortgage, inferentially holding, and we think properly, that if it should appear on a retrial that the property included in both mortgages was the same, the intervener's interest would be subject to the existing debt. Schwartzler v. Lemas, 11 Cal.App.2d 442, 53 P.2d 1039. On the retrial it was stipulated that said property was and is the same.

It is insisted by the intervener that by his contract of purchase he became a partner in the dairy business and that the findings and judgment on the second trial to the effect that the partnership property is charged with the mortgage debt is not supported by the evidence, and that in any event he is not personally liable on the mortgage note.

[1] This appeal was before the District Court of Appeal of the Third District, and a judgment of affirmance rendered. A hearing in this court was granted, mainly for the reason that it was indicated therein that a personal judgment had been rendered against the intervener-appellant, when such was not the case. The appellant was not a party to and had not assumed the obligation either directly or indirectly. The other points involved on the appeal are correctly determined in the following portions of the opinion of the District Court of Appeal which are hereby adopted, to-wit:

[2, 3] "Prior to September, 1924, M. Lemas and wife owned the dairy cattle and equipment which are involved in this action. September 11, 1924, M. Lemas executed a chattel mortgage on their forty head of cattle and dairy equipment to secure the payment of two promissory notes due in six months, one for $1,500 and the other for $3,317. The intervener, M. C. Vierra, lived in the Lemas home and was employed by them in the dairy business. Vierra had knowledge of the first chattel mortgage. January 1, 1925, the owners of the cattle and dairy equipment executed a written contract agreeing to sell to Vierra 'one-half interest in the said dairy business and personal property', which, it is conceded, are the same business and property involved in this action. The contract provided for payment of the purchase price of $3,500 in instalments 'on or before the 1st day of January, 1929'. The entire purchase price of the property was fully paid prior to 1928. The original chattel mortgage was never foreclosed. January 20, 1928, Mr. and Mrs. Lemas executed to the plaintiff, Schwartzler, a chattel mortgage on the same dairy cattle and equipment which were involved in the first transaction to renew the promissory note for $3,317, which was included in the first mortgage. This note became due in two years from the date of the second mortgage. At the time of the execution of the second chattel mortgage Mr. and Mrs. Lemas and Vierra were in joint possession of the property, and were engaged in operating the dairy. The plaintiff then knew of the interest of Vierra in the dairy business and property which was mortgaged. The $3,317 note for which the second chattel mortgage was given, was the same note which was included in the original mortgage. The second mortgage was, therefore, given to renew and secure the payment of one of the notes for which the first mortgage was executed. Only about $700 was thereafter paid on this last secured note. December 6, 1933, this suit was commenced against Mr. and Mrs. Lemas to foreclose the last-mentioned chattel mortgage. By permission of court, M. C. Vierra intervened in that action. The cause was tried, and the court adopted findings in favor of the plaintiff and thereupon rendered judgment against the defendants for the foreclosure and sale of the mortgaged property to pay the obligation due to plaintiff. From that judgment, the defendants appealed. On that previous appeal this court affirmed the judgment as to all the defendants except Vierra. For the reason that it could not be determined from the record whether the second mortgage dated January 20, 1928, covered the same property which was mortgaged September 11, 1924, the judgment was reversed with respect to the intervener, Vierra. This court then determined the following facts which became the law of this case:

"'As to the intervener, Vierra, as we have shown, the uncontradicted testimony shows the execution of the agreement; shows that the intervener, together with Lemas, remained in possession of the property from the date of the execution of the agreement; also, shows knowledge of the interest of the intervener on the part of the plaintiff, and that this knowledge was possessed by the plaintiff prior to the execution of the second mortgage.'

"This court determined on the former appeal that the mere making of the executory contract by the mortgagors agreeing to sell to this appellant an interest in the mortgaged property, contrary to the provisions of section 538 of the Penal Code, 'would not affect the title of the intervener Vierra.'

"The first judgment was reversed as to Vierra only because the record failed to disclose the fact that the second mortgage created a lien on the same property which was covered by the first mortgage. The opinion reads in that regard:

"'The record shows, as we have stated, that the interest of the intervener Vierra includes only a portion of the property described in the second mortgage, which may properly be determined upon a retrial of this cause.'

"The judgment of foreclosure was affirmed as to the mortgagors. To that extent the former decision of this court became the law of this case and is controlling on this appeal. The former judgment was reversed as to this appellant for the reason above stated. Upon retrial of the cause it was stipulated that the second mortgage covered all of the equipment and dairy property covered in the first mortgage, including the natural increase of cattle. There is now no question that the second mortgage covers all of the property which was included in the first mortgage.

"It thus appears as the law of this case that the intervener, Vierra, became the owner of an undivided one-half interest in the dairy business, stock and equipment of the mortgagors after the execution of the original chattel mortgage. It was also determined that the mortgagee had knowledge of Vierra's joint interest in the property before the execution of the renewal mortgage. It was not specifically determined on the previous appeal that Vierra's interest in the business and property was subject to the lien which was created by the first chattel mortgage. It necessarily follows as a matter of law that, since the lien to secure the payment of the mortgagors' debt vested before the undivided one-half interest in the property was acquired by Vierra, he took title subject to that lien. (11 C.J. 623, secs. 338 and 341; Jones on Chattel Mortgages, [4th ed.] 517, sec. 454; Ilfeld v. Ziegler, [40 Colo. 401] 91 P. 825.) In 11 Corpus Juris, supra, it is said:

"'In the absence of a stipulation to the contrary a mortgagor rightfully in possession may, before a default has occurred in the condition of the mortgage, sell the mortgaged property, but the purchaser takes subject to the mortgage lien.'

[4, 5] "To the same effect as the last-quoted authority is the text in Jones on Chattel Mortgages, supra. We therefore assume that Vierra took title to his undivided one-half interest in the dairy business, stock and equipment subject to the lien created by the original chattel mortgage to secure the two promissory notes. The evidence supports the finding of the trial court to the effect that the original lien was not extinguished. One of the notes, to-wit, the $3,317 note, for the security of which the original chattel mortgage was executed, was not paid, and the second mortgage was given to renew the mortgage to secure that note. In spite of the fact that the mortgage was renewed with knowledge on the part of the mortgagee of the intervening sale to Vierra of the undivided interest in the business and property, the renewal of the mortgage created no new obligation. On the contrary, it merely perpetuated the existing lien on the cattle and equipment as continuing security for the payment of the $3,317 note, together with accrued interest and counsel fees as provided by the terms of the original note. Under the circumstances of this case the lien created by the first mortgage was never extinguished. The second mortgage therefore did not abridge the rights acquired by Vierra in his purchase of the property for the reason that he took title subject to that very lien to secure the payment of the identical note which was secured by the renewal mortgage. There is substantial proof that the mortgage of January 20, 1928, was executed to renew the original $3,317 note which was secured by the first mortgage, and that the original lien was therefore not extinguished. * * * The second transaction, therefore, constituted a mere renewal of the mortgage and a continuation of the existing lien, and not an extinguishment of the obligation. (2 Jones on Mortgages, [8th ed.], p. 663, secs.

1186, 1187.) In the authority last cited it is said at page 664, section 1187:

> "'A mortgage does not lose its priority by taking a renewal mortgage when the debt is the same and the property is not released from the lien.'

[6] "The appellant contends that since he became a partner with the mortgagors in their dairy business and a joint owner of the cattle and equipment incident thereto, Mr. and Mrs. Lemas had no legal authority to mortgage partnership property or abridge his interest therein, to secure the payment of their individual debt. It is ordinarily true that a mortgage executed against partnership property by one partner only to secure his individual debt, and without the consent of his associate partners, conveys no title and creates no lien upon the property of the partnership or against nonconsenting partners. (47 C.J., p. 858, sec. 330; 20 R.C.L., p. 910; secs. 123, 124; 50 A.L.R., p. 441, note; 54 A.L.R., p. 554, note; 1 Rowley's Modern Law of Partnership, p. 538, sec. 441.) In 47 Corpus Juris, supra, it is said:

> "'Since a partner cannot, without consent, apply partnership property to the payment of his individual debts, he cannot abridge the rights of firm creditors or of his partners by giving an unauthorized mortgage of partnership chattels as security for such debts; * * * the mortgagee of such share takes subject to all the equities of the nonassenting partners.'

[7] "But in this case the mortgagor did not mortgage the partnership property to secure his individual debt. He mortgaged the property when he and his wife were the exclusive owners thereof and before Vierra became a partner in the business. When the property was mortgaged no partnership existed. Vierra bought his interest in that property subject to the lien which was previously created, and of which chattel mortgage the purchaser had knowledge. All that the mortgagors accomplished by renewing the mortgage was to extend the lien which then existed.

* * *

"It seems equitable and in accordance with law that the property which was mortgaged to secure a specific obligation prior to the disposal of one-half interest therein should be charged with the satisfaction of that debt in accordance with the terms of the chattel mortgage, so long as the lien thereon exists, independently of any subsequent interests which may have been acquired either as a purchaser thereof or as a partner in the business. There is nothing in the former decision of this court to the contrary."

The judgment is affirmed.

12 Cal.2d 127

SOUTHERN CALIFORNIA TEL. CO. v. STATE BOARD OF EQUALIZATION et al.

S. F. 15946.

Supreme Court of California.

Sept. 2, 1938.

1. Taxation 🔑497

In determining whether state board of equalization's classification of telephone company's central office equipment as improvements to realty for purpose of assessment, rather than as personalty, was correct, Supreme Court could not hold as a matter of law that all equipment was either personalty or realty, where company did not set forth in petition for writ of mandate a particular description of its equipment and its descriptive matter was general without reference to any particular office. Const. art. 13, § 14, as amended in 1933.

2. Taxation 🔑497

Where telephone company seeking writ of mandate to direct state board of equalization to correct its classification of company's central office equipment as improvements to realty for purpose of assessment, rather than as personalty, failed to show the nature of the equipment involved, the writ of mandate could not be granted. Const. art. 13, § 14, as amended in 1933.

3. Fixtures 🔑4

In disputes between private persons, the intention of the parties is controlling in determining whether an article is fixture or personalty.

4. Fixtures 🔑15

By virtue of the importance of intent in determining whether a thing has become a fixture, a lessee may be permitted to remove an article installed by him and constituting a trade fixture. Civ.Code, §§ 660, 1019.

5. Fixtures ⚷5

The fact that articles affixed are necessary or convenient to the use of a building for the purpose for which it is designed tends to indicate they are realty.

6. Fixtures ⚷5

In the ordinary case of articles necessary or convenient for the use of a building designed for a special purpose, the building, with equipment, has a resale or leasing value for the purpose for which it has been specially built, and hence, equipment should pass with the building as part of the realty for the convenient use thereof.

7. Taxation ⚷396

Telephone company's complex mass of interconnected wires, cables, electrical and other equipment which was contained in a large central office serving many thousands of subscribers constituted, together with the specially constructed building in which it was housed, and to which it was attached, a unit, which in its entirety was an "improvement to realty," and was correctly classified as such by the state board of equalization for assessment, rather than as "personalty." Const. art. 13, § 14, as amended in 1933.

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

8. Taxation ⚷396

Telephone company's central office equipment including such articles as headsets, breast-sets, and operators' stools, especially designed for use in connection with attached portions of equipment, and heavy machines, such as charging and ringing machines, which were not attached to building, together with attached portions, constituted a "unit for use" and "improvements to realty," and were correctly classified as such for assessment by the state board of equalization, rather than as "personalty." Const. art. 13, § 14, as amended in 1933.

9. Taxation ⚷396

Telephone company's switchboards and other equipment in small leased offices were not "improvements to realty," so as to permit classification as such by the state board of equalization for purpose of assessment, notwithstanding that switch board legs and equipment were attached to floors or walls by screws or bolts. Const. art. 13, § 14, as amended in 1933.

10. Taxation ⚷543(1)

If the state board of equalization's classification of telephone company's office equipment as improvements to realty for purpose of assessment was erroneous as to certain offices, telephone company, in actions brought by it to obtain refunds of taxes arising from such classification, could establish that the classification was erroneous. Const. art. 13, § 14, as amended in 1933.

11. Taxation ⚷396

Telephone company's central office equipment, which the state board of equalization had classified as improvements to realty for purpose of assessment, was not "telephone lines" within statute defining improvements to realty but excepting telephone and telegraph lines. Const. art. 13, § 14, as amended in 1933; Pol.Code, § 3617(c).

[Ed. Note.—For other definitions of "Telephone Line," see Words & Phrases.]

◆

In Bank.

Petition for writ of mandate by the Southern California Telephone Company against the State Board of Equalization of the state of California and John C. Corbett and others, as members of the State Board of Equalization of the state of California, to direct the court to correct its assessment of petitioner's property by classifying property as personalty and to transmit notice of correction to local tax officers.

Alternative writ discharged and peremptory writ of mandate denied.

Alfred Sutro and Francis N. Marshall, both of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for petitioner.

U. S. Webb, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Ray L. Chesebro, City Atty., and John W. Holmes, Deputy City Atty., both of Los Angeles, for respondents.

SEAWELL, Justice.

Petition for writ of mandate to be directed to the State Board of Equalization. Since 1935 the property of telephone and telegraph companies, other than their franchises, is assessed by the State Board of Equalization. Art. 13, sec. 14, Const., as amended in 1933, effective January 1,

1935. Upon the value as thus assessed cities, counties and other local taxing districts levy ad valorem taxes. The State Board of Equalization assessed the central office equipment of petitioner Southern California Telephone Company as improvements to realty for the fiscal year 1937–38, with the result that taxes in the amount of approximately $36,000 have been levied against said property which would not have been charged against it if it had been assessed as personal property. The prayer of the petition is that the board be directed to correct its assessment by classifying said property as personal property and to transmit notice of the correction to the local tax officers.

The alternative writ of mandate was granted on December 16, 1937. As grounds for applying to this court for extraordinary relief by writ of mandate, petitioner alleged that to remit it to the remedy of payment of the additional taxes under protest and action thereafter to secure a refund would involve a multiplicity of actions, and that only by applying to this court could a determination be had before the taxes became delinquent.

The hearing upon the return to the writ was not held until May 4, 1938. In the meantime petitioner had paid, under protest, the bulk of the taxes to which it objects to avoid penalties for delinquency, and it is to be inferred from petitioner's briefs that all said taxes have now been paid. The respondent board urges that by reason of this payment it would be an idle and ineffective act to grant petitioner the relief sought, that is, correction of the assessment, and that the remedy by claims and actions to recover the taxes is adequate. Secs. 3804, 3819, Pol.Code. Respondent board further points to the fact that the local tax officers by whom refunds must be made of taxes illegally collected are not parties to this proceeding. It also contends that after the time for hearing objections to the assessment has passed, it is without authority to reclassify property except where error appears from the "assessment book or from maps, block books, or other papers" of the board (sec. 3663c, Pol. Code), and that the error of classification herein, if any, does not thus appear.

Respondent board alleges in its answer, and petitioner admits, that the additional taxes of approximately $36,000, which have resulted from the classification of petitioner's office equipment as improvements to realty have been levied by only six taxing districts. Five of these districts are in Los Angeles county, the sixth, in which a tax of only $25.51 was levied, is in Orange county. Of the total of $36,623.08 additional taxes, $33,389.99 were levied in Los Angeles county on behalf of the Los Angeles county flood control district. The districts in question—flood control, sanitation and water districts—tax land and improvements to land, but not personalty.

Petitioner observes in its briefs that the determination of the propriety of the board's classification is of importance not only to it, but to its parent corporation, the Pacific Telephone and Telegraph Company, which owns central office equipment in other jurisdictions in the state, and, like petitioner, has been subject to additional taxes by reason of the board's classification. Petitioner contends that this court should order the correction of the assessment if it is erroneous notwithstanding that since the issuance of the writ it has paid taxes under protest. The theory of petitioner is that upon a determination of this proceeding in its favor the local authorities in the jurisdictions where it has made tax payments will allow petitioner's claims for refunds, or if it is required to resort to actions, the nature of the central office equipment will be concluded by the decision of this court in the instant proceeding. It also urges that a determination here will indicate to the board the course to be followed by it in future years. American Securities Co. v. Forward, 220 Cal. 566, 571, 32 P.2d 343, 96 A.L.R. 1268; Union Safe Deposit Bank v. Menlo Park, 3 Cal.2d 264, 43 P.2d 811. If it is required to resort to actions brought in the lower courts a final determination cannot be had on appeal until the time for assessment and payment of taxes for one or more ensuing fiscal years has elapsed, with the consequent necessity of bringing additional suits to recover taxes based on these later assessments.

We are of the view that it is not necessary to consider the above arguments for the reason that a fatal objection exists as to the granting of the writ. The instant case on the facts alleged in the petition involves directly only the assessment of central office equipment in the six taxing districts wherein petitioner has been compelled to pay additional taxes of approximately $36,000 by reason of the board's classification. In the affidavits presented by it petitioner does not set forth a particular description of the equipment in its offices in said districts. In fact it does not give the names or location of said offices. Its descriptive matter is general, without reference to particular offices. The photographs of central office equipment filed with this court show with two exceptions equipment owned not by petitioner but by the Pacific Telephone and Telegraph Company. This lack of descriptive matter concerning the particular offices involved in this proceeding is accounted for by the fact that petitioner has submitted its case on the theory that the similarity of equipment is such that a uniform classification can be adopted for central office equipment without regard to the particular office in which it is located.

[1] Desirable as a uniform classification may be in the interests of administrative expediency, we are of the view that upon the showing made in this proceeding it cannot be held as a matter of law that equipment in all petitioner's offices is either personalty or realty. Large offices are located in specially designed metropolitan buildings, built and owned by the telephone company. In small communities equipment is often located in premises devoted to other purposes, as in a grocery store or lunchroom, in which the telephone company leases space. In such cases the switchboard may be approximately the size of an ordinary desk, and the other equipment occupies an insignificant space. Whether any of petitioner's offices in the taxing districts involved in this proceeding are of this type does not appear.

[2] In the instant case, in view of the state of the record, it cannot be ascertained in which offices the equipment remains personalty, and in which it is an improvement to realty. It is not made to appear that the respondent board has incorrectly assessed petitioner's equipment in any office, since the nature of the equipment in the particular offices involved is not shown. In this situation a writ of mandate cannot be granted.

Between 1911 and 1935, public utilities paid to the state a tax on their operative property which was measured by a percentage of the gross receipts from operation. Art. 13, sec. 14. In 1935 the respondent board for the first time assessed petitioner's property on an ad valorem basis. It assessed central office equipment as personalty in 1935 and 1936. The assessment of 1937, for the fiscal year 1937–38, for the first time classified it as improvements to realty.

The term "improvements," as defined by section 3617, Political Code, for tax purposes, includes, "All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, except telephone and telegraph lines." By section 660, Civil Code, the term "affixed to land" is defined as follows: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws * * *."

The petitioner's central office equipment is briefly described by it as including "all mechanical and electrical devices used in making telephone connections—i. e., in making a connection for the duration of the conversation between the line of the calling party and the line of the party called—and includes that part of the subscriber lines and trunk lines which is within the central office." Central offices are of two kinds, those in which the equipment is manual, and those which have dial equipment.

The general description of equipment given by petitioner in its affidavits suggests its large offices. It describes first the manual type equipment. Switchboards are mounted in cabinet-like frames which rest on the floor. The frames of the switchboards are secured by means of bolts screwed into holes in the floor. Inside the switchboard contains a mass of wires. Main and intermediate distributing frames are of metal and are made secure by bracket members through which bolts are screwed into the floor and generally into the ceiling. Frames have several shelves each holding a mass of wires. Cables are made up of a bundle of small individual copper wires, and are described by petitioner "as the connecting links which carry subscriber lines from one piece of central office equipment to another." Cables are supported by cable racks or runways, which are iron frames usually suspended from the ceiling by bolts and also fastened to the framework of the distributing frames, relay racks and other equipment.

The relay racks have an iron framework screwed to the floor and in some instances into the ceiling by bolts. The iron framework of the relay racks has tiers of narrow iron strips holding the relays, which are small electro-magnetic switches. The coil rack is also an upright iron framework, kept in place by bolts screwed into the floor. It holds electrical coils, which act as distributors of electrical energy from the power plant, and thus supply telephone connections with current suitable for talking and signaling purposes.

The fuse panel is an upright slate or composition panel holding a large number of small electrical fuses set in rows. It is held by an iron framework which, like the other frames, is held secure by bolts fastened to the floor and usually in the ceiling. The power plant includes a power board in an iron framework bolted to the floor and to a wall or the ceiling. On the board are mounted fuses, overload protectors, switches to start motors, rheostats, current and voltage meters and other electrical equipment. The power plant also includes charging machines, which are heavy and rest on the floor without fastening, and ringing machines which rest on tables secured by bolts.

Registers for counting calls made on individual subscribers lines are mounted on iron frames bolted to the floor. The test desk and chief operator's desk are generally screwed to the floor. Operators' chairs, operators' head sets and breast sets, test sets and maintenance tools are not fastened to the building in any way, but are freely movable.

Offices which have the dial type equipment are of two kinds—offices with "step-by-step" equipment and offices with "panel" type equipment. Equipment in dial offices, as in manual offices, is largely mounted in metal frames which extend from the floor close to the ceiling, the frames being screwed to the floor by means of bolts. Photographs indicate that the frames are set in rows, and, as petitioner says, bear a resemblance to the book stacks in a large library, with narrow aisles between.

[3] It is settled that in disputes between private persons the intention of the parties is controlling in determining whether an article is a fixture and part of the realty or is personalty. In M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 37, 63 P.2d 818, 821, the rule is thus expressed: "This court has recognized the test of intention to make the article a permanent addition to the realty as manifested by the physical facts, and has accepted the character of the annexation and the use for which the article is designed as subsidiary elements employed for the purpose of testing the intention of permanency. City of Los Angeles v. Klinker, supra [219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148]; Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Oakland Bank of Savings v. California Pressed Brick Co., supra [182 Cal. 295, 191 P. 524]; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 P. 184, 13 Am.St.Rep. 147. Thus whether an article is or was physically affixed to the building is only one of the criteria in determining whether there was an intention to make it a permanent accession to the real property."

[4] By definition in section 660, Civil Code, a thing becomes a fixture when it is "permanently attached" to the realty, and permanence has reference to intent. By virtue of the importance of intent, a lessee may be permitted to remove an article installed by him and constituting a trade fixture. Sec. 1019, Civ. Code. The respondent board recognizes the importance of intent in disputes between private persons. But it contends that for purposes of taxation the "physical facts" alone should be considered. On this theory no consideration would be given to the circumstance that articles have been installed by a lessee and are trade fixtures removable by him at the end of his term. In this regard it may be said that under the above cited cases the "intent" to which weight is given where rights of those who are not parties to any private agreement are concerned, is intent as manifested by the physical facts, with due consideration to the status of the party by whom the articles have been installed. The respondent board, as we understand its contention, does not maintain that annexation, as by bolts and screws, is the only "physical fact" to be considered, to the exclusion of such factors as the nature of the article itself and its special adaptation to the purposes for which the building is particularly designed. Consideration of these so-called "physical facts" alone would not provide a rule of thumb applicable without practical difficulty in all cases.

Respondent board further contends that the attachment of petitioner's office equipment is made with intent that it shall be "permanent", as that word is used in section 660, Civil Code. Petitioner, in support of a contrary contention, points to the fact that it may be detached by a simple operation of removing bolts and screws. The bolt and screw holes which remain cannot be said to be a substantial injury to the building. Central office equipment removed from one office is customarily used in assembling equipment in other offices unless it is too obsolete. Petitioner places special emphasis on the fact that when it removes from office premises it always removes all office equipment. Said equipment is of no use in the building but to itself. Petitioner's vice-president in charge of operations lists fourteen instances in which it has removed from central offices and the premises have been used thereafter for a wide variety of purposes.

Petitioner also refers to the uniform system of accounts for telephone companies in accordance with which it is now required to keep its accounts by the federal communications commission and the California railroad commission. Separate accounts are maintained for plant and for central office equipment. The plant account includes the cost of "buildings and all permanent fixtures, machinery, appurtenances and appliances installed as a part thereof". The central office account includes the cost of the equipment which the board has classified as improvements in the instant case. Overemphasis cannot be given to the placing of central office equipment in a separate account from plant, including "permanent fixtures". Said accounting classification is not shown to have been made for purposes of taxation, nor with intent to establish the legal status of central office equipment as realty or personalty.

The respondent board states that the "permanency of location of most of the central office equipment is determined not so much by the bolts and screws as by the multitude of wires that lace and interlace the equipment, binding its parts into a complex, intricate machine". In the Hollywood central office about 180,000 wires are attached to the main distributing frame, in addition to many thousands of "jumper wires" on the frame itself. If the frame were to be moved and used in a different position it would be necessary to disconnect and reconnect all these wires.

[5, 6] Measured in terms of investment 97 per cent of central office equipment is housed in buildings owned by petitioner, most of which have been specially designed for that purpose. The fact that articles affixed are necessary or convenient to the use of a building for the purpose for which it is designed is generally treated as tending to indicate they are realty. Dauch v. Ginsburg, 214 Cal. 540, 6 P.2d 952; M. P. Moller, Inc., v. Wilson, supra; Broadway Improvement & Investment Co. v. Tumansky, 2 Cal.2d 465, 41 P.2d 553. Petitioner disputes the applicability of this principle in the instant case. In the ordinary case of articles necessary or convenient for the use of a building designed for a special purpose, the building, with equipment, has a resale or leasing value for the purpose for which it has been specially built. The equipment should pass with the building as part of the realty for the convenient use thereof. But when the telephone company ceases to use a central office, any market value is for the building without equipment.

However, the fact that central office buildings are constructed for a special use favors permanence of location and attachment of fixtures. In the territory which it serves petitioner is the only company engaged in the highly specialized business of supplying telephone service. By reason of this fact there are not available other buildings constructed for this specialized business. Furthermore, the special suitability of telephone offices restricts their salability for other purposes. These two factors—dearth of other specially designed buildings and difficulty of disposal of buildings designed for a business in which only petitioner is engaged—strongly favor permanence of location of telephone offices. In all but one of the fourteen fundamental plan areas of the Los Angeles exchange, petitioner has acquired land for future expansion. The anticipated span of recently constructed large offices is thirty-five years.

[7] The great expense incident to the moving of the equipment in a large office to another telephone office or to another position within the same building make for permanence of location of telephone equipment. The estimated average life of central office equipment is twenty years. Thirty-three and one-third per cent of the cost of installing central office equipment is for labor. Disconnection and reconnection of thousands of wires and cables involves much labor, with some loss in adapting old equipment to a new location. Furthermore, the equipment is so arranged that routine wire changes, such as those necessitated daily by subscribers changing addresses and telephone numbers can be made without disturbing the permanence of location of equipment. The conclusion is inescapable

that the complex mass of interconnected wires, cables, electrical and other equipment which is contained in a large central office serving many thousands of subscribers, as described and illustrated by photographs in this proceeding, constitutes together with the specially constructed building in which it is housed, and to which it is attached, a unit, which in its entirety is an improvement to realty. The fact that equipment is sometimes moved and office locations changed does not militate against this conclusion. Absolute permanence is not required.

[8] Central office equipment includes such articles as head sets, breast sets and operators' stools, which are readily portable and not attached by bolts or screws to the building. Said property is specially designed for use in connection with the attached portions of the equipment, most of it is not usable except with telephone equipment, and from the standpoint of investment it represents less than one per cent of the total equipment. There are also certain heavy machines, such as charging and ringing machines, which although not readily portable are not attached to the building by bolts or screws. Including these machines petitioner states that the percentage of nonattached property in terms of investment is between six and one-half and ten per cent. We are of the view that respondent's contention that the nonattached portions of the equipment and the attached portions together constitute a unit for use together and are improvements to realty, must be sustained. The detached portions of the equipment are constructively annexed. City of Los Angeles v. Klinker, 219 Cal. 198, 207, 25 P.2d 826, 90 A.L.R. 148; White v. Cincinnati, etc., R. R., 34 Ind.App. 287, 71 N.E. 276.

[9] We have heretofore referred to the fact that the petitioner also operates a number of small offices. It owns 75 office buildings, and has equipment in 67 buildings or parts of buildings leased by it. From the standpoint of investment 97 per cent of its equipment is in owned buildings, due to the fact that it owns its large offices where the greatest investments are made. Photographs of several small offices occupying leased space in buildings devoted to other purposes, such as lunchrooms, have been filed in this proceeding. The switchboard in these offices approximates in size a desk and the other equipment occupies but little space. In no proper sense can equipment in small leased offices be held an improvement to and part of real property owned by another. The mere attachment of switchboard legs and equipment to floor or walls by screws or bolts does not have that effect.

[10] It would seem that the office equipment in the bulk of petitioner's offices will readily fall into one classification or the other. Petitioner may establish that the board's assessment of central office equipment as improvements to realty is erroneous as to certain offices in actions brought by it to obtain refunds of taxes arising from such classification. In such actions the facts relating to the particular offices involved may be fully developed.

[11] Petitioner further contends that central office equipment should be held to constitute "telephone lines" within the exception provided in section 3617, Political Code. The provision is as follows: "Third [Improvements]—The term 'improvements' includes:

"1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, except telephone and telegraph lines." Although the entire telephone system may be said in a broad sense to constitute a "telephone line", we are of the view that central office equipment should not be held to be "telephone line" within the above exception. Said exception has reference to lines of the company outside central office buildings, which lines are commonly located in or under public streets and roads or on rights of way over private lands.

Petitioner relies on our decision in General Pipe Line Co. v. State Board of Equalization, 5 Cal.2d 253, 54 P.2d 18. That case involved a construction of the provision of section 14, article 13, Constitution, which requires the State Board of Equalization to assess "all pipe lines, flumes, canals, ditches and aqueducts not entirely within the limits of any one county". It was held that the section applied to lines of an inter-county pipe line which was used for private and not public utility purposes. The court further held that the pumps, boilers and other appurtenances were part of the "pipe line" for assessment by the State Board of Equalization. Any other construction would have resulted in assessment of the "line", strictly speaking, by the state board, and the appurtenances by which it was operated by the local assessors, which it was the purpose of the section to avoid. We do not regard said case as controlling the operation of section 3617, Political Code.

The alternative writ is discharged and the peremptory writ of mandate is denied.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

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12 Cal.2d 156

PEOPLE ex rel. STATE BOARD OF MEDICAL EXAMINERS v. PACIFIC HEALTH CORPORATION, Inc.

S. F. 15690.

Supreme Court of California.

Sept. 2, 1938.

Rehearing Denied Sept. 29, 1938.

1. Physicians and surgeons ⇨4

A corporation may not engage in the practice of medicine.

2. Physicians and surgeons ⇨6(1)

A corporation which paid for medical services rendered contract holders by physicians selected by corporation in consideration for payment of a premium by the contract holders was illegally engaged in the "practice of medicine." St.1913, p. 722.

[Ed. Note.—For other definitions of "Practice of Medicine," see Words & Phrases.]

3. Constitutional law ⇨70(1)

The courts may follow changes in public policy of matters not covered by statute but the courts must in such case declare the public policy and not merely its own choice among conflicting views of desirable reform.

4. Constitutional law ⇨70(1)

The courts are without authority to sanction the corporate practice of medicine on ground that public policy with reference thereto has changed as indicated by the movement for health insurance and group medicine, in absence of statute.

EDMONDS, J., WASTE, C. J., and HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Proceedings in quo warranto by the People of the State of California, on the relation of the State Board of Medical Examiners, against the Pacific Health Corporation, Inc. From a judgment holding the defendant's activities unlawful, the defendant appeals.

Affirmed.

Rehearing denied; EDMONDS and HOUSER, JJ., dissenting.

Knight, Boland & Riordan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondent.

Hartley F. Peart and Howard Hassard, both of San Francisco, amici curiæ.

Gilford G. Rowland, of San Francisco, amicus curiæ for State Bar of California.

PER CURIAM.

This is an appeal from a judgment in quo warranto against defendant holding its activities violative of the California Medical Practice Act; St.1913, p. 722 (now sections 2000–2496 of the Business and Professions Code, St.1937, p. 1254 et seq.)

The facts are stipulated. Defendant Pacific Health Corporation, Inc., is a corporation organized under the general corporation law of the state of California, with its principal place of business in San Francisco. Upon application of persons in good health, the defendant issues a contract by the terms of which defendant undertakes to pay for services rendered by physicians, hospitals, ambulance and medical laboratories under certain circumstances, and the applicant pays the required sum or premium therefor. When a contract holder becomes sick or is injured, defendant advises him from whom these services are to be obtained, that is, the physician, hospital or ambulance available to him. After the services are rendered, defendant pays the charges. Defendant keeps a list of physicians and surgeons approved by it, and to obtain the benefits of the service the contract holders must, save as to emergency expenses not exceeding $50, accept a doctor from the list.

Defendant is a stock corporation, operated for profit. It advertises its service and solicits the public for purchase of its contracts, paying commissions to its soliciting agents. The money collected from contract holders is paid into the general fund, and this, together with the capital and surplus, is invested. The charges for medical services are paid out of the general fund and income from investments.

Upon these facts the lower court concluded that defendant was illegally engaged in the practice of medicine, in excess of its corporate rights, powers and franchises. It was ordered that defendant be excluded from such practice, and that its articles of incorporation be amended to conform to the decree. We are in accord with the court's conclusion.

[1] The issue presented herein is not new, and has been considered in this state by recent cases which are controlling. It is an established doctrine that a corporation may not engage in the practice of such professions as law, medicine or dentistry. People v. Merchants' Protective Corp., 189 Cal. 531, 209 P. 363; Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67; Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 52 P.2d 992; Benjamin Franklin Life Assur. Co. v. Mitchell, 14 Cal.App.2d 654, 58 P.2d 984; People v. United Medical Service, 362 Ill. 442, 200 N.E. 157, 103 A.L.R. 1229; see notes, 25 Cal.L.Rev. 91; 10 So.Cal.L.Rev. 329; 30 Ill.L.Rev. 533. This doctrine is not challenged by defendant, which seeks to distinguish its activities from those previously held to constitute illegal practice of medicine. It is stated that defendant does not itself undertake to perform medical services, but merely to furnish competent physicians; that the contracts do not contemplate that services shall be performed at its offices, but elsewhere; and that the doctors are not employed by defendant on a salary basis, nor directed by defendant, but are compensated for actual services after they are rendered. Defendant's theory is that the doctors are independent contractors, and that this fact absolves it of the charge of practicing medicine.

[2] We are unable to agree that the policy of the law may be circumvented by technical distinctions in the manner in which the doctors are engaged, designated or compensated by the corporation. The evils of divided loyalty and impaired confidence would seem to be equally present whether the doctor received benefits from the corporation in the form of salary or fees. And freedom of choice is destroyed, and the elements of solicitation of medical business and lay control of the profession are present whenever the corporation seeks such business from the general public and turns it over to a special group of doctors. As the court said in Pacific Employers Ins. Co. v. Carpenter, supra, 10 Cal.App.2d 592, 601, 52 P.2d 992, 996: "But we need not quibble here over the use of terms, as it is immaterial whether the appointed practitioners are termed employees, agents, or appointees of the petitioner. The fact remains that petitioner's agreement was to furnish, in consideration of the premium paid by the insured, the services of doctors and dentists who were to be appointed, engaged, hired, or employed by petitioner for the purpose of furnishing such services. Any such agreement is clearly condemned as unlawful and against public policy by the authorities above cited."

The foregoing case is so similar in its facts to the instant case as to be conclusive on the issue before us. See, also, Benjamin Franklin Life Assur. Co. v. Mitchell, supra.

Defendant suggests that the Medical Practice Act should be strictly construed so as not to prohibit its activities; but this argument ignores the basic policy of the law, of which the statute is merely declaratory, against corporate practice of the learned professions, directly or indirectly. See authorities cited supra.

Although, as we have already pointed out, defendant does not challenge but fully concedes that corporations cannot practice the learned professions, the procedure which it seeks to defend is within the prohibition of this doctrine. To avoid this result, defendant launches into a discussion of the effect of an adverse decision upon other organizations and activities. Our attention is called to certain data from medical and lay sources in support of the movement for group medicine and health insurance, and we are told that a decision against defendant will outlaw all fraternal, religious, hospital, labor and similar benevolent organizations furnishing medical services to members. We have given careful consideration to this argument and we find it wholly unconvincing.

The question of the effect of this decision upon any other organizations is not squarely before the court, and the information in the record as to their character and activities is meagre and unsatisfactory. If we undertook to determine their legality in this proceeding, in which they are not represented, our decision would have no binding force. But it should be pointed out that the fear of applying the holding of this case to such philanthropic associations as those mentioned does not exist in the minds of the directors thereof, nor has it been suggested that the public authorities contemplate any attack on them. This illusory apprehension is expressed by defendant alone, in an attempt to bolster up its case by bringing it within the general class of associations furnishing medical or health benefits which have been tacitly approved for generations. But a most obvious and, to us, a fundamental distinction must be made between defendant and these other institutions. In nearly all of them, the medical service is rendered to a limited and particular group as a result of cooperative association through membership in the fraternal or other association, or as a result of employment by some corporation which has an interest in the health of its employees. The public is not solicited to purchase the medical services of a panel of doctors; and the doctors are not employed or used to make profits for stockholders. In almost every case the institution is organized as a nonprofit corporation or association. Such activities are not comparable to those of private corporations operated for profit and, since the principal evils attendant upon corporate practice of medicine spring from the conflict between the professional standards and obligations of the doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to nonprofit institutions. This view almost seems implicit in the decisions of the courts and it certainly has been the assumption of the public authorities, which have, as far as we are advised, never molested these organizations.

[3, 4] The other question raised by defendant's proffered materials is whether the time has come, as indicated by the movement for health insurance and group medicine, to reverse the long settled policy against corporate medical practice and declare it legal and proper. A simple answer would be that the few extracts from the opinions of writers which we find in the briefs furnish us with no evidence whatsoever of a widespread change in social viewpoint sufficient to repudiate the existing law of practically all the states. All that we have before us is the proof of a controversy, which has raged for years, between medical men, sociologists and others, as to the future course of medical practice. The desirability of present methods and the suggested reforms, including various kinds of insurance and group treatment, are hotly debated. (See 25 Cal.L. Rev. 91, 93.) Public policy may change, and doubtlessly where statutes do not cover the field, the court may follow such changes, but the court must, in such case, declare the public policy, the social view of people generally, and not merely its own private choice among hopelessly conflicting views of desirable reform of settled practices or principles in this field. In the present circumstances there can be no true declaration by this court that a change in social viewpoint now requires the abandonment of the rule against corporate practice of medicine. Such a drastic change should come from the legislature, after the full investigation and debate which legislative organization and methods permit. Though certainly aware of the controversy, and with presumed knowledge of our decisions preventing corporate practice (see supra), the legislature thus far has not acted, and until it does we deem it proper to follow the existing law. See Pacific Employers Ins. Co. v. Carpenter, supra, 10 Cal.App.2d 592, 602, 52 P.2d 992.

We might observe, in conclusion, that an admission of the desirability of some form of health insurance or group medicine by no means requires approval of the activities of defendant. It is perfectly possible to bring adequate medical service to the vast numbers of people who now can ill afford it by some means which will protect both the profession and the public from the evils of corporate control of the practitioner. An example is found in the system adopted by the City and County of San Francisco for the furnishing of medical service to its employees, approved by us in Butterworth v. Boyd, 82 P.2d 434, this day filed.

The future of group medicine would seem to lie either in such well considered plans, submitted to and adopted by the proper legislative authority, or in a carefully regulated statute setting forth the means by which private organizations may offer such services.

The judgment is affirmed.

EDMONDS, Justice (dissenting).

This case presents only two questions for decision: (1) Does the plan followed by the appellant in providing health service for its contract holders violate the provisions of the Medical Practice Act, and (2) If not, is its plan violative of public policy? I find nothing in the act which expressly or by implication prohibits a corporation from hiring a physician regularly licensed to practice in this state to care for its employees or members, and I see no reason for holding that the plan contravenes public policy.

The decision to the contrary relies upon the cases of Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67; People v. Merchants' Protective Corp., 189 Cal. 531, 209 P. 363; Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 52 P.2d 992, and Benjamin Franklin Life Assur. Co. v. Mitchell, 14 Cal.App.2d 654, 58 P.2d 984. The two appellate court decisions are directly in point in support of respondent's position. The opinions in those cases clearly hold that a health insurance plan similar to that involved in the present case is violative of the Medical Practice Act and of public policy, in that it contemplates and provides for the practice of medicine by a corporation, although it may be noted that the Benjamin Franklin Case was decided by a divided court. The Painless Parker Case involved the unlawful practice of dentistry by a corporation in violation of the Dental Practice Act, a statute substantially different from the Medical Practice Act in that it expressly prohibited the practices there involved. There can be no doubt, and appellant concedes, that within certain constitutional limitations the legislature may declare that the employment of physicians by lay persons or corporations constitutes the practice of medicine. The Dental Practice Act did so declare. The Medical Practice Act contains no such provision, and the appellant expressly excludes dental care from its contracts.

The Merchants' Protective Corporation Case is likewise not controlling. The evidence in that case showed that the corporation contracted to hire attorneys to render legal advice to members of the corporation. It attempted to justify its action, according to the opinion of the court, upon the ground that "it is merely an agency for the bringing of attorneys and clients together, and is not itself engaged in practicing law." (Page 366.) It was held that this contention was not supported by the facts in that under its articles and contracts the corporation itself, through attorneys, purported to give legal advice. The implication of the opinion is that if the corporation were in fact an agency, which for a fee brought attorneys and clients together, its activities would have been within the law.

The present case involves a factual and legal situation fundamentally different from the contract for legal services. Here the corporation is acting as an agency for bringing the doctor and patient together. In addition it underwrites or insures the cost of such medical care. The doctor in caring for the insured is not rendering medical care on behalf of the corporation. When the doctor starts treatment of the member, the relationship of doctor and patient, with all that that relationship implies, is created. The situation is legally no different from that where A (who may be a layman or a corporation) secures medical services for B from C, a duly licensed physician, C agreeing to look solely to A for his fee. Could it be contended that A is practicing medicine? I think not. As I read the articles of incorporation and the contracts here involved the corporation does not directly or indirectly agree to perform any medical service; it merely agrees to pay for it when rendered by persons duly licensed to render it. It is true that the member does not have unlimited choice in the selection of a doctor, and that he must select a physician approved by the corporation. But there is nothing in the stipulated facts indicating that the corporation directly or indirectly supervises the doctors in the professional service rendered the member.

There are cases from this state and elsewhere recognizing that, in the absence of a statute providing to the contrary, a corporation or a layman may lawfully employ a doctor to care for its patrons or members. These cases hold that practices substantially similar to those here involved do not constitute the unlawful practice of medicine. In Renwick v. Phillips, 204 Cal. 349, 268 P. 368, it was held that a storekeeper may employ a person licensed under the Medical Practice Act to treat his patrons. In that case the Board of Medical Examiners had revoked the license of Dr. Renwick upon the ground that he had aided and abetted one Roy Finney, a lay person, to practice medicine. This court stated (page 369): "The petitioner [Renwick] was a licensed chiropodist. The said Roy Finney conducted a chiropodist parlor, equipped with a variety of foot remedies and appliances which he prepared and sold there. He employed the petitioner and respondent herein to act as a chiropodist in connection with his said establishment and to give such treatment and perform such operations as only could be done by the holder of a regular chiropodist's license so to do. In so far there was nothing illegal or unprofessional in the relations or conduct of Dr. Renwick in his connection with said Finney at the latter's place of business * * * ." This decision was written by Justice Richards, who six years before had written the Merchants' Protective Corporation Case. In Pilger v. City of Paris Dry Goods Co., 86 Cal.App. 277, 261 P. 328, it was held that "there can be no doubt that a corporation may undertake to furnish the services of a competent physician or the services of a competent chiropodist" (page 330). In State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078, 12 Ann.Cas. 673, the supreme court of Nebraska held that although a corporation could not practice medicine, it could contract with its members to furnish them with medical care. The court stated (page 1079): "The intention of the law is that one who undertakes to judge the nature of a disease, or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications; and, if he does these things without having complied with the law, he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine within the meaning of this statute. No professional qualifications are requisite for doing these things." See, also, State Electro-Medical Institute v. Platner, 74 Neb. 23, 103 N.W. 1079, 121 Am.St.Rep. 706; State v. Lewin, 128 Mo.App. 149, 106 S.W. 581.

Respondent and amici curiæ appearing on its behalf urge that the plan of the appellant violates public policy. But if the policy were as contended by respondent it would be clearly stated in the pertinent statutes. This the legislature has not seen fit to do. In recent years the subjects of health insurance and group medicine have been the frequent source of discussion and investigation, and both lay and professional opinion concerning them is sharply divided. The need for some such service, particularly in the lower income brackets, is conceded by all parties to the controversy. The courts, in the absence of legislation, should not on the ground of public policy place a stumbling block in the way of working out this problem. It is not a proper function of the courts to thus block the natural growth of social and economic processes.

The attempt of lay associations or corporations to retain doctors for the purpose of rendering medical services to their members in return for the payment of dues or a premium is by no means a modern development. Judicial notice can be taken that for many years fraternal, employee, and hospital associations, and various medical-hospital services have been rendering such services to their members through doctors employed by them. Respondent does not question the propriety of their activities. If this court should hold that the plan adopted by appellant is unlawful on the ground urged by respondent, that is, that it permits a corporation to unlawfully practice medicine, it would inevitably and necessarily follow that all of such associations are likewise unlawfully practicing medicine. Such a conclusion, adversely affecting the interests of thousands of individuals, should only be reached if compelled by statutory enactment or by clear public policy. Neither is present in the instant case.

It is claimed that the medical profession will be commercially exploited if private corporations interested solely in a profit are permitted to engage in activities such as are here involved. If that is an evil the solution rests not with the courts but with the legislature. It might be added that under the Workmen's Compensation Act, St.1917, p. 831, insurance companies through doctors are daily rendering medical service to thousands of injured employees to the apparent satisfaction of all concerned.

The judgment should be reversed.

We concur: WASTE, C. J.; HOUSER, J.

12 Cal.2d 140

BUTTERWORTH et al., Health Service Board of City and County of San Francisco, v. BOYD, Controller, et al.

S. F. 16017.

Supreme Court of California.

Sept. 2, 1938.

1. Constitutional law ⇨70(3)

The courts are not concerned with the policy of duly enacted laws, but only with their validity.

2. Municipal corporations ⇨57

A city charter is not a grant of power but is a restriction only, leaving the municipality supreme in the field of municipal affairs even as to matters on which the charter is silent. Const. art. 11, § 8.

3. Municipal corporations ⇨56

A constitutional provision permitting any city charter to authorize the municipality governed thereunder to make and enforce all laws and regulations in respect to "municipal affairs" permits the grant of a comprehensive power, although the scope of the term "municipal affairs" cannot be fixed but fluctuates as changes in conditions make necessary new and broader applications thereof. Const. art. 11, § 8.

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

4. Municipal corporations ⇨597

Under constitutional provision permitting a charter to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to "municipal affairs," a city may by charter provide a health service system for city employees and their dependents, as a "municipal affair." Const. art. 11, § 8.

5. Municipal corporations ⇨597

A provision in a city charter establishing a health service system for city employees was not invalid because of failure to set a standard for the expression "adequate medical care" as used in its provision for exemption of those already provided with "adequate medical care." St.1937, p. 2790, § 172.1.

6. Evidence ⇨83(2)

Municipal corporations ⇨597

A charter provision establishing a health service system for city employees was not invalid because health service board could allegedly exercise discrimination in exempting those who were already provided with adequate medical care, since it was to be presumed that board would exercise its powers in conformity with constitutional requirements. St.1937, p. 2790, § 172.1.

7. Municipal corporations ⇨58

Constitutional guaranties against arbitrary and discriminatory action were read into statute and charter provision establishing a health service system for city employees. St.1937, p. 2790, § 172.1.

8. Municipal corporations ⇨591

A charter amendment establishing a health service system for city employees, to be administered by a health service board, did not make an unconstitutional delegation of legislative power to the board to perform municipal functions. Const. art. 11, § 13.

9. Municipal corporations ⇨62

Constitutional provision prohibiting the Legislature from delegating to any special commission or private agency power to perform any municipal function merely prohibits the Legislature from interfering with the municipalities in respect to their municipal affairs and has no application to the appointment of boards or officers pursuant to valid charter provisions. Const. art. 11, § 13.

10. Statutes ⇨233

General words in a statute which might have the effect of restricting governmental powers are to be construed as not applying to the state or subdivisions.

11. Municipal corporations ⇨79

A charter amendment establishing a health service system for city employees was not in conflict with the state insurance code in that it allegedly authorized an insurance business without a certificate of authority from the insurance commissioner. St.1937, p. 2790, § 172.1.

12. Physicians and surgeons ⇨4

A charter amendment establishing a health service system for city employees to be administered by a health service board was not invalid as authorizing the board to practice medicine in violation of the Medical Practice Act. St.1913, p. 722; St.1937, p. 2790, § 172.1.

13. Constitutional law ⇨278(4)

Municipal corporations ⇨597

A charter amendment establishing a health service system for city employees did not deny employees "due process of law" because providing for a compulsory deduction in an uncertain amount from salaries of city employees. St.1937, p. 2790, § 172.1.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

14. Officers ⚿77

Public employees do not have a vested right in their employment except in so far as the right is conferred by statute or other valid regulation.

15. Officers ⚿100(1)

Public employees have no vested right in any particular measure of compensation or benefits, and compensation may be modified or reduced by proper statutory authority.

16. Constitutional law ⚿212
Municipal corporations ⚿597

A charter amendment establishing a health service system for city employees did not deny "equal protection of the law" because it exempted those receiving salaries of over $4,500 annually, those relying on healing by prayer, and those already having adequate medical care. St.1937, p. 2790, § 172.1.

[Ed. Note.—For other definitions of "Equal Protection of the Law," see Words & Phrases.]

17. Municipal corporations ⚿46

An objection that health service system established by charter amendment for employees of the city of San Francisco could not legally include school teachers and others employed by the San Francisco School District could be properly raised only by those whose rights were thus allegedly invaded, since objection, if sustained, would only exclude that group of employees from the system without affecting the validity of the plan. St.1937, p. 2790, § 172.1.

18. Schools and school districts ⚿20

Cities may make local regulations beneficial to and in furtherance of the school system, provided the provisions do not conflict with general law. School Code, § 5.405.

19. Municipal corporations ⚿597

A health service system established by charter amendment for employees of the city of San Francisco could legally apply to school teachers and other employees of the San Francisco School District, though district was a separate entity. School Code, § 5.405; St.1937, p. 2790, § 172.1.

20. Constitutional law ⚿84
Municipal corporations ⚿597

A charter amendment establishing a health service system for city employees did not illegally interfere with the freedom of religion of those who desired exemption because of their belief in healing by prayer because it required them to disclose their religion by filing an affidavit making exemption claim. St.1937, p. 2790, § 172.1.

21. Mandamus ⚿164(2)

An allegation that a health service system for city employees established by charter amendment was arbitrary and discriminatory with respect to particular individuals stated no defense to mandamus proceeding by which it was sought to compel the controller and treasurer of the city and county of San Francisco to make funds available for use of the health service board. St.1937, p. 2790, § 172.1.

EDMONDS, J., dissenting.

◆

In Bank.

Mandamus proceeding by Charles T. Butterworth and others, as members of and constituting the Health Service Board of the City and County of San Francisco, petitioners, against Harold J. Boyd, as Controller of the City and County of San Francisco, and another, to compel respondents to make available to petitioners certain funds deducted from the compensation of employees and teachers in San Francisco under the Health Service System.

Writ granted.

Cushing & Cushing and Ben C. Duniway, all of San Francisco, for petitioners.

William P. O'Brien, of San Francisco, amicus curiæ.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

Frank L. Fenton, of San Francisco, for respondent Harold J. Boyd.

Joseph McInerney, Vladimir Vucinich, Charles H. Brennan, O'Brien, Dibert & Acton, and Lillian M. Wollitz, all of San Francisco, amici curiæ.

U. S. Webb, Atty.-Gen., and Lionel Browne, Deputy Atty. Gen., for Board of Medical Examiners.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for Samuel L. Carpenter, Jr., Ins. Com'r.

PER CURIAM.

This is a petition for a writ of mandate to compel respondents, the controller and treasurer of the city and county of San Francisco, to make available to petitioners certain funds deducted from the compensation of employees and teachers in San Francisco under the Health Service System established by charter amendment in 1937.

The proposal to establish a system of health service for city employees, upon payment of small, fixed monthly sums, was first submitted to a referendum vote of such employees, who declared themselves in favor of it by a vote of 7,428 to 939. Thereafter the charter amendment was submitted to the electorate by the board of supervisors, and upon approval by vote of the people, became effective by concurrent resolution of the legislature on April 14, 1937. (Stats.1937, p. 2782.)

The amendment adds section 172.1 to the charter of the city and county of San Francisco. Its chief provisions are as follows:

1. A "health service system" for municipal employees is established, to be administered by a "Health Service Board". The board consists of nine members, elected by members of the system for three-year terms at elections supervised by the registrar of voters. Each board member gives a $10,000 bond, the premium being paid from funds of the system. (Subds. 1, 2.)

2. The "members of the system" are (1) all employees of the city and county who are members of the retirement system, and (2) all teachers and employees of the board of education who are members of the retirement system. Exemptions, however, are permitted as follows: (1) "Any employee who adheres to the faith or teachings of any recognized religious sect, denomination or organization and, in accordance with its creed, tenets or principles, depends for healing upon prayer in the practice of religion shall be exempted from the system upon filing annually with the Health Service Board an affidavit stating such adherence and dependence and disclaiming any benefits under the system." (2) The board "shall have the power to exempt" any person whose annual compensation exceeds $4,500, and (3) any person "who has otherwise provided for adequate medical care". For the purposes of the first election, all employees eligible for membership are deemed members. (Subds. 1, 2.)

3. The board has power, by a two-thirds vote of its members, "to adopt a plan or plans for rendering medical care to the members of the system, or for the indemnification of the costs of said care, or for obtaining and carrying insurance against such costs". The board is further empowered to put the said plans into effect and administer them; to make rules and regulations for transaction of its business, granting of exemptions, and admission to the system of members; and to appoint and fix the compensation of a secretary and other employees, to hold office at the pleasure of the board. (Subd. 3.)

4. The board has power "to make provision for the participation in the benefits of the system by the dependents of members, retired municipal employees and temporary municipal employees, provided that such participation shall be without cost to the city and county". (Subd. 3.)

5. The board "shall determine and certify to the controller" the monthly sum to be paid by members of the system into its fund, and the controller "shall deduct said sums from the compensation of the members" and deposit them with the treasurer of the city and county to the credit and for the use of the system. "Such deductions shall not be deemed to be a reduction of compensation under any provision of this charter." The board has control over the administration and investment of the funds, provided that all investments "shall be of the character legal for insurance companies in California". Disbursements may be made only upon audit by the controller, who exercises the same accounting and auditing powers as the charter gives him over other municipal boards, officers and commissioners. (Subd. 4.)

6. "Members of the system shall have and possess no claim or recourse against any of the funds of the municipality by virtue of the adoption or operation of any plan for rendering medical care, indemnifying costs of said care or carrying insurance against such costs, but the claim and recourse of any such members shall be limited solely to the funds of the system. All expenses of the system shall be borne exclusively by the funds of the system and the city and county shall not appropriate or contribute funds in any manner for the purposes of the system hereby established and provided." (Subd. 6.)

7. "The term 'medical care' shall include the services of physicians, surgeons, nurses, persons licensed to treat human diseases without the use of drugs, hospitalization, medicines and appliances and dental, optical and other medical treatments and services." All such services "shall be performed in accordance with the provisions as to professional conduct" prescribed by the state law. Members are not entitled to medical care in the municipal health and hospital facilities, except ordinary emergency service. (Subd. 5.)

8. No member is required to accept the services or medical supplies of any practitioner or hospital selected by the board, but "subject to the rules and regulations of the board", any member may "select of his own choice" any duly licensed physician, etc., and the board "shall make provision for the exercise of such choice, and is hereby expressly prohibited from entering into any exclusive contract for the rendering of said services". The only restrictions on the power of choice are (1) it is "subject to the rules and regulations of the board"; (2) the doctor or hospital chosen must render the services "pursuant to said rules and regulations"; and (3) the services or supplies must be furnished "at uniform rates of compensation to be fixed by the board". Subd. 3. Such rates, and any contract respecting the rendering of such services, is subject to review by, and requires the approval of the retirement board of the city and county.

Pursuant to the powers conferred by the charter amendment, an election was held on May 8, 1937, at which the petitioners were chosen as the members of the Health Service Board. They commenced performance of their duties, and after some nine months of study and consultation with professional advisers, adopted "Plan No. 1" for the rendition of medical services, and rules and regulations to carry it into effect.

[1] Following the adoption of the plan, the board determined upon the sum of $2.50 as the monthly deduction from compensation of members of the system, payable commencing March 15, 1938. This was certified to respondent controller, who made the deductions, but refused to make the funds available to petitioners until the legality of the charter provision was determined. Respondent treasurer likewise refused to make disbursements of funds for the same reasons. Accordingly petitioners sought relief in this court, and an alternative writ of mandate issued. Respondents filed a demurrer to the petition, and the matter is presented solely on questions of law. Counsel for respondents and various amici curiae make a number of contentions of unconstitutionality and alleged conflict with state law, and also attack the project as arbitrary and special legislation. It is a familiar observation that the courts are not concerned with the policy of duly enacted laws, but only with their validity; and in our opinion the present legislation violates no constitutional guaranties. But it may be pointed out, in this connection, that the overwhelming vote of city employees in favor of the measure was matched by the reception of the plan by the members of the medical profession. Over a thousand physicians, a majority of the licensed practitioners in the city, and nearly all of the city's hospitals, agreed to furnish services under the plan. And petitioners' brief states that among those who have joined the staffs are the president of the State Board of Health, the president of the California State Medical Association and past presidents of that association, the president of the San Francisco County Medical Society and several past presidents of that society, the president of the American College of Physicians, and leading members of the staffs of the medical schools of the University of California and Stanford University.

The first question is whether the city may by its charter provide for a regulation of this character. The answer to the question depends on whether the establishment of the health service system is a "municipal affair".

[2] Under the provisions of article 11, section 8 of the California Constitution, a city or city and county having a freeholders' charter adopted pursuant to said section has the power of "municipal home rule". The section provides: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." In the early stages of municipal home rule in California, the charter prevailed only where it expressly covered

the particular power exercised. Under the liberalizing constitutional amendment of 1914, the charter is not a grant of power but a restriction only, and the municipality is supreme in the field of municipal affairs even as to matters on which the charter is silent. The history of the movement has been fully covered in decisions and law review comments, and need not be repeated here. See Bank v. Bell, 62 Cal.App. 320, 217 P. 538; 15 Cal.L.Rev. 60; 11 Cal. L.Rev. 446.

[3] The purpose of the constitutional provisions was to make municipalities self-governing and free from legislative interference with respect to matters of local or internal concern. "It was to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs." Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925. No exact definition of the term "municipal affairs" can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power is, however, conceded in all the decisions, and it is recognized that it is not fixed but fluctuates in scope, and that changes in conditions make necessary new and broader applications thereof. See Bank v. Bell, supra; 15 Cal.L.Rev. 60; 11 Cal.L.Rev. 94, 446.

[4] In applying these principles, the following activities, similar to that under consideration here, have been held to be municipal affairs and hence within the city's legislative power: Providing for the compensation of a municipal officer or employee, irrespective of whether the duties of the office are exacted by the charter or imposed by state law. Trefts v. McDougald, 15 Cal.App. 584, 587, 115 P. 655; Popper v. Broderick, 123 Cal. 456, 56 P. 53. Providing for removal of municipal officers. Scheafer v. Herman, 172 Cal. 338, 155 P. 1084. Providing for pay of municipal employees while absent on sick leave. Jackson v. Wilde, 52 Cal.App. 259, 198 P. 822. A pension or retirement system for municipal employees. Klench v. Board of Pension Fund Commissioners, 79 Cal.App. 171, 179, 249 P. 46; Richards v. Wheeler, 10 Cal.App.2d 108, 111, 51 P.2d 436. Supervision of sanitary conditions in a city, and provision for the health of its inhabitants, by establishment of a local board of health. People ex rel. Lawlor v. Williamson, 135 Cal. 415, 421, 67 P. 504. Protection of property and lives through the licensing and regulation of a private patrol system. In re Hitchcock, 34 Cal. App. 111, 166 P. 849. See, also, 15 Cal. L.Rev. 60.

There can be no question, under these authorities, of the power of the city to establish a system of medical service for its employees or their dependents. Proper medical attention, freely available to all such employees and such dependents, should have a direct and beneficial effect on their health, and therefore their efficiency. If a pension or retirement system, or provision for sick leave payments at the expense of the municipality is within the municipal power, the present plan, entirely self-supporting, and having a tendency to decrease sickness and lessen the expense of sick leave must equally be so.

[5-7] With the municipal power to act in this field established, there remains only to consider briefly the specific details in which the plan is said to be invalid.

First it is contended that the charter sets up no standard for the expression "adequate medical care", in its provision for exemption of those who are already provided with such care. The contention is made that the lack of criteria for determining this question leaves the matter within the uncontrolled discretion of the board, which may destroy the whole plan by broadening the grounds of exemption, or may discriminate among the employees. It may be observed at the outset that at most this argument challenges the validity of this particular exemption provision alone, and is in no sense an attack on the system itself. The system is applicable to the great majority of the city's employees, and the comparatively few exemptions could be severed without destroying the general plan. See Bacon Service Corp. v. Huss, 199 Cal. 21, 248 P. 235; 22 Cal.L. Rev. 228. But in truth the term is clear enough. As defined in subdivision 5 of the charter (see supra) it refers to the treatment by licensed doctors, etc., and in view of the great complexity and rapid changes in medical science it is neither desirable nor possible to set forth in a statute any detailed outline of particular services. This is one of the innumerable situations in which only the broadest type of standard may be stated, and the details must be left to the expert administrative board or officer chosen to carry out the legislative direction. Terms equally general have been frequently upheld against objections of uncertainty, and standards equally broad have been sustained against the objection of undue delegation of legislative power. See People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186; Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 238 P. 703; 19 Cal.L.Rev. 448; 15 Cal.L.Rev. 408. The suggestion that the board, chosen by vote of members of the system, might, in disregard of the purposes for which it was created and in defiance of constitutional limitations, exercise its delegated powers in a discriminatory manner, is fully answered by numerous decisions of the courts. It is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the board and not the statute. Constitutional guaranties against arbitrary and discriminatory action are read into the law, and the courts will compel administrative officials to respect them. People v. Globe Grain & Milling Co., supra; Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348.

[8, 9] It is next contended that the amendment makes an unconstitutional delegation of legislative power to the board to perform municipal functions, in violation of article 11, section 13, of the California Constitution. But this section merely prohibits the legislature from interfering with the municipalities in respect of their municipal affairs, and has no application to the appointment of boards or officers pursuant to valid charter provisions. In re Pfahler, 150 Cal. 71, 87, 88 P. 270, 11 L.R.A.,N.S., 1092, 11 Ann.Cas. 911.

[10-12] It is suggested that the charter provision is in conflict with the state Insurance Code in that it authorizes what is in effect an insurance business without a certificate of authority from the insurance commissioner; and it is contended in this connection that the subject of insurance is of state-wide concern and not a municipal affair. Nothing of substance is contained in this last statement, for though insurance may be a matter of general concern, the health and efficiency of city employees is a municipal affair; and a plan established by charter to safeguard the health, peace of mind and working efficiency of such employees is validly applied to them, though it might be entirely improper if applied to objects beyond the scope of municipal power. A still more obvious answer to counsel's suggestion is that the Insurance Code deals with the private business of insurance, and neither expressly nor impliedly purports to regulate governmental activities of municipalities. It is of course a well settled doctrine that general words in a statute which might have the effect of restricting governmental powers are to be construed as not applying to the state or subdivisions. Estate of Miller, 5 Cal.2d 588, 55 P.2d 491; Balthasar v. Pacific Electric Ry. Co., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452. These same considerations dispose of the further contention that the charter permits the board to practice medicine in violation of the state Medical Practice Act, St.1913, p. 722.

[13-15] It is next argued that the charter denies due process of law in providing for a compulsory deduction in an uncertain amount from the salaries of municipal employees. A conclusive answer is that no one has a vested right in his public employment except in so far as the right is conferred by statute or other valid regulation; that the employment is accepted under the terms and conditions fixed by law; and that one of the terms of the employment in the present case is the provision for the benefits of the health service system at the charge imposed therefor. The charter governs the salaries of city employees; by the amendment to the charter, in force at the time the municipal salaries were fixed for the current fiscal year, the deduction was authorized and made accordingly. It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority. Pennie v. Reis, 80 Cal. 266, 269, 22 P. 176; Snell v. Byington, 2 Cal.App.2d 127, 37 P.2d 734; Casserly v. Oakland, 6 Cal.2d 64, 56 P.2d 237. If salaries can be reduced it is certainly clear enough that compensation provisions may be modified by sub-

stituting for a fraction thereof the valuable protection of comprehensive medical service. It is immaterial that the amount of the deduction is not limited to a stated sum; it is limited to the amount necessary to carry out specific purposes. Obviously, the board must be given some leeway in fixing the amount in accordance with its experience; and the nature of the plan, in the light of economic studies, is such that the amounts will always be small in relation both to the total salaries and the benefits received. A safeguard against excessive exactions is found in the democratic control over the elective members of the board; and doubtless any attempt by the board to deprive employees of the substantial benefits of their compensation would be ground for redress in the courts.

It should not be forgotten, in this connection, that the deduction herein considered has none of the compulsory features of a tax, for no one is compelled to pay anything, unless he voluntarily seeks the public employment under the terms and conditions which the law imposes. See McAuliffe v. Mayor, etc., of City of New Bedford, 155 Mass. 216, 29 N.E. 517.

[16] The further contention is made that the exemptions under the charter constitute a denial of equal protection of the law; but a mere glance discloses that the classification is reasonable and proper. For example, the power to exclude those receiving salaries of over $4,500, a small fraction of the employees, is based upon the reasonable legislative determination that such persons may be able to provide themselves with sufficient medical care. The exemption of those who rely on healing by prayer is designed to avoid interference with the free practice of religion. And the exemption of those who already have adequate medical care avoids the arbitrary imposition of the facilities of the system upon those who already have provided for equal facilities from another source.

[17-19] The next contention is that the plan cannot legally include the school teachers and others employed by the San Francisco School District, which, though it covers the same territory as the city and county, is a separate entity. This contention, if sustained, would only exclude this group of employees from the benefits of the system without affecting the validity of the plan itself; and the objection could only be properly raised by those whose rights were invaded by inclusion in the system. See People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331. We are satisfied, however, that the objection is, on the merits, unsound. The school system has been held to be a matter of general concern, rather than a municipal affair, and consequently is not committed to the exclusive control of local governments. But the cities may make local regulations beneficial to and in furtherance of the school system, provided that these provisions do not conflict with the general law. Whitmore v. Brown, 207 Cal. 473, 279 P. 447; Esberg v. Badaracco, 202 Cal. 110, 259 P. 730; Anderson v. Board of Education, 126 Cal.App. 514, 15 P.2d 774, 16 P.2d 272. The power thus to regulate the schools by charter provisions is in fact recognized and declared in the state School Code, section 5.405, which declares: "Nothing in this Part shall be construed so as to repeal or negate any provisions concerning employees of school districts contained in the charter of any city, county, or city and county, heretofore or hereafter adopted and approved in conformity with Article XI of the constitution of this state." Certainly a regulation designed to promote the health and efficiency of teachers is in furtherance of the objects of the school system, and it does not conflict with any general law. The state law establishes teachers' tenure, but the charter does not affect tenure. It only provides for a deduction from the monthly salary, and it has been expressly held in this state that the tenure law does not carry with it any assurance against change in salary. Hence, just as in the case of other municipal employees, a reduction or modification of compensation impairs no vested rights. Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029; Emerson v. Board of Trustees, 23 Cal.App.2d 432, 73 P.2d 935; Hodge v. Board of Education, 22 Cal.App.2d 341, 70 P.2d 1009.

[20] Amicus curiae makes the suggestion that the plan interferes with the freedom of religion, on the ground that it provides an exemption for employees believing in healing by prayer, and requires the employee to disclose his religion by filing of the affidavit making the exemption claim. It seems unnecessary to point out that there is no interference with the practice of religion in the mere disclosure of a particular faith to a board which has nothing to do with its practice. In no way does the charter permit the slightest inter-

ference with the practice or belief in any religious faith. See Hamilton v. Regents of University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343.

[21] Finally, we are told that some of the rules and regulations and practices of the board are, or may be, arbitrary or discriminatory with respect to particular individuals. There is no reason to consider such a contention at this time, for the only issue before us is whether the charter amendment and the plan adopted thereunder are valid. If so, the respondents must release the money to the board in order that it may carry out its duties. If in the performance thereof, the rights of any individual are infringed, the regular procedure of the courts is available to test the action. It is premature and irrelevant to deal at this time with speculative future acts of the board which involve no present invasion of private rights. See People v. Globe Grain & Milling Co., supra.

There being no valid objection to the system and plan herein considered, it follows that respondents must perform the duties imposed upon them and make available to petitioners the funds collected.

Let the writ issue as prayed for.

I concur in the judgment: HOUSER, J.

EDMONDS, Justice (dissenting).

The charter provision of the city and county of San Francisco which is attacked in the present proceeding provides, in effect, for compulsory health insurance of municipal employees. It allows the Health Service Board, a private organization over which the city has no control, to order the city controller to deduct an amount to be determined by it from the compensation of each employee of the city and deposit such sum "with the treasurer of the city and county to the credit and for the use of the system". Certain persons shall be and others may be exempted from this requirement. The money taken from the employees' salaries may be paid out by the treasurer only upon "audit by the controller and the controller shall have and exercise the accounting and auditing powers over the funds of the system which are vested in him by this charter with respect to all other municipal boards, officers and commissions". St.1937, p. 2790, § 172.1 subd. 4.

The city attorney contends that the amendment grants unlawful delegation of power to the Health Service Board. He relies upon section 13 of article 11 of the Constitution of California, which provides, in part, that "the Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects * * *." The legislature in approving the charter amendment, in effect delegated to an association of individuals the power to make, control, appropriate and supervise certain property interfering with the operation of the municipality. This association, created neither by election of the city's voters nor appointment by its officers, is given the authority to determine the amount of money to be taken by the controller from the salaries of the employees for the purpose of carrying on a non-public engagement, and further permits the use of the facilities of the offices of the registrar and treasurer for the purpose of administering that which is unquestionably not of a general public character.

If, notwithstanding the constitutional provision, the Health Service Board can lawfully carry out the plans it has undertaken, then innumerable organizations can be created for the purpose of carrying on cooperative enterprises of various kinds. It is said that the successful operation of the health service will increase the employees' peace of mind. Undoubtedly many municipal employees would feel that they had more social security if they could purchase groceries through a cooperative organization. Their economic status would be improved if they could secure housing through group purchasing power. But to set up such organizations with funds compulsorily taken from each employee's salary through the machinery of the city government constitutes, in my opinion, a violation of the constitutional provision.

The city attorney also claims that the health service plan is not a municipal affair but, on the contrary, is nothing more than a private engagement affording an opportunity for certain employees of the city and county to procure stated kinds of medical care for an amount to be fixed by the board selected by the employees to run the system. Such a program, he says, does not concern the government of the municipality. In Bank v. Bell, 62 Cal.App. 320, 217

P. 538, the court defined "a municipal affair" as follows (page 542): "In defining a 'municipal affair' it has been said that—'The true test is that which requires that the work should be essentially public, and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large. Within that sphere of action, novelty should impose no veto.' Sun Printing, etc., Ass'n v. New York, 8 App.Div. 230, 40 N.Y.S. 607, 611, 612." In Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925, it was held that "'municipal affairs,' as those words are used in the organic law, refer to the internal business affairs of a municipality". See, also, In re Hitchcock, 34 Cal.App. 111, 114, 166 P. 849.

All of the decisions construing the phrase "municipal affair" define it as referring to those things which are so intimately connected with the government of a municipality as to affect all of its people, or as including a city's right to compensate employees in addition to the amount of wages paid. But the health service plan neither affects all of the inhabitants of the city nor is it limited to employees. It includes dependents of employees related by consanguinity or marriage, retired city employees, retired school teachers, members of the board of education and employees of the public school system. Medical care is to be given by private physicians having no contractual relation with the city but acting solely for the Health Service Board, over which the city has no control. "Members of the system shall have and possess no claim or recourse against any of the funds of the municipality by virtue of the adoption or operation of any plan for rendering medical care * * * but the claim and recourse of any such member shall be limited solely to the funds of the system." Section 172.1, subd. 6. It is, therefore, obvious that the plan has nothing to do with the public health, security, or general welfare. It is simply social health insurance for a restricted group of individuals who are compelled to participate in it.

For another reason, at least a portion of the charter provision is invalid. Section 172.1 of the charter requires all teachers to become members of the system. Membership in the system is made compulsory. School teachers are not employees of the city and county of San Francisco but of a school district, a governmental entity entirely separate from the city and county. The teachers derive their credentials from the state, and their compensation from funds of the school district and the state. Under sections 8 and 8½ of article 11 of the Constitution, a municipality is strictly limited to the enactment of laws in respect to "municipal affairs". The courts have frequently declared that the public school system of the state is not a "municipal affair" but a "state affair", a matter of general and not local concern. People ex rel. Davidson v. Martz, 2 Cal.2d 136, 138, 39 P.2d 422; Gerth v. Dominguez, 1 Cal.2d 239, 242, 34 P.2d 135.

I am of the opinion that the writ should be denied.

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12 Cal.2d 93

In re CRAIG.

Misc. 1467.

Supreme Court of California.

Sept. 1, 1938.

1. Judges ⚷21

A justice of the District Court of Appeal is not entitled to practice law while he holds such office, notwithstanding that he must be admitted to practice law. Const. art. 6, § 23.

2. Attorney and client ⚷46

An attorney whose conviction in federal court for conspiracy to obstruct and impede justice was affirmed by the United States Supreme Court was subject to disbarment under statute providing for disbarment of attorneys convicted of felony or misdemeanor involving moral turpitude, notwithstanding that attorney was an associate justice of District Court of Appeal at the time of conviction, where attorney had resigned from that judicial office. Code Civ.Proc. §§ 287, 289; Cr.Code § 37, 18 U.S.C.A. § 88; Const. art. 4, § 18.

> "Moral turpitude" means an act of baseness, vileness, or depravity in the private and social duties which a man

owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. "Turpitude" means everything done contrary to justice, honesty, modesty, or good morals.

[Ed. Note.—For other definitions of "Moral Turpitude" and "Turpitude," see Words & Phrases.]

3. Attorney and client ⚿39, 53(2)

Conviction of an attorney and counselor at law of a felony or misdemeanor involving moral turpitude in a court of California or of another state or any court of the United States is ground for his disbarment, and the record of his conviction is conclusive evidence of such conviction. Code Civ.Proc. § 287.

◆

In Bank.

Proceeding by the State Bar of California for the permanent disbarment of Gavin W. Craig, an attorney and counselor at law.

Respondent disbarred.

Frank B. Belcher, Warren E. Libby, Gurney E. Newlin, and Philbrick McCoy, all of Los Angeles, for State Bar of California.

John P. Beale, of San Francisco, and Leonard Thomas and Daniel M. Hunsaker, both of Los Angeles, for respondent.

J. Wiseman Macdonald, of Los Angeles, amicus curiæ.

WASTE, Chief Justice.

The State Bar of California, a public corporation created by the Act of March 31, 1927 (Stats. 1927, p. 38), filed in this court its petition praying, under section 289 of the Code of Civil Procedure, that Gavin W. Craig, formerly an Associate Justice of the District Court of Appeal of the Second Appellate District of the State of California, be permanently disbarred from the practice of the law in this state. A certified copy of a record of conviction of said Craig of a crime involving moral turpitude was filed with the petition.

In the petition it was alleged that said Gavin W. Craig was admitted to practice by the Supreme Court of the State of California on or about April 9, 1901, and ever since had been and at the time of the filing of the petition was an attorney and counselor at law licensed to practice in all the courts of this state. It was further alleged that theretofore, and on or about May 8, 1935, said Gavin W. Craig was indicted in the District Court of the United States for the Southern District of California, charged with the crime of felony, to-wit, a violation of section 88 of title 18 of the United States Code, 18 U.S.C.A. § 88, in that he, with certain other defendants therein named, did conspire to obstruct and impede the due administration of justice; that on due trial on the charges contained in said indictment the jury returned a verdict of guilty, and judgment was thereupon entered assessing a fine of one thousand dollars and ordering that the defendants be confined in jail for the period of one year; that thereupon an action in quo warranto was commenced by the attorney-general of the state of California in the name of The People, based on section 996, subdivision 8, of the Political Code, praying for a judgment declaring and decreeing that the defendant's office as such Associate Justice of the District Court of Appeal of the Second Appellate District had become vacant, and praying that he be ousted and excluded therefrom; that defendant Craig answered the complaint, denying and putting in issue the allegations thereof, and alleging that he had never been impeached or removed by legislative action from office as such Associate Justice, nor otherwise in the manner provided by law, nor at all; that judgment in said cause was given and entered that the office of Associate Justice of the District Court of Appeal, Second Appellate District, Division Two, had become vacant by reason of the conviction of the defendant Gavin W. Craig of a felony; that said Gavin W. Craig had not, since the date of the conviction, had any lawful right to any public civil office, and that he unlawfully held and exercised the office of Associate Justice of the District Court of Appeal of the Second Appellate District, and continued to hold the same without right.

Respondent Gavin W. Craig appealed to this court from the judgment just noted. Before the appeal was finally determined, respondent filed with the governor of the state his resignation as an Associate Justice of the District Court of Appeal of the Second Appellate District. Upon this fact being admitted in open court by the appellant, the court, of its own motion, raised the question whether or not, by reason of such resignation, the office had become vacant and the sole question presented by the action in quo warranto brought by the attorney-general had become moot. After consideration of the points and authorities filed by the parties on this point, the court concluded that the question had been settled and disposed of by the resignation of the alleged unlawful occupant of the office, and that the matter had become moot. The appeal was therefore dismissed.

In the meantime, this proceeding had been filed, seeking disbarment of respondent Craig as an attorney and counselor at law. In response to the order to show cause issued therein, the respondent appeared and demurred to the petition and filed objections to disbarment. In addition to general grounds of demurrer, the respondent attacks the jurisdiction of this court to suspend or disbar him as an attorney and counselor at law and to strike his name from the rolls, contending that he was, at the time he was convicted in the United States court, a duly elected, qualified and acting Justice of the District Court of Appeal, and on the further ground that, for like reasons, The State Bar of California had no power or authority to file the petition. As a further ground of demurrer the respondent contends that it cannot be ascertained from the petition whether or not the respondent was convicted of a crime involving moral turpitude.

[1] The various grounds of demurrer must be overruled. The present proceeding is one to disbar an attorney at law who at one time held judicial office and who, of his own volition, resigned therefrom. His prior status as a Justice of the District Court of Appeal, if it had any bearing on the matter (which we fail to see), passed out of the picture on respondent's resignation from his judicial position. In order to be eligible to hold the office as Justice of the District Court of Appeal, respondent was required to be admitted to practice law (Const. art. 6, sec. 23); but, while he held the office, he was not entitled to practice. State Bar of California v. Superior Court, 207 Cal. 323, 336, 278 P. 432.

[2, 3] Section 287 of the Code of Civil Procedure provides that an attorney and counselor may be removed by the Supreme Court upon his conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence. The certified copy of the record of conviction of respondent in the United States District Court, and subsequent affirmation by the Supreme Court of the United States, Craig v. United States, 298 U.S. 690, 56 S.Ct. 959, 80 L.Ed. 1408, supports the allegations of the petition as to the nature of the offense for which respondent was convicted. It is respondent's contention that the offense with which he was charged and the purported judgment upon which he was convicted do not relate to an offense against the penal laws of the state of California. Assuming the correctness of the contention as applied to respondent's personal relations, it has no force in this proceeding. This court has held that conviction of an attorney and counselor at law of a felony or misdemeanor involving moral turpitude in a court of this or of another state or any court of the United States is ground for his disbarment, and the record of conviction is conclusive evidence of such conviction. Barnes v. District Court of Appeal, 178 Cal. 500, 504, 173 P. 1100; In re O'Connell, 184 Cal. 584, 194 P. 1010.

Moral turpitude has been defined by many authorities as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. In re O'Connell, supra. Bouvier defines turpitude as "everything done contrary to justice, honesty, modesty, or good morals". In re Coffey, 123 Cal. 522, 524, 56 P. 448. See, also, 3 Cal.Jur. 732, par. 126. In the O'Connell Case, the attorney engaged in a conspiracy to impede and obstruct the laws of the United States relating to the enlistment of soldiers in war-time. We entertain no doubt that the offense of conspiring to corruptly influence, obstruct, impede, hinder and embarrass the due administration of justice, with which respondent was charged and of which he was convicted in the United States District Court, falls easily within the definition of "moral turpitude".

Respondent has devoted the greater part of his arguments to developing the contention that the legislature is without power to provide by general law for the disbarment of a Justice of the District Court of Appeal under the provisions of section 18 of article 4 of the Constitution. We deem it unnecessary to discuss the contention for, as hereinabove stated, the respondent, by his voluntary act of resignation, ceased to be an Associate Justice of the District

Court of Appeal. Therefore, the provisions of section 18, article 4, supra, and the maxim "inclusio unius est exclusio alterius", upon which respondent relies, have no application to his case.

Respondent's demurrer is overruled. Let an order be entered disbarring respondent as an attorney and counselor at law in the courts of this state, effective thirty days from filing thereof.

We concur: CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

HOUSER, J., deeming himself disqualified, does not participate.

12 Cal.2d 61

EPPERSON v. JORDAN, Secretary of State.
KORNMANN v. SAME.
S. F. 16101, 16098.

Supreme Court of California.
Aug. 31, 1938.

1. Courts 🔑207(4)

The Supreme Court is not deprived of jurisdiction to entertain a petition for mandamus to compel the secretary of state to refrain from submitting a purported initiative measure to the electors, by constitutional provisions reserving to the people the power to propose laws and amend the Constitution by initiative process, or by provision relating to the separation of powers. Const. arts. 3, 4.

2. Constitutional law 🔑74
Statutes 🔑35½

Statutes purporting to create a board of title commissioners consisting of three justices of the District Court of Appeal for the Third Appellate District with power to prepare a proper title for an initiated measure to which objection has been made on ground of defect in title are unconstitutional to the extent that a board of title commissioners is created, because conferring nonjudicial duties on appellate justices. Pol.Code, §§ 1197(3), 1197a.

3. Constitutional law 🔑9(1)

A constitutional requirement that a title for an initiated or referred law be prepared containing a summary of the chief purpose and points of the proposed measure does not require that the title contain a catalogue or index to all the provisions of the measure. Pol.Code, § 1197a, as amended by St.1937, p. 1605; § 1197b, as amended by St.1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

4. Constitutional law 🔑9(1)
Evidence 🔑83(1)

All legitimate presumptions are indulged in favor of the propriety of the Attorney General's actions in preparing the constitutionally required title for an initiated or referred measure, it being only in a clear case that a title so prepared should be held insufficient. Pol.Code, § 1197a, as amended by St.1937, p. 1605; § 1197b, as amended by St.1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

5. Constitutional law 🔑9(1)

The title prepared by the Attorney General for an initiated or referred measure should be held sufficient if reasonable minds may differ as to its sufficiency. Pol.Code, § 1197a, as amended by St.1937, p. 1605; § 1197b, as amended by St.1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

6. Constitutional law 🔑9(1)
Statutes 🔑35½

Constitutional and statutory provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of such privilege. Pol.Code, § 1197a, as amended by St.1937, p. 1605; § 1197b, as amended by St.1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

7. Constitutional law 🔑9(1)

A constitutional requirement that constitutional amendments be so prepared and distinguished by numbers or otherwise that each can be voted on separately is not applicable to petitions for amendments proposed under the initiative process. Const. art. 4, § 1, as amended in 1932; art. 18, § 1.

8. Constitutional law 🔑9(1)
Statutes 🔑35½

A substantial compliance with constitutional and statutory requirement that circulation title of an initiated or referred measure be a summary of the chief purpose and points thereof is sufficient. Pol.Code, §

1197a, as amended by St.1937, p. 1605; § 1197b, as amended by St.1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

9. Constitutional law ⚿9(1)

Where initiated constitutional amendment proposed to repeal existing constitutional tax limitations on real property, to progressively abolish taxes on tangible personal property and improvements, to repeal constitutional prohibitions relating thereto and to repeal certain taxes including the sales tax, title prepared by the Attorney General stating that measure repealed limitations on ad valorem property taxes for state appropriations, prohibited increasing present assessed valuation of improvements and tangible personal property, annually reduced tax rate thereon and exempted it from taxation, exempted $1,000 of assessed improvements on land from taxation and limited tax moratoriums and repealed specified taxes was sufficient. Pol.Code, § 1197a, as amended by St. 1937, p. 1605; § 1197b, as amended by St. 1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

10. Constitutional law ⚿9(1)

The title prepared by the Attorney General for an initiated constitutional amendment is not fatally defective because it includes some matters which are auxiliary and subsidiary and fails to mention others of the same character. Pol.Code, § 1197a, as amended by St.1937, p. 1605; § 1197b, as amended by St.1937, p. 1604; Const. art. 4, § 1, as amended in 1932.

◆

In Bank.

Mandamus proceedings by Sidney R. Epperson and Edward S. Kornmann, petitioners, to compel Frank C. Jordan, as Secretary of State of the State of California, to refrain from submitting a purported initiative measure to the electors of the state and to refrain from certifying the measure to the registrars of voters and county clerks of the state.

Alternative writ theretofore issued discharged, and peremptory writ denied.

Jesse H. Steinhart and B. J. Feigenbaum, both of San Francisco, for petitioner Epperson.

Wallace Sheehan, of San Francisco, and Fred M. Cross, of Los Angeles, for petitioner Kornmann.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

O. K. Cushing and Ben C. Duniway, both of San Francisco, amici curiae.

PER CURIAM.

Petitioners, qualified electors and taxpayers of the state, by separate applications, seek writs of mandate directed to the secretary of state commanding him (1) to refrain from submitting a certain purported initiative measure to the electors of the state, and (2) not to certify the measure to the registrars of voters and county clerks of the state. After the issuance of the alternative writs the respondent, by way of answer and return, filed general demurrers to the petitions. Inasmuch as the two petitions involve substantially the same contentions both will be disposed of in this one opinion.

The proposal which petitioners seek to keep from being submitted to the voters at the next general election is a constitutional amendment proposed under the initiative provisions of the state Constitution. It is signed by the requisite number of qualified electors of the state and has been filed with the secretary of state within the time entitling it to be submitted at the November election.

Petitioners' main contention is that such proposal should be kept from the ballot because the circulation title of the measure appearing upon each page of the initiative petition whereon signatures appear, does not contain a "summary of the chief purpose and points" of the proposed constitutional amendment as required by the provisions of article 4, section 1, of the Constitution and section 1197b of the Political Code.

[1] At the outset of our consideration of the problems here presented we are met by the contention of amici curiae, representing the proponents of the measure, that this court has no jurisdiction to consider the petitions for the reasons that: (1) Article 4 of the Constitution reserves to the people the power to propose laws and amendments to the Constitution by the initiative process; that the Constitution itself sets up the steps for exercising this reserved power; that one of these constitutional steps is the preparation of a title and summary by the attorney-general; that under the separation of powers provided for by ar-

ticle 3 of the Constitution the initiative process must be held free from interference by the courts; and (2) that section 1197 of the Political Code provides the sole and exclusive method of objecting to the title prepared by the attorney-general, that is by review by a statutory board of title commissioners.

Neither of these contentions is sound. The first contention is basically unsound in that the petitions filed herein do not seek judicial interference with a legislative function, but seek a determination as to whether the provisions of the Constitution and statutes have been followed. The petitioners are not seeking to control the actions of any legislative officer, but those of the Secretary of State—an administrative officer. This court frequently has exercised the power here invoked. Boyd v. Jordan, 1 Cal.2d 468, 35 P.2d 533; Clark v. Jordan, 7 Cal.2d 248, 60 P.2d 457, 106 A.L.R. 549.

[2] The second contention equally lacks merit. It is predicated upon the provisions of sections 1197 (3) and 1197a of the Political Code. By these sections "any person who is dissatisfied" with the attorney-general's ballot or circulation titles to an initiative measure, may file his objections with the Secretary of State, who shall then transmit copies of the initiative measure, the attorney-general's title, and the objections thereto to "the board of title commissioners, which board shall consist of the three justices of the district court of appeal * * * in and for the third appellate district, who shall be ex officio title commissioners for the purposes of this act and which board is hereby created". This board is then required to hold a hearing and prepare a proper title, and its determination "shall be final and conclusive". Obviously these sections purport to provide a method for passing upon the correctness of the attorney-general's title. If such sections were valid it is quite possible that the method therein provided was intended to be the sole method of passing upon the correctness of such titles. However, it is quite clear that these sections, inasmuch as they purport to confer nonjudicial duties on the appellate justices, are unconstitutional. This point need not be discussed at length. The principles involved have recently and exhaustively been considered by this court in Abbott v. McNutt, 218 Cal. 225, 22 P.2d 510, 89 A.L.R. 1109. On the authority of that case and the cases and constitutional provisions therein cited, sections 1197 (3) and 1197a in so far as they provide for the creation of said board of title commissioners must be held to be unconstitutional.

Before discussing the sufficiency of the title here challenged, some reference should be made to the constitutional and statutory provisions involved. Article 4, section 1, of the Constitution, as amended in 1932, is the section dealing with the initiative, and the method of its exercise. Among other things it provides: "Prior to circulation of any initiative or referendum petition for signatures thereof, a draft of the said petition shall be submitted to the Attorney General with a written request that he prepare a title, and summary of the chief purpose and points of said proposed measure, said title and summary not to exceed one hundred words in all. * * * Any initiative or referendum petition may be presented in sections, but each section shall contain a full and correct copy of the title and text of the proposed measure. * * *" Until 1937 this one hundred word title appeared only on the first page of each section of the initiative petition. Prior to 1937 on each page of each section of the petition there was required to be printed under the provisions of section 1197a of the Political Code a so-called "short title" in not to exceed twenty words, showing the "nature of the petition and the subject to which it relates". It was these short titles, prepared by the proponents of the measures, that were held legally insufficient in Boyd v. Jordan and Clark v. Jordan, supra. In 1937 the legislature amended sections 1197a and 1197b of the Political Code, St.1937, pp. 1604, 1605, so as to abolish the requirement of the short twenty word title on each page and to provide that the one hundred word title prepared by the attorney-general should appear not only on the first page of each section of the petition as required by the Constitution, but also across the top of each page of the petition on which signatures appear. Section 1197b of the Political Code as amended in 1937, St.1937, p. 1604, provides: "The proponents of any proposed initiative measure shall, prior to its circulation, place on each section of the petition in relation thereto above the text of the measure, and across the top of each page thereof whereon signatures are to appear, the title and summary referred to in the

Constitution and in section 1197a of the Political Code * * *."

[3-6] These 1937 amendments worked an important change in the law by legislative mandate and have modified to some extent the rule of the Boyd and Clark Cases, so strongly relied upon by petitioners. In those cases the titles therein challenged were the short titles prepared by the proponents of the measures. Although the title must contain a "summary of the chief purpose and points of said proposed measure" it need not be a catalogue or index to all of the provisions of the measure. In approaching the question as to whether the title so prepared is a proper one all legitimate presumptions should be indulged in favor of the propriety of the attorney-general's actions. Only in a clear case should a title so prepared be held insufficient. Stated another way, if reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient. These rules of construction are in accord with the fundamental concept that provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this most important privilege.

Keeping these rules in mind we turn to a consideration of the provisions of this proposed constitutional amendment and to the title prepared by the attorney-general. We are called upon to determine whether that title contains a "summary of the chief purpose and points of said proposed measure".

The main purposes of the proposed amendment are clear—they are, to repeal existing constitutional tax limitations on real property, to progressively abolish taxes on tangible personal property and improvements, to repeal provisions of the Constitution which now prohibit this, and to abolish certain existing taxes, chief of which is the sales tax.

To accomplish these main purposes the proposal is divided into three parts. First, that portion of article 4, section 34a, of the Constitution providing that not more than 25 per cent of the total appropriations from all funds of the state shall be raised by taxes on real and personal property is repealed.

Second, a new section—section 5—is added to article 13 of the Constitution to provide:

(a) That for the first year after the adoption of this amendment taxation of improvements and tangible personal property levied by the state or other taxing power shall not exceed 90 per cent of the rate levied on land for the same year; that annually thereafter the rate on improvements and tangible personal property shall be reduced an additional 10 per cent less than the rate levied on land; that after ten years, improvements and tangible personal property shall be exempt from taxation; that the present assessed value of improvements and tangible personal property shall not be increased; that existing limitations of the tax rate of county, city and county, municipality or district, shall become inoperative proportionately to the extent necessary to offset the reduced taxation of tangible personal property and improvements required by this article.

(b) That improvements on land occupied by the owner as a home are exempt to the extent of $1,000.

(c) That no existing or future tax moratorium or extension of time for the payment of taxes shall extend to any class of property except improved property in one parcel and ownership, of an assessed value not to exceed $5,000.

(d) In this subdivision the words "improvements", "tangible personal property" and "land" are defined.

Third, a new section—section 5.5—is added to article 13 to provide:

(a) That on July 1st after the adoption of the amendment the Retail Sales Tax Act of 1933, The Use Tax Act of 1935, the Automobile License Tax Act of 1935 and the Private Car Tax Act of 1937, and all acts amendatory or supplementary thereto are repealed, subject to the right of the state to collect accrued taxes.

(b) That "except for police or regulatory purposes", no tax, license fee or excise shall hereafter be levied upon the privilege of selling, storing, or consuming tangible personal property or which is based upon or measured by the value of tangible personal property or improvements.

(c) That nothing in the proposal shall be construed as repealing or affecting the Motor Vehicle Fuel License Tax Act or the Use Fuel Tax Act, nor, except as specifically provided, shall anything in the proposal be construed as repealing, modifying or otherwise affecting or prohibiting the continuation or re-enactment of existing license taxes or fees, corporation taxes, inheritance taxes, or income taxes, or existing constitutional tax exemptions, or as forbidding the imposition of severance taxes.

(d) That the proposal shall not affect the obligations of any county, city and county, municipality or district, and shall be deemed inoperative to the extent that any bonds or other outstanding obligations specifically require the imposition of taxes upon tangible personal property or improvements.

(e) That this amendment does not repeal or modify that provision of section 15 of this article requiring that out of state revenues there shall be first set aside the moneys for the support of the public school system and state university.

(f) That the provisions of the proposal shall control in any case of conflict with any other provision of the Constitution.

The circulation title, prepared by the attorney-general, and challenged in these proceedings reads as follows: "Taxation. Initiative Constitutional Amendment. Repeals limitation on ad valorem property taxes for State appropriations. Prohibits increasing present assessed valuation of improvements and tangible personal property; annually reduces tax rate thereon and exempts same from property; annually reduces tax rate thereon and exempts same from taxation in nine years, except for regulation; existing tax rate limitations becoming inoperative proportionately as necessary to offset such reductions. Exempts from taxation $1,000.00 of assessed improvements on land occupied by owner as home. Limits tax moratoriums to improved property in one parcel and ownership having assessed valuation not exceeding $5000.00. Repeals specified Sales, Use and Private Car Taxes."

[7] In the Kornmann petition it is alleged that the proposed initiative measure is violative of the Constitution in that it does not present a single, comprehensive measure to be voted upon by the electors, but contains several proposed amendments and the repeal of four general laws which cannot be voted on separately by the electors. It is contended that the provisions of article 18, section 1, of the Constitution providing that in the case of constitutional amendments proposed by the legislature that "Should more amendments than one be submitted at the same election they shall be so prepared and distinguished, by numbers or otherwise, that each can be voted on separately" are applicable to amendments proposed under the initiative process. Little need be said in reference to this contention. The point has heretofore been fully considered by this court, and decided adversely to the contentions of petitioner. Wright v. Jordan, 192 Cal. 704, 711, 221 P. 915. That case expressly held that the provisions of article 4, section 1, relating to the initiative were not limited by the provisions of article 18, section 1. The argument of petitioner that that case should be overruled is not convincing. We are satisfied with the correctness of the prior decision.

The other contentions of both petitioners are that the title is fatally defective in that:

1. It fails to disclose that the proposal not only repeals certain tax statutes, but places in the Constitution a prohibition against the levying in the future for revenue purposes of any tax, excise, or license fee upon the privilege of selling, storing, using, or consuming tangible personal property or which is measured by the value of tangible personal property or improvements.

2. It fails to disclose that the proposal repeals the Motor Vehicle License Fee Act and prohibits its reenactment.

3. It fails to disclose that other taxes are indirectly repealed.

4. In that the title states that the tax rate on improvements and tangible personal property is to be "annually reduced" for nine years—that this statement is untrue; that no annual reduction is in fact granted; that all that is granted is an adjustment of such tax rate in relation to the rate on land.

5. In that the proposal not only limits the granting of tax moratoriums to certain property, as disclosed by the title, but provides that no extension of time for the payment of taxes shall extend to any class of property except improved property in one parcel and ownership of an assessed value not exceeding $5,000.

6. In that the title fails to disclose that the proposal contains definitions of certain terms.

7. In that the title fails to disclose that the proposed measure shall control if in conflict with any other provisions of the Constitution.

8. In that the title fails to disclose that the provisions of the proposed measure vitally affect the taxing power of every

county, city and county, municipality and district, in the state.

9. In that the title fails to disclose that the chief purpose of the measure is to tax land to the exemption of personal property and improvements.

[8] We do not find it necessary to take up each of the above objections seriatim in order to demonstrate why the failure to mention them in the title does not render the title defective. It must be remembered that all the Constitution or Political Code require is that the title shall be a "summary of the chief purpose and points of said proposed measure". A substantial compliance with this section is all that is required. California Teachers' Ass'n v. Collins, 1 Cal. 2d 202, 34 P.2d 134. For the preparation of this title and summary the only rule provided by law is that it must not exceed 100 words. What the "chief purpose" or "points" of a measure is obviously many times a question of opinion. If reasonable minds can differ as to whether a particular provision is or is not a "chief point" of the measure the determination of the attorney-general should be accepted.

[9, 10] In reading over the proposed measure it is obvious that its "chief purpose and points" are to repeal existing constitutional tax limitations on real property, to progressively abolish taxes on tangible personal property and improvements, to repeal provisions of the Constitution which now prohibit this, and to repeal certain taxes, chief of which is the sales tax. The other provisions of the proposal are subsidiary or auxiliary to this chief purpose and to these points. In reading over the title here challenged it is obvious that the chief purpose and points above mentioned are fully set forth. The title also includes many other references to various provisions of the proposal. Evidently the attorney-general believed they were important. It might well be that the title as drafted includes references to some provisions which to some might seem subsidiary and auxiliary, and that it fails to mention other matters which to others might seem of considerable importance. However, we are not permitted to keep this proposal from the ballot upon any such ground. We are called upon to decide simply whether within reasonable and fair limits, so as to protect the electorate from imposition, the title discloses the chief purpose and points of the proposed measure. As we have seen the title does this. The fact that it includes some matters which are auxiliary and subsidiary, and fails to mention others of the same character, does not render the title fatally defective. A mere reading of the many objections to the title raised by petitioners indicates that it is their belief that the title must include a complete index of all of the provisions of the proposal regardless of whether such provisions are main provisions or are auxiliary and subsidiary thereto. To do this within the limits of 100 words would be palpably impossible. We have carefully read each of the nine objections raised by petitioners to the present title and while several of these embody some very important matters, we think that all of them are subsidiary and auxiliary to the chief purpose and points of the proposal as heretofore set forth. No useful purpose would be served by considering each of them separately.

For the foregoing reasons the alternative writ heretofore issued is discharged, and the peremptory writ is denied.

12 Cal.2d 75

BROWN v. JORDAN, Secretary of State.

SALINE v. SAME.

S. F. 16102, 16096.

Supreme Court of California.

Aug. 31, 1938.

1. Constitutional law 🔑9(1)

A proposed initiative petition may include a number of proposed constitutional amendments.

2. Constitutional law 🔑9(1)

The circulation title of an initiated constitutional amendment is not fatally defective because it contains references to some provisions of the proposal which are no more important than some to which no reference is made. Pol.Code, § 1197b; Const. art. 4, § 1.

3. Constitutional law 🔑9(1)

The circulation title of an initiated constitutional amendment need not contain a summary or index of all of the measure's provisions. Pol.Code, § 1197b; Const. art. 4, § 1.

4. Constitutional law ⚷9(1)

Where initiated amendment to the Constitution proposed the issuance to each qualified person over 50 years of age and not an employer or employee, of thirty $1 redeemable warrants each week, through the office of a state retirement life payments administrator, circulation title stating that provision was made for an administrator and for weekly issuance of compensation warrants redeemable in cash by the administrator was sufficient, though failing to enumerate certain subsidiary and auxiliary matters. Pol. Code, § 1197b; Const. art. 4, § 1.

5. Mandamus ⚷74(1)

The Supreme Court would not prevent submission to the electorate, of an initiated measure proposing the issuance of compensation warrants by the state in furtherance of a retirement plan, although measure, if passed, would allegedly violate federal constitutional prohibition against making anything but gold and silver coin a tender in payment of debts. U.S.C.A.Const. art. 1, § 10.

◆

In Bank.

Mandamus proceedings by Ruth Brown and Tess Marie Saline, petitioners, to compel Frank C. Jordan, as Secretary of State of the State of California, to refrain from submitting a purported initiative measure to the electors and to refrain from certifying the measure to the registrars of voters and county clerks of the state, wherein proponents of the proposal and certain amici curiae, pursuant to permission by the court, intervened and filed briefs.

Alternative writ theretofore issued discharged, and peremptory writ denied.

S.F. 16102:

O'Melveny, Tuller & Myers, Walter K. Tuller, Louis W. Myers, and Jackson W. Chance, all of Los Angeles, for petitioner.

John J. Hamlyn, of Sacramento, for California State Employees' Ass'n.

I. H. Paffenberger, of Oakland (Joseph E. Cutten and Lester Stern, both of San Francisco, of counsel), for California Farm Bureau Federation.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Carl S. Kegley, John W. Preston, J. Lamar Butler, John Dockweiler, Wm. J. Clark, Olson & Olson, Charles E. McGinnis, Sheridan Downey, and Allen Miller, all of Los Angeles, interveners and amici curiae.

S.F. 16096:

Jay J. Stein, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Philip C. Boardman and Joseph W. Boardman, both of San Francisco, amici curiae.

PER CURIAM.

Petitioners, qualified electors and taxpayers of the state, by separate applications, seek writs of mandate directed to the secretary of state commanding him (1) to refrain from submitting a certain purported initiative measure to the electors of the state, and (2) not to certify the measure to the registrars of voters and county clerks of the state. After the issuance of the alternative writs, the respondent, by way of answers and return, filed general demurrers to the petitions. Proponents of the proposal and certain amici curiae, pursuant to permission by the court, have intervened in the proceeding, and have filed briefs herein. Inasmuch as the two petitions involve substantially the same contentions, both will be disposed of in this one opinion.

The measure which petitioners seek to keep from being submitted to the voters at the next general election is a constitutional amendment proposed under the initiative provisions of the state Constitution. The initiative petition has been signed by the requisite number of qualified electors of the state and has been filed with the secretary of state within the time entitling it to be submitted at the November election.

[1] Petitioners both contend that the proposal should be kept from the ballot because the circulation title appearing upon each page of the initiative petition whereon signatures appear, does not contain a proper "summary of the chief purpose and points" of the proposed constitutional amendment as required by the provisions of article 4, section 1, of the Constitution and section 1197b of the Political Code. In S. F. No. 16102 petitioner Brown, in

addition, urges that the proposed amendment, if adopted, would be clearly, obviously and palpably, violative of various provisions of the federal Constitution; that to permit it to be voted upon would constitute a waste of public funds; that for that reason the proposal should be kept from the ballot. In S. F. No. 16096 petitioner Saline urges, as an additional ground for keeping the measure from the ballot, that the proposed initiative petition is contrary to law in that it includes therein a number of proposed constitutional amendments and that under the initiative provisions of the Constitution this cannot be done. In this connection this petitioner asks that this court reconsider its decision in Wright v. Jordan, 192 Cal. 704, 221 P. 915. This last contention is without merit. Substantially the same contention was made by petitioners in Epperson v. Jordan and Kornmann v. Jordan, Cal.Sup., 82 P. 2d 445. In that case it was held that this contention was unsound, and the decision of Wright v. Jordan, supra, was reaffirmed.

There is no necessity of reviewing the provisions of the Constitution and of the Political Code requiring the proponents of an initiative measure to secure from the attorney-general a circulation title to their measure before soliciting signatures. In the Epperson and Kornmann Cases, supra, and to some extent in Vandeleur v. Jordan, Cal.Sup., 82 P.2d 455, these provisions were quoted and discussed at length. In those cases it was held that in passing upon the legal sufficiency of the circulation title prepared by the attorney-general all presumptions are in favor of the propriety of his actions, and that if reasonable minds may differ as to whether the title contains a proper "summary of the chief purpose and points" of the proposal, the title so prepared must be held to be legally sufficient. Auxiliary and subsidiary matters need not be included in the title. It is this test which must be applied to the title here challenged.

The proposal here involved is quite long. Its provisions cover four legal-sized pages, single spaced. It is proposed to add a new article to the Constitution to be numbered article 32. This article is divided into 45 sections. The following is a very brief summary of each section: Section 1 provides that this article shall be known as "The California State Retirement Life Payments Act—$30.00 a week for life". Section 2 states the views of the proponents of the measure as to the purposes of the proposal. Section 3 creates the office of state retirement life payments administrator, and section 4 requires the governor within five days after the adoption of the amendment to appoint one of three named persons to this office who shall serve until 1940, and also provides for what shall happen, if the governor shall fail to act or if one of the three be not available. Section 5 provides that after 1940 the administrator shall be elected for a four-year term. Section 6 confers upon the administrator broad powers to supervise and administer the provisions of the article. Section 7 requires the administrator to print and issue serially numbered warrants to be known as "Retirement Compensation Warrants of the State of California", and to print and issue serially numbered revenue stamps to be known as "Warrant Redemption Stamps." The section also provides that the warrants shall be non-interest bearing, self-liquidating, negotiable and transferable without endorsement; that they shall be in the denomination of $1 each, and the number of such warrants shall be limited to the requirements of the article. The stamps shall be in the denomination of two cents each and shall be issued in sufficient quantities to provide for the warrant redemption provisions of the article. The warrants shall have suitable spaces on the backs thereof for the affixing of 52 of the redemption stamps, and shall designate serially where each stamp shall be placed weekly starting the first Thursday after the issuance of the warrant. The section also provides what the face of the warrant must disclose, and confers upon the administrator certain powers in the issuance of such warrants. Section 8 provides that starting 12 weeks after the adoption of this article and for 6 weeks thereafter the administrator shall cause to be issued and paid to each person entitled 15 one-dollar warrants each week, 20 such warrants for the next 6 weeks, and 25 warrants for the next 6 weeks; that starting the 31st week after the adoption of this article not less than 30 such warrants or their equivalent in lawful money shall be paid to each person entitled. This section also provides for the increase in number of such warrants to be paid to each recipient in the event of the increase in price of consumer goods over the average 1937 price. It is also provided that after a designated period the administrator may issue a limited number of such warrants in denominations of $5 and $10 each. Section 9 sets forth the qualifications of those entitled to the warrants—every qualified elector of California 50 years of age or over who is not an employer or employee. Such person must have been a legal resident of California for one year immediately preceding the adoption of this article, or if he becomes a resident thereafter, 5 years residence is required. Section 10 permits each recipient of life payments to give notice of his desire that such payments shall cease. Section 11 provides that each recipient of life payments shall receive them for life provided he retains his qualifications. Section 12 provides that each qualified recipient shall be assigned to a bank or agency in his locality, and the administrator shall issue to him a letter of credit, payment record and identification, drawn on that bank or agency entitling him to his weekly payments. Each such letter of credit shall be valid for 52 weeks, at which time the recipient shall receive a new one. The form of such letter of credit is set forth. Section 13 provides that warrants properly stamped shall be accepted in payment of all debts (specifying some of them) due the state, county, city or political subdivision. Section 14 provides that in the event disbursement officers have sufficient warrants on hand, all wages due state, city, county or other political subdivision employees shall be paid up to 50 per cent in such warrants. Certain limitations on this section are provided. Section 15 requires all state, city, county or political subdivision purchasing agents to insert in contracts of purchase a provision that 50 per cent of the purchase price shall be paid in warrants. Section 16 permits governmental agencies receiving warrants under section 13 to deposit the same with the administrator while section 17 permits new warrants to be issued for soiled or unserviceable ones. Section 18 requires the administrator to redeem warrants properly stamped with 52 stamps, in lawful money of the United States. Section 19 exempts from the sales tax all purchases made with warrants, and from the income tax that portion of income received in warrants. Section 20 requires the administrator to appoint banks as payment agencies, but if they refuse such appointment, then merchants shall be so appointed, and if they refuse then independent offices shall be opened by the administrator as such agencies. Section 21 requires the administrator to deposit with such agencies sufficient warrants so that they can pay to the persons assigned to that agency their warrants each week, and section 22 requires the administrator to deposit with the agencies for sale the required number of stamps. Such stamps shall be sold by such agencies only for lawful money of the United States. Section 23 requires every agency other than a bank to furnish a bond to be paid for by the administrator. Section 24 provides for the compensation of each agent for paying out the warrants and selling the stamps, while section 25 permits banks that receive warrants for deposit to charge a 2-cent per warrant service charge. Section 26 provides for the salary, oath, and a bond of the administrator, while section 27 requires him to appoint four assistant administrators and provides for their salary. Section 28 provides for the employment of various employees by the administrator, for their salaries and the adjustment thereof and for their oath of office. Section 29 provides that the attorney-general shall be the attorney for the administrator. Section 30 provides that until sufficient money is available from the sale of stamps, all operating, administrative and advertising costs, and costs of printing shall be paid from the general fund as requested by the administrator up to $700,000. All sums thus advanced shall be repaid to the state treasury out of excess proceeds resulting from the sale of stamps. Section 31 provides for proceeds from stamp sales to be deposited in California banks. Section 32 places certain restrictions on the number of warrants that shall be issued, and for the repayment of advances made by the state treasurer. Any excess money received from the sale of stamps shall be apportioned to retired beneficiaries as part of their weekly compensation. Section 33 requires the administrator immediately upon the adoption of the article to expend $200,000 for advertising to inform and acquaint the public of the purposes and workings of the plan, to create public confidence in the use of the warrants and "to stimulate their general acceptance and to urge widespread use of warrants in all fields of employment and business endeavor". Section 34 provides for what shall be done with redeemed or reissued warrants. Section 35 provides that retirement life payments shall not be alienated and shall be exempt from attachment or execution, nor shall any person receiving life payments be required to use any portion thereof for the support or maintenance of any person over 18 for whom he might otherwise be legally responsible. Section 36 provides that any person receiving life payments must waive any right to receive payments under the old age security law, but he may elect which payments he desires to receive. Section 37 authorizes the administrator to propose amendments to this article to be voted on at either special elections called by the administrator or at the general election. Section 38 provides that "no injunction or writ of mandate or other legal or equitable process" shall ever issue to interfere with the administration of this article or to enjoin or prevent any provision of this article from going into effect. Section 39 provides that the office of administrator shall be nonpartisan and he shall be elected as are other nonpartisan officers, while section 40 provides for what shall happen in the event of the death or retirement of an administrator. Section 41 provides that the warrants, stamps or other printing, at the election of the administrator, shall be printed by the state printer or by private enterprise. Section 42 provides that any person who shall knowingly use, prepare, circulate or distribute, with intent to defraud, any spurious, counterfeit, or altered warrant or stamp is guilty of forgery. Section 43 contains a provision repealing all provisions of the Constitution in conflict with this article, with an additional provision as to what shall happen if any other measure is adopted at the same election in conflict with the provisions of this article. Section 44 defines certain designated terms, while section 45 contains a severability provision.

It is obvious from the above brief summary of the provisions of this proposal that its chief purpose is the issuance to each qualified person, over 50 years of age and not an employer or employee, of thirty one-dollar warrants each week, such warrants being annually redeemed in cash obtained from the sale of redemption stamps, which stamps are to be affixed to such warrants each week. It is also quite clear that in addition to this "chief purpose" of the provision there are various "chief points" aiming towards the accomplishment of the chief purpose. One such point is the provision for the appointment and subsequent election of the administrator; another is the provision to the effect that the warrants are receivable in payment of state or local governmental obligations, and its counter provision, that certain governmental obligations are to be paid in such warrants.

Keeping this main purpose and these main points in mind it is clear that all of them are included within the circulation title prepared by the attorney-general. That title reads as follows:

"Retirement Life Payments. Initiative Constitutional Amendment. Provides for State Retirement Life Payments Administrator, appointed by Governor from three named persons, appointee serving until successor elected in 1940 for four years. Requires State issue retirement compensation warrants, and redemption stamps to be affixed thereon weekly to redeem warrants annually. Requires weekly issuance of at least thirty $1.00 warrants during his life to each qualified California elector fifty years of age not employer nor employed, redeemable in cash by Administrator and receivable in payment of taxes and certain other obligations due to or from State or political subdivisions."

Petitioners attack this title on many grounds. It is urged that the title is deceptive and tended to mislead the signers, and is illegally insufficient in that: Taxes are imposed and the title is silent with reference thereto; that the measure appropriates $700,000 out of the general funds of the state which is not disclosed; that the title makes no reference to the power of the administrator to propose amendments and call special elections; that various exacting provisions of the Constitution are repealed by the proposal and that the title is silent as to this fact; that the act provides for cash payments instead of warrant payments under certain conditions, and this the title does not disclose; that the proposal repeals in part the Income and Sales Taxes and the Old Age Security law and this is not disclosed in the title; that the title does not disclose that public officers and employees must accept one-half of their compensation in warrants; that the title is silent concerning the provision that all public bodies must insert in their contracts of purchase a provision that one-half the price shall be paid in warrants; that the proposal places certain limits on the power of the courts to interfere with the act and this the title does not disclose; that the title makes no reference to the large system of agencies provided for; that the title makes no reference to the provision exempting payments under the act from the claims of creditors; that the title does not disclose clearly that $1.04 must be paid for each $1 warrant or that the stamps must be purchased with cash; that the title does not disclose the $200,000 to be expended by the administrator for advertising.

It is not necessary to consider each of the above objections seriatim in order to demonstrate that the failure to mention them in the title does not affect the legal sufficiency of the title. Clearly the "chief purpose and points" of the proposal are disclosed by the title. It is true that the proposal contains many provisions of far-reaching importance—many of them listed in the objections of petitioners. Considered separately, many of the provisions of the proposal not disclosed in the title would be of gravest importance. But when those provisions are read in connection with the other provisions of the act it is apparent that those provisions to which reference is not made in the title are subsidiary and auxiliary to the chief purpose and points already enumerated. The proposal is not being made to accomplish those things which were omitted from the title—they all follow along subsidiary to those things disclosed in the title.

[2, 3] If it be conceded that after disclosing the chief purpose and points of the proposal, the title contains references to some provisions of the proposal no more important than some to which reference was omitted, this does not render the title fatally defective. The title need not contain a summary or index of all of the measure's provisions. Within certain limits what is and what is not an important provision is a question of opinion. Within those limits the opinion of the attorney-general should be accepted by this court.

[4] We have carefully read and considered each of the objections raised by petitioners to the sufficiency of the title and while several of them embody some very important matters, we think all of them are subsidiary and auxiliary to the chief purpose and points of the proposal as disclosed in the title.

[5] As already indicated, petitioner Brown advances the further contention that the measure if passed would be violative of the federal Constitution, particularly article 1, section 10 thereof, U.S.C.A. Const. art. 1, § 10, providing that "No state shall * * * emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts." It is urged that for this reason it now should be declared invalid and excluded from the ballot. Assuming that this court has power under some circumstances to prevent submission of an initiative measure to the electorate on the ground that if passed it would be void for unconstitutionality, we are convinced that under all of the circumstances here presented this is not a case for the exercise of such power. For that reason, we refrain from passing on the question of the constitutionality of the proposed measure.

For the foregoing reasons the alternative writ heretofore issued is discharged, and the peremptory writ is denied.

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12 Cal.2d 71

VANDELEUR v. JORDAN, Secretary of State.

S. F. 16112.

Supreme Court of California.

Aug. 31, 1938.

1. Statutes 🔑35½

The circulation title of an initiated statute relating to labor problems was not defective because failing to disclose that the terms "labor organizations," "coerce," "coercion," "intimidate," and "intimidation" were defined in the act, notwithstanding that definitions were allegedly new and revolutionary. Pol.Code, § 1197b; Const. art. 4, § 1.

2. Statutes 🔑35½

The circulation title of an initiated statute is not fatally defective because failing

to include definitions which are auxiliary and subsidiary to the chief purpose and points of the proposal. Pol.Code, § 1197b; Const. art. 4, § 1.

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In Bank.

Mandamus proceeding by Edward D. Vandeleur, petitioner, to compel Frank C. Jordan, as Secretary of State of the State of California, to refrain from submitting a purported initiative measure to the electors and to refrain from certifying the measure to the registrars of voters and county clerks of the state, wherein proponents of the proposal, pursuant to permission of the court, intervened.

Alternative writ theretofore issued discharged, and peremptory writ denied.

Clarence E. Todd and Henry S. Todd, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Darwin Bryan, of San Francisco, for intervener.

PER CURIAM.

Petitioner, a qualified elector and taxpayer of the city and county of San Francisco, seeks a writ of mandate directed to the Secretary of State commanding him (1) to refrain from submitting a certain purported initiative measure to the electors of the state, and (2) not to certify the measure to the registrars of voters and county clerks of the state. Proponents of the proposal, pursuant to permission of the court, have intervened in the proceeding.

The measure which petitioner seeks to keep from being submitted to the voters at the next general election is a proposed initiative act. It is signed by the requisite number of qualified electors of the state and has been filed with the Secretary of State within the time entitling it to be submitted at the November election.

Petitioner's sole contention is that the proposed statute should be kept from the ballot because the circulation title of the measure appearing upon each page of the initiative petition whereon signatures appear, does not contain a "summary of the chief purposes and points" of the proposed law as required by the provisions of article 4, section 1 of the Constitution and section 1197b of the Political Code.

In the cases of Epperson v. Jordan and Kornmann v. Jordan, Cal.Sup., 82 P.2d 445, we had occasion to review the constitutional and statutory provisions here involved. In that decision it was held that in passing upon the legal sufficiency of the attorney-general's title, all presumptions are in favor of the propriety of his actions and that if reasonable minds may differ as to whether the title contains a "summary of the chief purposes and points" of the proposal, the title so prepared must be held to be legally sufficient. Auxiliary and subsidiary matters need not be included in the title.

The proposed statute here involved is quite long. Its provisions cover four and one-half legal size pages single spaced. No useful purpose would be served in analyzing in detail each of its provisions. Section 1 states, in detail, the proponents' analysis of the existing labor problem, and the proponents' views as to the abuses now existing in reference thereto. Section 2 defines some 13 different terms, including the terms "labor organization", "coerce" or "coercion", and "intimidate" and "intimidation". Sections 3, 4 and 5 prohibit certain types of picketing as fully set forth in these sections. Section 6 permits a defined type of picketing under the circumstances set forth in the section. Section 7 prohibits the display of banners under certain defined circumstances, while section 8 prohibits the utterance of certain language as set forth in this section. Section 9 prohibits conspiracies or agreements between two or more persons affecting the disposition of another's goods, while section 10 contains certain exceptions to section 9. Section 11 makes it a just cause for dismissal for any employee to refuse to work for the reason, in whole or in part, that an industrial controversy exists. Section 12 makes it unlawful for any employee or labor organization to intimidate or coerce any other persons to join or refrain from joining, or to remain, or to cease to remain a member of any labor organization, and makes certain other acts unlawful. Section 13 states that the act does not prevent employees from voluntarily striking, or otherwise terminating their employment. Section 14 makes it unlawful to block or impede any public place or lawful access thereto or any exit or approach to any place of business so as to interfere with any person entering or leaving such places. Section 15 makes it unlawful for any person to cause the driver of any vehicle to slow down or stop with intent to induce the driver of such vehicle to refrain from entering or leaving any place of business, or from seeking and leaving employment, etc. Section 16 prohibits the seizure of any private property as a means of forcing a settlement of a labor dispute. Section 17 prohibits conspiracies to violate certain provisions of the act, while section 18 makes violation of certain provisions of the act a crime. Section 19 gives any person injured by a violation of the act a civil action for damages. Section 20 confers jurisdiction upon the superior courts to prevent and restrain violations of the act and confers certain powers and duties upon the district attorneys in connection with enforcement of the act, while sections 21-24 regulate the circumstances under which preliminary restraining orders and injunctions shall be granted, and what shall be done in case of violations of such orders. Section 25 repeals all statutes or portions of statutes in conflict with the proposal, while section 26 contains the usual severability clause, with a specific provision that certain enumerated sections are intended to be severable.

The circulation title prepared by the attorney-general, and here challenged, is as follows: "Labor, Initiative. Defines what constitutes lawful and unlawful picketing, boycotting and display of banners. Prohibits seizure of private property, coercion, intimidation, obstruction or interference with use of public highways, streets, wharves, docks, and other public places, use of abusive or misleading statements or threats of violence, and certain other acts in connection with labor disputes and other industrial controversies. Recognizes the right of employees to strike and bargain collectively. Provides for civil damages and prescribes criminal punishments and penalties for and judicial procedure to prevent and enjoin violations thereof. Repeals all laws conflicting therewith."

[1, 2] Petitioner challenges this title solely on the grounds that it fails to disclose that the terms "labor organizations", "coerce" and "coercion", "intimidate" and "intimidation", are defined in the act, and that the definitions there contained are "new" and "revolutionary". It is quite obvious from a reading of the title that it does set forth with clarity, considering the length and complexity of the measure, a "summary of the chief purpose and points" of the proposed statute. The fact that the title fails to indicate that certain terms are defined in the act, even though those definitions may be "new" definitions, in no way detracts from the legal sufficiency of the title. Such definitions are clearly auxiliary and subsidiary to the chief purpose and points of the proposal. What was said in the Epperson and Kornmann decision, supra, concerning the legal sufficiency of the title there involved, is equally applicable here. On the authority of that decision, and for the reasons therein stated, it is held that the title here involved is legally sufficient.

For the foregoing reasons the alternative writ is discharged and the peremptory writ is denied.

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28 Cal.App.2d 281

PEOPLE v. DE MELLO.

Cr. 514.

District Court of Appeal, Fourth District, California.

Aug. 25, 1938.

Hearing Denied by Supreme Court Sept. 21, 1938.

1. **Criminal law** 🔑511(3)

An accomplice need not be corroborated by direct evidence; it being sufficient if accused's connection with the crime may be inferred from corroborating evidence.

2. **Criminal law** 🔑511(1)

In grand theft prosecution, evidence was sufficient to corroborate testimony of accomplice.

3. **Criminal law** 🔑742(2)

The credibility of accomplice testifying against defendant is for the jury. Code Civ. Proc. § 1847.

4. **Witnesses** 🔑366, 370(1)

Any circumstance tending to show interest, bias or prejudice of accomplice is a proper subject of inquiry.

5. Criminal law ⚷742(3)

Whether the granting of probation to accomplice on condition that accomplice testify against defendant and that accomplice take an affirmative stand and not a negative stand when so testifying had any effect on accomplice when called to testify in defendant's trial or affected accomplice's testimony by showing a strong motive was question for jury. Code Civ.Proc. § 1847.

6. Witnesses ⚷370(1), 372(1)

Questions on cross-examination of witness, tending to show bias, are competent, and great latitude should be allowed in developing existence of bias.

7. Witnesses ⚷366

In grand theft prosecution, refusal to admit evidence that accomplice was granted probation on condition that he testify against defendant and that he take an affirmative stand and not a negative one when so testifying was error.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Joe De Mello was convicted for grand theft, and he appeals.

Reversed and new trial granted.

Russell & Heid, of Tulare, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

GORDON THOMPSON, Justice pro tem.

Two informations were filed, charging the defendant with offenses of grand theft, the stealing of three calves. The two cases were consolidated for trial and the defendant was convicted by a jury in both cases. While defendant gave notice of appeal in each case, but one record and one set of briefs have been filed, and it was stipulated that the two appeals might be considered together.

Appellant relies upon three grounds for reversal of the judgment: (1) That the judgment and verdict are not supported by the evidence, in that there was no corroboration of the accomplice, Joe Mendes. (2) That the court erred in sustaining an objection to appellant's offer of proof of the terms of probation imposed upon the accomplice Mendes. And, (3) that the district attorney committed prejudicial error in his argument to the jury when he referred to appellant's prior convictions (which were charged and admitted).

The principal witness against appellant was one Joe Mendes, an admitted accomplice. Mendes testified in substance, that on the 10th or 11th of March, 1938, he and appellant left Visalia and drove to Avenal to look for employment on a pipe line. This trip was unsuccessful. On the 11th of March, 1938, they drove to the Alta Packing Company at Monson in an automobile owned by Mendes. While at the packing company, Mendes enquired of a Mr. Tripp, the owner, if he was interested in purchasing some calves. After the calves had been described to him, Tripp said that he would buy them. The evening of March 14, 1938, appellant met Mendes on the street in Visalia and there a conversation was had with one Freitas. During this conversation, appellant asked Freitas if he had a cook out where he was working with one Joe Nunes. Freitas replied in the negative and stated he and the boss were the only ones out there. That appellant and Mendes drove out to the Nunes ranch and stole two calves which were placed in the pasture of Mendes and his brother. They then drove to the Goulart ranch and stole another calf. Early next morning, the calves were loaded in a trailer and taken by both Mendes and appellant to the Alta Packing Company where they were sold. Mendes transacted the business, signing the bill of sale and receiving a check made payable to him in the sum of $47.07. Mendes and appellant were arrested and charged with stealing the calves. Mendes entered a plea of guilty to the theft of the Nunes calves and made an application for probation which was by the court granted, upon certain conditions.

During the trial, evidence was presented by the witness Mrs. Mariana Goulart who testified that she saw appellant on March 13, 1938, at which time he asked her where they kept their cows. To this inquiry, she replied "in the Calcote pasture". She further testified that a calf had been stolen the night of March 14, 1938. The evidence disclosed that three or four days after appellant was released from jail, he came to the Goulart ranch and asked the witness if she was coming to court. Upon being told that she and her husband were, if called, appellant stated "he would pay for the calf and all expenses, if I did not come to court". That she was present when appellant made a similar statement to her husband.

The witness Augustino Goulart testified in substance: That he lost a calf the night of the 14th and later saw the calf at the slaughter house. Several days later, appellant told Goulart he would pay for the calf and expenses, if he did not go to court. He further testified that appellant asked him to say that the calf was not his.

One Freitas, called by the People, testified to meeting appellant and Mendes in Visalia, at which time appellant asked him "who was cooking out there", to which he replied "me and Joe Nunes was". The afternoon of the 15th at the slaughter house, he identified the two calves as the property of Mr. Nunes.

The owner of the packing house testified that about the 11th or 12th of March, Mendes came to him and inquired about selling some calves. He believed another man was in the automobile with Mendes, but was not positive. On March 15, he purchased the calves in question and transacted all of the business with Mendes alone. That appellant was with Mendes and helped to unload the calves which were brought to him early in the morning.

Appellant, testifying in his own behalf, denied being present when the calves were stolen, or of knowing that they had been stolen, when he assisted Mendes in taking them to the slaughter house. Denial was also made as to appellant receiving any money from Mendes from the sale of the calves. He did admit offering to pay Goulart for his calves and expenses, but testified that his reason for doing this was that he had been convicted of three felonies and would rather pay for the calves than go to court. In the same conversation, he denied any participation in the theft. Appellant urges that this evidence was insufficient to corroborate the testimony of the accomplice.

[1] In People v. Yeager, 194 Cal. 452, 229 P. 40, the rules with respect to corroborative evidence are thus set forth (page 49):

"It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, nor to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient."

[2] Although the corroborating evidence was slight, there was evidence which tended to connect the appellant with the commission of the offense. No complaint is here made as to any instructions given by the trial court. The jury was instructed that Joe Mendes was an accomplice. It was also instructed as to what was necessary to be established before a conviction could be had upon an accomplice's testimony. The jury, by its verdict, signified its belief in this testimony, as required by law. We cannot say from the record in the case that there was not sufficient corroboration of the testimony of the accomplice, Joe Mendes.

Appellant further urges that the trial court erred in sustaining an objection to appellant's offer of proof as to the terms of probation imposed upon the accomplice Mendes. On cross-examination, Mendes admitted being charged with stealing the calves. To this charge, he entered a plea of guilty and made application for probation. His application was heard by the same court which conducted the trial of appellant. Mendes denied having a conversation in appellant's automobile, in the presence of a Miss Morsalian, now Mrs. DeMello, at which time she asked him if it was true that Joe DeMello was implicated in this cattle stealing matter, to which he replied, "No, he's not, but I have to implicate him so that I may get probation."

Mrs. DeMello, called as a witness for appellant, testified that the statement was made by Mendes in response to the question asked by her. Whereupon, counsel for appellant offered in evidence the files and records of the court in the case of People v. Joe Mendes. Counsel stated the offer was made for the purpose of showing the conditions imposed upon Mendes at the time his application for probation was granted. The court sustained an objection made to this offer.

From the record before us, it appears that when Mendes was granted probation, there were certain conditions imposed, such as restitution and fine. There was also, in addition to the usual terms and conditions imposed, a statement by the court, which was:

"Now in referring to this co-operation with the district attorney, it will be understood that the defendant must honestly and fully and completely tell any and all circumstances which he may be called upon to testify to, in regard to these matters involving the theft of the calves described in the probation officer's report and in his statement, to which the court has already referred; and I mean by that, that this court will not be satisfied with neglect to make an honest and full statement as to any matter which must be within the knowledge of the defendant in regard to those matters; that he must take an affirmative stand as a witness, and not a negative."

The other information charging Mendes with grand theft was dismissed on motion of the district attorney. The ground of said motion was "In furtherance of justice."

[3-5] Where there was evidence as here presented, the jury was entitled to know, not only that probation had been granted to the accomplice, but was also entitled to know the conditions. It was for the jury to pass upon the credibility of the accomplice. Any circumstance tending to show interest, bias or prejudice would be a proper subject of inquiry. The accomplice had received favorable consideration of the court by the granting of probation. The court, in effect, not only required the accomplice to testify against this appellant, but directed him, when he appeared as such witness, to take an affirmative stand and not a negative one. What effect, if any, did this have upon the accomplice, when called to testify in the trial of appellant? Did it affect his testimony by showing a strong motive to color his testimony? These are questions the jury should have had presented to it. It is the exclusive judge of a witness' credibility. (Sec. 1847, Code Civ.Proc.)

[6, 7] Where motive or state of mind of a witness is the object of cross-examination, questions which would have a tendency to show bias of a witness are not only competent, but great latitude on cross-examination should be allowed in developing its existence. People v. Pantages, 212 Cal. 237, 239, 297 P. 890. We believe this same principle of law applies to the case at bar. Under the circumstances here existing, the trial court committed prejudicial error in precluding the jury from being apprised of all the conditions imposed on the accomplice in granting him probation.

Appellant urges as another ground of reversal, misconduct of the district attorney in making a certain argument to the jury, and error of the court in a comment made in ruling on an objection to that argument. The argument of the district attorney and the statement of the trial judge were, to a certain extent, improper and should not have been made. However, the question as to whether they were sufficiently prejudicial in themselves to justify a reversal, need not be considered, since there must be a reversal of the judgment for the reason above set forth.

The judgments and orders denying motions for a new trial, are, and each is, reversed and a new trial granted.

We concur: BARNARD, P. J; MARKS, J.

28 Cal.App.2d 277

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

Civ. 10821.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1938.

Workmen's compensation ⚷1114

Where employer applied to State Compensation Insurance Fund for compensation insurance, policy contained provision that no relative was covered by policy unless relative's name was specifically mentioned in policy schedule, employer informed the Fund that niece of employer's wife and niece's husband were employees, and was advised that employer was fully covered, the Fund thereby waived the restriction, as respects claims for injuries to niece and for death of niece's husband.

◆

Application for a writ of review by the State Compensation Insurance Fund against the Industrial Accident Commission of the State of California and another, for the purpose of obtaining a judgment annulling an award made against petitioner.

Award affirmed.

Carroll S. Bucher and B. E. Pemberton, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Keith & Creede, of San Francisco, of counsel), for respondent Industrial Accident Commission.

STURTEVANT, Justice.

This is an application by the State Compensation Insurance Fund for a writ of review for the purpose of obtaining a judgment annulling an award made against it.

The employer, Emil Tabournel, for some years prior to 1936, owned and operated the Hotel Henry in San Francisco. In May, 1936, he determined to place an application for compensation insurance with the State Compensation Insurance Fund, and he was advised to go to the office of the latter and inquire for Mr. Rizzo. Accordingly he went to said office at 450 McAllister street, San Francisco, and made his application to Mr. Rizzo. The latter questioned him as to his business and the details concerning the insurance and had him fill out and sign an application for an insurance policy. Mr. Tabournel told Mr. Rizzo that he had six employees and that he wanted all of them covered. Later he left the office of the petitioner and a short time afterwards received a policy insuring him from June 3, 1936, until June 3, 1937. At once he proceeded to read the policy. One endorsement thereon was as follows:

"Important Change

"(Relatives Not Covered)

"In accordance with the rule of the Insurance Commissioner No Relative is covered under this Policy Unless His or Her Name is Specifically Mentioned in the Policy Schedule.

"Please examine the Policy and write us immediately if any relative not specifically mentioned by name in the schedule is to be covered. Be sure to give full names, a description of their duties and specify whether or not they will reside on property in your possession."

Another endorsement in so far as applicable was as follows:

"Endorsement Agreement

"Limiting and Restricting This Insurance.

"Relatives Not Covered.

"The insurance under this policy is limited as follows:

"It is agreed that, anything in this policy to the contrary notwithstanding, this policy Does Not Extend To or Cover Injuries (or death resulting therefrom) sustained by any relative either by blood or marriage, (meaning husband, wife, * * * nephew or niece) of the insured and/or his or her spouse, unless such relative is Specifically Mentioned by Name in the Schedule as Covered by This Policy, or in an Endorsement Attached to This Policy."

"Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, stipulations, conditions, agreements or limitations of this policy other than as above stated.

"This endorsement, issued by the State Compensation Insurance Fund, when countersigned by a duly authorized officer or representative of the Fund and attached to this Policy shall be valid and form part of the Policy."

Having read the above, Mr. Tabournel promptly returned to the petitioner's office and had another conversation with Mr. Rizzo. He pointed out to the latter the above passages. He also stated to Mr. Rizzo that at the Hotel Henry he employed Pierre Griffoul and Madeline Griffoul, husband and wife, as manager and maid respectively at said hotel. Madeline, he stated, was the niece of Mrs. Tabournel. Mr. Rizzo inquired if Mrs. Tabournel was one of the owners of the hotel. Mr. Tabournel stated that she was not, that he was the sole owner. Mr. Rizzo thereupon stated to Mr. Tabournel that he was fully covered, returned to the latter the insurance policy, and later Mr. Tabournel left the petitioner's office. There was evidence before the defendant commission that at said time Mr. Rizzo was an underwriter of the petitioner and had the authority to sign and issue policies and at times did sign and issue policies on behalf of the State Compensation Insurance Fund.

On June 3, 1937, the policy above mentioned, was renewed for the year ending June 3, 1938, by another instrument which, except as to dates and names, is an exact copy of the policy written June 3, 1936.

On September 2, 1937, in a labor dispute, a clerk at the Hotel Henry shot both Pierre Griffoul and Madeline Griffoul. Pierre died. Madeline recovered. A claim in behalf of Pierre was presented to the Industrial Accident Commission. An award was made in favor of the complainant. The petitioner, without objection, paid according to the terms of the award. A claim in behalf of Madeline was presented to the defendant commission. The petitioner contested the claim. All of the foregoing facts were developed on the hearing. Mr. Rizzo was present but was not called as a witness to dispute any of said facts. The defendant commission made an award in favor of the claimant and against the petitioner, "of the sum of $10.33 a week, beginning September 10, 1937 to and including January 5, 1938, and indefinitely thereafter, until termination of disability or the further order of this commission, less, however, $35 payable to Keith and Creede, as their attorneys fee". To annul that award the petitioner commenced this proceeding.

The petitioner claims the policy was not ambiguous, that a contract in writing can be modified by a contract in writing, or by an executed oral agreement; but not otherwise. It cites and relies on State Compensation Ins. Fund v. Industrial Accident Commission, 70 Cal.App. 650, 234 P. 116 and Kugler v. Industrial Accident Commission, 63 Cal.App. 308, 218 P. 472. The case first cited was not at all similar in its facts. No waiver or estoppel was claimed or passed on. The sole question was the proper construction of the written contract between the parties. In the second case a modification was claimed. However, the court was at pains to point out that there was no evidence that any representative having authority did anything whatever which would constitute a modification of the policy on which the claim was based. In the case before us the facts which we have recited above show that Mr. Rizzo was a general agent of the petitioner having authority to execute insurance policies and at times he signed and issued policies for the petitioner. We think it is clear, therefore, that the facts before the defendant commission warranted it in holding that the case falls within the rule stated and applied in Golden Gate Motor Transp. Co. v. Great American Indemnity Co., 6 Cal.2d 439, 58 P.2d 374, and cases there cited, and that the petitioner under the facts waived the restriction regarding claims by the niece of the wife of the employer.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

28 Cal.App.2d 160

McALLISTER v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 10873.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1938.

Rehearing Denied Sept. 17, 1938.

Hearing Denied by Supreme Court Oct. 17, 1938.

1. Judgment 🔑521

A proceeding in prohibition to restrain the enforcement of a judgment because of the claimed invalidity thereof constitutes a collateral attack upon the judgment.

2. Judgment 🔑497(1)

A proceeding in prohibition to restrain the enforcement of a judgment being a collateral attack, the judgment must be held to be valid unless the invalidity thereof appears upon the face of the judgment roll.

3. Prohibition ⚿27

In a proceeding in prohibition to restrain the enforcement of a judgment because of the claimed invalidity thereof, only evidence which is admissible is the judgment roll and other evidence, even though showing that jurisdiction did not in fact exist, is inadmissible.

4. Prohibition ⚿10(3)

A petition for writ of prohibition to restrain the enforcement of the alternative provision of sentence imposed upon petitioner in a criminal action on ground that trial court was without jurisdiction to impose alternative provision which court inadvertently omitted when petitioner was arraigned for sentence but which was added before judgment was entered would be denied, where judgment roll showed that but one judgment was pronounced and entered which judgment was valid upon its face.

5. Judgment ⚿476
Prohibition ⚿5(4)

Though, generally, a judgment of conviction is subject to collateral attack upon showing of want of due process even though want of due process does not appear upon the face of the judgment roll where petitioner after having been duly tried was arraigned for sentence and court inadvertently omitted alternative provision which was added on the same day when petitioner and counsel were in court room and before judgment was entered, writ of prohibition to restrain enforcement of judgment would be refused as an exception to the general rule.

◆

Proceeding by H. L. McAllister for a writ of prohibition to restrain the Superior Court of the state of California in and for Alameda County and the Honorable Frank M. Ogden, as judge thereof, from enforcing the alternative provisions of a sentence imposed upon petitioner by the court in a criminal prosecution.

Writ denied.

Reed M. Clarke and H. L. McAllister, both of San Francisco, in pro. per., for petitioner.

Earl Warren, Dist. Atty. County of Alameda, Ralph E. Hoyt, Chief Asst. Dist. Atty., James H. Oakley, Deputy Dist. Atty., and Lynn J. Gillard, Deputy Dist. Atty., all of Oakland, for respondents.

SPENCE, Justice.

Petitioner seeks a writ of prohibition to restrain the respondent court from enforcing the alternative provisions of the sentence imposed upon petitioner by the respondent court in a criminal action.

The minutes of said court show that petitioner was convicted of the crime of conspiracy to violate section 17 of an act known as the General Cemetery Act, St. 1931, p. 2443, and that after he was duly arraigned for sentence on March 2, 1936, the trial court ordered that petitioner "pay a fine of $900.00, said fine to be paid at not less than $25.00 per month beginning on June 1st, 1936, and each and every month thereafter until said fine be satisfied; and in default of payment of said fine he be confined in the County Jail of the County of Alameda at the rate of one day's imprisonment for each $5.00 of said fine unsatisfied, imprisonment however not to exceed six (6) months". No appeal was taken from said judgment. It appears that petitioner has paid a portion of said fine but is delinquent in making the further payments as ordered. It also appears that petitioner has been directed to appear before the respondent court for the purpose of making the delinquent payments or being remanded to the custody of the sheriff in conformity with the alternative provisions of said judgment.

Certain further facts should be stated as these facts were substantially alleged in the petition and constituted the basis for the issuance of the alternative writ herein. These facts are undisputed but respondents contend that they are not material on this proceeding. It appears that on the day set for sentence, petitioner and two codefendants were before the court. Motion for new trial was denied and motions for reference to the probation officer were made by the other defendants and granted. During these proceedings, petitioner was arraigned for sentence and the reporter's transcript shows that the respondent court ordered that defendant be fined $900, payable in monthly instalments of not less than $25 per month commencing on June 1. It further appears that petitioner left the courtroom and that later on the same day, but before any judgment was entered, petitioner and his counsel returned to the courtroom, where the trial court stated that the alternative provision had been inadvertently omitted. It was then ordered that in the event of default, petitioner be confined in the county jail at the rate of one day for each $5 of said fine remaining unpaid, not exceeding a total period of six months.

In support of his contention that the respondent court was without jurisdiction to impose the alternative provision at the time and in the manner above set forth, petitioner cites and relies upon In re Claudette, 21 Cal.App.2d 688, 69 P.2d 1021; In re Garrity, 97 Cal.App. 372, 275 P. 480; In re Bateman, 94 Cal.App. 639, 271 P. 757; In re Humphrey, 64 Cal.App. 572, 222 P. 366; In re Gottschalk, 47 Cal.App. 260, 190 P. 649, and In re Sullivan, 3 Cal. App. 193, 84 P. 781. Respondents make two replies. First, they claim that the trial court did have jurisdiction to so impose the alternative provision under the circumstances, citing Ex parte Long, 30 Cal.App. 442, 158 P. 1056; Ex parte Monckros Von Vetsera, 7 Cal.App. 136, 93 P. 1036; People v. Thompson, 4 Cal. 238, and also some of the language found in the authorities cited by petitioner. Second, they claim that, in any event, petitioner is not entitled to the issuance of the writ of prohibition as the alleged invalidity of the judgment did not appear upon the face of the judgment roll. We believe the last-mentioned claim of respondents must be sustained and we do not deem it necessary to discuss the first.

[1-3] A proceeding in prohibition to restrain the enforcement of a judgment because of the claimed invalidity thereof constitutes a collateral attack upon the judgment. Hogan v. Superior Court, 74 Cal.App. 704, 241 P. 584; Frey v. Superior Court, 22 Cal.App. 421, 134 P. 733; Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646. On such collateral attack, the judgment must be held to be valid unless the invalidity thereof appears upon the face of the judgment roll. Hogan v. Superior Court, supra; Fletcher v. Superior Court, 79 Cal.App. 468, 250 P. 195; Burrows v. Burrows, 10 Cal.App.2d 749, 52 P.2d 606. From the authorities cited, it appears that the only evidence which is admissible upon such collateral attack is the judgment roll and that other evidence is inadmissible even though it might show that jurisdiction did not in fact exist.

[4] Applying these principles to the proceeding before us, it is apparent that the writ should be denied. The judgment roll shows that but one judgment was pronounced and entered, which judgment contained the alternative provision under attack and which judgment appeared valid upon its face. The instant case is therefore distinguishable from the authorities cited by petitioner. There was no failure to "pronounce" the alternative provision as in Re Bateman, supra; the alternative provision, as pronounced and entered, was not invalid on its face as in Re Humphrey, supra; and there was no subsequent attempt to modify the judgment, as pronounced and entered, as was the case in Re Claudette, supra; In re Garrity, supra; In re Sullivan, supra, and In re Gottschalk, supra. In other words, the judgment roll shows no invalidity upon its face and the enforcement of the judgment may not therefore be restrained in this proceeding.

[5] Petitioner claims that the foregoing principles are not applicable in criminal proceedings, and in support of said claim he cites Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. As we read the decision in that case, it appears that the court was of the opinion that it was dealing with an exceptional situation in which the allegations of the petition were sufficient, if true, to show that the petitioner had been convicted in a proceeding which did not satisfy the requirements of the due process clause. The court stated, however, that petitioner had not applied to the state courts for a writ of habeas corpus upon the grounds stated in his petition and had not shown that remedy to be unavailable. The court said (page 342), "no decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States". We do not believe that the decision in that case nor the decision of our Supreme Court which followed (Ex parte Mooney, 73 P.2d 554) is authority to sustain the claim that the foregoing principles are not generally applicable to criminal as well as civil proceedings. The Supreme Court of the United States was no doubt of the opinion that if a criminal trial was had which did not satisfy the requirements of the due process clause of the Constitution of the United States, U.S.C.A.Const. Amend. 14, and said trial resulted in depriving a person of his liberty, such trial was the equivalent of no trial whatsoever and the judg-

ment of conviction would be subject to collateral attack upon a showing of want of due process even though this did not appear upon the face of the judgment roll. We believe it proper to treat this decision, under the exceptional facts there alleged, as an exception to the general rules above stated.

The alternative writ is discharged and the peremptory writ is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

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28 Cal.App.2d 152

PEOPLE v. LA FRANCE.

Cr. 1626.

District Court of Appeal, Third District, California.

Aug. 17, 1938.

1. False pretenses 🔑49(3)
Licenses 🔑42(4)

Evidence that defendant, without a permit to deal in securities, induced school teacher to let him exchange her valuable investment certificates for municipal bonds of doubtful value, by false representations that investment certificates were unsound and that municipal bonds were as good as government bonds, and that school teacher's friends had sent defendant to help, authorized conviction for grand theft by fraud and for dealing in securities without permit. Gen.Laws 1931, Act 3814, § 3.

2. False pretenses 🔑49(3)

In prosecution for fraudulently inducing an exchange of securities, evidence *held* sufficiently corroborative of prosecutrix' testimony under statute requiring false pretenses unaccompanied by writing to be proved by two witnesses or by one witness and corroborating circumstances. Pen.Code, § 1110.

3. False pretenses 🔑49(3)

The statute requiring false pretenses unaccompanied by writing to be proved by two witnesses or one witness and corroborating circumstances does not require false pretenses to be established by two witnesses, but proof is sufficient if testimony of defrauded person is satisfactorily corroborated by material circumstances. Pen.Code, § 1110.

4. Criminal law 🔑730(12)

In prosecution for fraudulently inducing an exchange of securities, statement of district attorney in course of argument on competency of evidence that securities were property of prosecutrix "and she was entitled to keep them and not be defrauded of them," did not require reversal of conviction, where court specifically instructed jury to disregard the statement.

5. Criminal law 🔑384

In prosecution for defrauding prosecutrix of securities on November 5, 1937, evidence on whether defendant called on a witness "last fall * * * in November of last year, 1937," was not too remote.

6. Criminal law 🔑730(1)

Where defense counsel asked permission to present authorities concerning admissibility of certain evidence after luncheon hour, and district attorney insisted on immediate adjournment, saying, "We will see whether counsel is bluffing," the remark was not prejudicial where court promptly instructed jury to disregard it.

7. Criminal law 🔑726, 1171(1)

In prosecution for fraudulently inducing exchange of securities, wherein witness gave description of man who had attempted to procure certain securities from him, remark of defendant's counsel that "there may be hundreds and thousands of men" answering to such description and district attorney's reply that "they are not going through Gridley exchanging securities" at specified time, were improper but not prejudicial.

8. Criminal law 🔑1037(2)

In prosecution for fraudulently inducing exchange of securities, without a license to deal in securities, alleged impropriety of the word "smear" in district attorney's cross-examination of defendant on whether defendant had managed "to accumulate quite a smear of" such securities, did not require reversal of conviction, where objection thereto was sustained and no application was made to instruct jury to disregard the question.

9. Criminal law 🔑1170½(5)
Witnesses 🔑277(1)

Questions on cross-examination of defendant, charging defendant with evasive-ness and deliberate falsification of testimony, were improper but not prejudicial in view of irritating attitude of defendant and his counsel toward prosecuting attorney.

10. Criminal law ⚷706

A prosecuting officer should refrain from statements or conduct tending to prejudice the jury and should examine witnesses with dignity, decorum and due consideration.

11. Criminal law ⚷1173(1)

Statements of district attorney in argument to jury, indicating at most indiscretion and excess zeal caused by defense counsel's heckling, were not reversible error.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Paul J. La France was convicted of grand theft and of dealing in and selling securities without a permit, and he appeals.

Affirmed.

Oliver C. Hardy, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted on two counts of an information charging him with grand theft in defrauding the owner of certain shares of securities, and of another count accusing him of dealing in and selling securities without having secured a permit therefor from the commissioner of corporations, contrary to section 3, the Corporate Securities Act of California, St. 1917, p. 673, 2 Deering's Gen.Laws of Cal. of 1931, p. 1924, Act 3814. From the judgment which was accordingly rendered against him and from the order denying a new trial this appeal was perfected.

It is contended the verdicts and judgment are not supported by the evidence as to any of the three counts, and that the district attorney was guilty of prejudicial misconduct in his examination of witnesses during the trial and in his argument to the jury. It is asserted the alleged fraudulent representations by means of which the defendant secured possession of the property in question were not material inducements which prompted the owner to part with her securities; that they did not constitute representations of past or existing facts, but, on the contrary, that they were mere opinions regarding the future value of certain bonds for which the securities were exchanged, and that the alleged false representations were not corroborated as required by section 1110 of the Penal Code.

[1] We are of the opinion that the verdicts finding the defendant guilty on two counts of grand theft and a third count of a violation of the Corporate Securities Act, together with the judgment which was rendered accordingly, are sufficiently supported by the evidence, and that the evidence of the fraudulent representations by means of which the defendant secured the property in question, testified to by the prosecutrix, is adequately corroborated by circumstances sufficient to comply with the requirements of section 1110 of the Penal Code.

There are conflicts of evidence on several material issues in this case, but it satisfactorily appears that the defendant deliberately defrauded Ora Combs, an elderly retired school teacher of Red Bluff, of two certificates of "Trusteed Estates of Oregon" and one investment certificate of the "Mercantile Acceptance Company", by means of false and fraudulent representations, and that he sold and transferred securities without having procured a permit to do so as required by the Corporate Securities Act of California. Certificate number C-1573 of "Trusteed Estates of Oregon" was owned by Ora Combs and fully paid for in the sum of $1,200. Certificate number C-1588 in the same company was for the principal sum of $6,000, upon which she had paid the sum of $602. The investment certificate in the "Mercantile Acceptance Company" was for the principal sum of $4,000, and was in the nature of a bond to be matured in ten years from its date by the payment of annual instalments of $301, upon which she had paid about $600. At the time the defendant procured the last-mentioned certificate it had a surrender value of $350. The two Trusteed Estates of Oregon certificates then had a surrender value of about $1,250. The evidence is undisputed that these three certificates were of the values last stated.

It is not contended the defendant had a permit from the corporation commissioner to sell or deal in securities. About October 5, 1937, he appeared at the residence of Ora Combs in Red Bluff, armed with a long list of persons in that vicinity who held investment securities. He lived in Southern California, and had never before met her. He told her he had been sent by a friend of hers to help her get rid of her securities by exchanging them for sound securities. When the defendant was urged to reveal the name of the friend who had sent him to Miss Combs, he said it was Nettie Baciarini, now Mrs. Anders, who had told him she "had lost a great sum of money in the Trusteed Estates". He said, "Miss Combs, you don't want to lose your money, do you?" He told her he could exchange her securities for municipal bonds of the City of Cisco, Texas, which were just as good as government bonds or cash, and that she could thereby get back and save every cent she had put into her investment securities. He told her positively that she could clip the interest coupons from the Cisco bonds every six months and cash them for at least $60 a year. Relying upon those statements, Miss Combs agreed to permit him to exchange her securities for the Cisco bonds.

She went with the defendant to her safe deposit box in the local bank and assigned and delivered them to him about a month after his first visit to her. He promptly deposited them with a bank for collection, drawing upon the respective companies for the surrender value of each certificate. It was several weeks before Miss Combs heard of him again. She finally succeeded in reaching him by telephone. He apologized for the delay, saying he had been seriously ill. He did finally purchase six Cisco bonds of the matured value of $330 each, payable November 1, 1974, with interest gradually increasing from one per cent until November, 1936, two per cent from that date until November, 1940, etc. These bonds cost him only thirty cents on the face value of the bonds. Later he procured two other similar bonds with which to replace her Mercantile Acceptance Company bond, which he delivered to her December 4, 1937. It does not appear what he paid for the last-mentioned Cisco bonds, but the City of Cisco defaulted in the payment of interest on those bonds, and Miss Combs never realized any interest on them. They were quoted on the market for ten or fifteen per cent of the face value thereof.

When Miss Combs took the coupons from the Cisco bonds to her bank for collection, she was notified of the uncertain value and character of the bonds. She was unable to recover her interest on the bonds, and she soon learned of the fraud which had been perpetrated upon her. It appears without conflict that Miss Combs was defrauded of her investment certificates which then had an actual surrender value in excess of $1,600 by the false and fraudulent representations which the defendant made to her. It is clear that she parted with her property relying upon the truthfulness of the statements which he made to her regarding the uncertainty of the values of her own securities, and the assurance of unquestionable value and security of the Cisco bonds.

The false representations which the defendant made were regarding alleged past and existing facts. He told Miss Combs that her friend Nettie Baciarini had told him she had lost a great sum of money on her certificates of Trusteed Estates of Oregon, and that Miss Baciarini had sent him to her to help exchange her certificates for reliable securities. Nettie Baciarini, who afterwards married Mr. Anders, took the witness stand and testified that she had never owned certificates of the Trusteed Estates of Oregon, that she had never met the defendant, and did not tell him she had lost money in any securities, nor ask him to see Miss Combs about her investments. The defendant positively assured Miss Combs that in exchanging her securities for the Cisco municipal bonds she would get back every cent she had invested in them, that the Cisco bonds were as good as government bonds or cash, and that she would be assured of being able to collect at least $60 interest on her Cisco bonds each year by merely clipping the coupons and depositing them in her bank for collection. All of those statements were false, as the defendant must have known. Those and other statements made by the defendant furnish ample evidence of false statements of pretended existing and past facts.

[2, 3] The record contains adequate corroboration of the false and fraudulent representations of the defendant to which the prosecutrix testified to comply with the requirements of section 1110 of the Penal Code. That section does not require the false pretenses to be established by two witnesses. It is sufficient if the testimony of the person defrauded is satisfactorily corroborated by material circumstances. Sec. 1110, Pen.Code; People v. Munson, 115 Cal.App. 694, 2 P.2d 227; People v. Fisher, 116 Cal.App. 243, 2 P.2d 564; 8 Cal.Jur. 178, secs. 256, 257. The circumstances under which the defendant first interviewed Miss Combs, the contradiction of Nettie

Baciarini of the defendant's false story regarding her loss of money in similar Trusteed Estates securities, together with the testimony of Mr. and Mrs. Elliott of Orange county, California, who told the jury of being defrauded of certain securities by similar false and fraudulent representations made to them by the defendant and his partner, Mackreth, and the testimony of C. E. DeBell and A. W. Marshall regarding similar false representations made to them by the defendant affecting the same Cisco municipal bonds all tend to corroborate the prosecuting witness in her story regarding the manner in which she was defrauded. There is ample corroboration in the present case to conform to the requirements of the statute.

The appellant has assigned certain statements which were made by the district attorney in his argument to the jury and in the progress of the trial, and questions propounded by him in the cross-examination of the defendant as prejudicial and reversible errors. We are of the opinion the challenged questions and statements do not constitute prejudicial or reversible error.

[4] On cross-examination by counsel for the defendant of Miss Ora Combs, the prosecutrix, with reference to her certificate number C-1588 for shares in the "Trusteed Estates of Oregon", which was payable in instalments, and upon which she had paid the aggregate sum of $600, she was asked: "Q. Did you understand from your reading of this paragraph that instalments were due 'annually, semi-annually, quarterly or monthly, as the case may be, reckoning from the date of the within certificate'?" To this question the district attorney objected on the ground that it was incompetent and immaterial. In his argument regarding the competency of the evidence sought to be elicited, he finally said: "The fact is that those were her property and she was entitled to keep them and not be defrauded of them." The latter statement was assigned as error. The court specifically instructed the jury to disregard the statement.

[5, 6] With respect to the second assignment of error, the district attorney was examing a witness by the name of DeBell regarding the defendant's misrepresentation to him as to his mission in Tehama and adjacent counties about the time that he procured the securities from Miss Combs. The witness was asked: "Q. Is that the gentleman [the defendant] that called on you last fall in Gridley, * * * In November of last year, 1937? A. That's right." To that question the defendant objected on the ground that it was "too remote". The information charges the defendant with defrauding Miss Combs of her securities on November 5, 1937. The evidence was therefore not too remote. But counsel for the defendant insisted that it was too remote and therefore incompetent. The court asked him if he had any authority on that subject to submit. He asked the court to allow him to present the authorities after the luncheon hour. To this the district attorney insisted on an adjournment at that time to settle the matter, and said, "We will see whether counsel is bluffing or whether he has some authorities." This statement was assigned as prejudicial, and the court promptly instructed the jury to disregard it.

[7] With respect to the third assignment of prejudicial misconduct, the district attorney was examining Doctor Freudenthal to show that the defendant was operating in Tehama county and other counties about the time he was charged with defrauding Miss Combs in an attempt to also procure certain securities from him. The witness described the man with whom he negotiated as a heavy-set person, wearing a gray overcoat and a light hat, which, we assume, corresponded with the description of the defendant. To that statement the defendant objected, saying, "There may be hundreds and thousands of men heavy set and wearing a gray overcoat and soft hat. As a matter of fact, I have one of each but I am not heavy set, probably." To that remark the district attorney replied, "They are not going through Gridley exchanging securities in the middle of November, 1937." Upon request, the court once more promptly instructed the jury to disregard the remark. The answer was invited by the improper statement made by the attorney for the defendant. Both remarks were improper. The episode illustrates a too frequent exchange of wits which occur in the heat of many contested criminal trials. We do not approve such conduct, but we assume jurors make due allowance for such incidents. It was not prejudicial misconduct.

The fourth assignment was similar in nature to the last-mentioned one. Again the court instructed the jury to disregard the remark of the district attorney.

[8] The fifth assignment arose on cross-examination of the defendant with relation

to his handling and disposition of numerous Cisco City bonds, some of which he exchanged with Miss Combs. He was attempting to make it appear that he bought and owned the bonds and that he therefore had a right to sell them without the corporation commissioner's license to do so. After a lengthy examination on that subject, the district attorney said: "Well, you managed by tremendous effort, did you not, to accumulate quite a smear of these?" The defendant objected to the use of the word "smear" as improper. The objection was sustained. No application was made to instruct the jury to disregard that question.

[9, 10] In the course of a strenuous cross-examination of the defendant, in which he had expressed his disbelief in the testimony of a certain witness, he was asked: "Q. Have you had any occasion to doubt the honesty of the Elliotts?" To this question he replied, "That would all depend on what you are talking about." The district attorney then said, "You are a very evasive man, are you not, Mr. La France?" To that question the attorney for the defendant objected. The objection was sustained. It was then assigned as prejudicial misconduct. Again the district attorney charged the defendant on the witness stand with deliberately falsifying his testimony. The questions were clearly improper. A prosecuting officer should temper his remarks and refrain from saying things or conducting himself in a manner which may tend to prejudice the jury. The examination of witnesses should be conducted with dignity, decorum and due consideration. If the conduct or answers of a witness appear to be evasive or false, a prosecuting officer has a right to call the jury's attention to those facts in the course of his argument. In the present case the district attorney was greatly irritated and annoyed by the attitude of the defendant and his counsel. That fact may excuse to some extent the indiscreet remarks which he uttered. We do not commend them, but, under the circumstances of this case, we are of the opinion they do not constitute reversible error.

[11] We are also of the opinion the statements of the district attorney made to the jury in the course of his argument which are challenged by the appellant do not constitute reversible error. At most they indicate merely indiscretion and excess zeal prompted by irritation caused by the heckling of adverse counsel. We are confident the jury was not prejudiced against the defendant on that account. We must assume average jurors have sufficient sound reason to thoroughly understand and make due allowance for such controversies between counsel in course of a spirited trial. We are satisfied the verdict and judgment in this case are not the result of a miscarriage of justice.

The judgment and the order are affirmed.

I concur: PULLEN, P. J.

PEOPLE v. MAHONEY.*

Civ. 11858.

District Court of Appeal, Second District,
Division 2, California.

Aug. 26, 1938.

Hearing Granted by Supreme Court
Oct. 24, 1938

1. Licenses 🔑32(2)

The statutory provision that a certificate of sales tax delinquency should be prima facie evidence, in an action to collect delinquent taxes, of the levy of tax, of delinquency, and of equalization board's compliance with the act, does not constitute such certificate prima facie evidence of the fact that a retailer has actually done the excess amount of gross business upon which the tax is levied, computed, and declared delinquent in certificate. St.1933, p. 2599, as amended; St.1935, pp. 1258, 1265, §§ 9, 30; St.1937, p. 2224, § 17.

2. Licenses 🔑32(2)

In action against retailer to recover delinquent sales tax, where the only evidence to show that retailer did more business than he had reported and had paid sales tax upon was a certificate of sales tax delinquency, evidence was insufficient to raise issue for jury regarding whether retailer was liable for delinquent sales tax. St.1933, p. 2599, as amended; St.1935, pp. 1258, 1265, §§ 9, 30; St.1937, p. 2224, § 17.

3. Trial 🔑178

The court has the right to direct a verdict only when, disregarding conflicting evidence and giving opposing evidence all the value to which it is legally entitled, and in-

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***For subsequent opinion see 91 P.2d 1029.**

dulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality which would support a verdict contrary to the one directed, if given.

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Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by the People of the State of California against Paul Mahoney to recover a sales tax under the Retail Sales Tax Act. Judgment for defendant, and plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

Maurice J. Hindin, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment on an instructed verdict. The action was brought by the People of the State of California for the recovery of sales taxes from the defendant, the complaint alleging that the defendant was a retailer and selling tangible personal property at retail and as such, under the provisions of the Retail Sales Tax Act (chap. 1020, Stats.1933, p. 2599, as amended by chaps. 351 and 355, Stats. 1935, pp. 1225, 1252, and chaps. 400 and 778, Stats. 1937, pp. 1326, 2222), was liable to the state of California for sales taxes, penalties and interest in a sum in excess of $5,000 because of said sales of said tangible personal property.

Defendant answered plaintiff's complaint denying all of the allegations of the complaint except as to his residence and as to the fact that there is a sales tax in the state of California. A jury trial was had and at the conclusion thereof the court instructed the jury to return a verdict in favor of the defendant, which was done, and judgment was entered accordingly.

The California Retail Sales Tax Act provides in section 9 thereof, as amended by St.1935, p. 1258, that all retailers must file returns at certain stated intervals setting forth the amount of their gross receipts, the amount of sales tax due, and must at the time of filing said returns pay the amount of taxes shown by the returns. Defendant filed returns and paid certain amounts of taxes which were the amounts due under said returns, but the board of equalization was not satisfied with said returns.

Under the provisions of section 17 of the Retail Sales Tax Act, as amended by St. 1937, p. 2224, the board of equalization levied additional assessments against defendant for the period set forth in the complaint, and this case was tried by the plaintiff on the theory that the returns filed by defendant were incorrect and did not reflect the true amount of taxes due.

In support of plaintiff's case there was introduced into evidence a certificate of sales tax delinquency as provided for under section 30 of the California Retail Sales Tax Act, as amended by St.1935, p. 1265. This certificate showed that the board of equalization had levied an assessment against the defendant for delinquent sales taxes for the period, stating the amount. The certificate further stated that no amount of the indebtedness had been paid and that the whole thereof was wholly due, owing and unpaid.

The only evidence in the record to support the plaintiff's case that the defendant did in fact do more business than he reported and paid sales tax upon is this certificate of delinquency. Section 30 of the California Retail Sales Tax Act provides that the certificate in question in an action to collect delinquent taxes shall be "prima facie evidence of the levy of the tax, of the delinquency and of compliance by the board with all of the provisions of this act in relation to the computation and levy of the tax".

[1-3] Appellant contends that this certificate was sufficient to make out a prima facie case upon which to go to the jury. Neither the appellant nor the respondent has presented us with a citation of authority on the question. We are of the view that there is nothing in the act which provides that such certificate is prima facie evidence of the fact that the retailer did actually do the excess amount of gross business upon which the tax was levied, computed and declared delinquent in the certificate. There is no evidence whatever in the record to show defendant did any business at all over the amount he reported and paid taxes upon, and therefore the court properly directed a verdict for the defendant. "The court has the right to direct a verdict only when, disregarding conflicting evidence and giving opposing evidence all the value to which it is legally

entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality which would support a verdict contrary to the one directed, if given." California Packing Corp. v. Lopez, 207 Cal. 600, 603, 279 P. 664, 665, 64 A.L.R. 1412.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 297

KEIL v. GRAY.

Civ. 2072.

District Court of Appeal, Fourth District, California.

Aug. 25, 1938.

1. Execution 🔑73

The granting or denying of a motion to issue execution after five years from the date of entry of judgment is within the sound discretion of the trial court, and such discretion must be exercised in conformity with the spirit of the law, and in a manner to subserve and not impede or defeat the ends of substantial justice. Code Civ.Proc. § 685.

2. Execution 🔑73

Where affidavits of judgment creditor and of judgment debtor conflicted as to whether creditor's claim had been paid, court did not abuse discretion in denying creditor's motion to issue execution more than five years after judgment. Code Civ. Proc. § 685.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by C. C. Keil against Henry Gray. From an order denying a motion to issue execution more than five years after judgment, plaintiff appeals.

Affirmed.

Liggett & Liggett, of San Diego, for appellant.

Arthur H. DeRiemer, of San Diego, for respondent.

GORDON THOMPSON, Justice pro tem.

This is an appeal from an order denying a motion to issue execution more than five years after judgment.

On May 23, 1927, plaintiff recovered judgment against defendant in the sum of $543.98, besides costs. The judgment was based on a claim assigned to plaintiff by the Standard Oil Company of California.

Execution on the judgment was issued on May 29, 1927. On affidavit of one of the attorneys for plaintiff, defendant was required to appear for supplemental examination on October 21, 1930.

On December 6, 1937, plaintiff filed a notice of motion to issue execution on the judgment. Among other things, the supporting affidavit recited that the judgment was wholly unpaid. Defendant filed a counter-affidavit in which it was stated that the claim of the Standard Oil Company of California had been paid in full. Plaintiff filed no counter-affidavit.

[1] It is thoroughly settled in California that the granting or denying of a motion to issue execution after five years from the date of its entry (sec. 685, Code Civ.Proc.) is within the sound discretion of the trial court; that such discretion must "be exercised in conformity with the spirit of the law, and in a manner to subserve and not impede or defeat the ends of substantial justice". Bailey v. Taaffe, 29 Cal. 422; McClelland v. Shaw, 23 Cal. App.2d 107, 72 P.2d 225; Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567; Wheeler v. Eldred, 121 Cal. 28, 53 P. 431, 66 Am.St.Rep. 20.

[2] The record presents the familiar condition of a conflict in the evidence, which the trial judge resolved against the plaintiff. Plaintiff swore the judgment had not been paid. Defendant swore that the claim had been fully paid. The trial judge accepted defendant's affidavit as true and impliedly found that plaintiff's assignor had been paid. That fact furnished sufficient ground for denial of the motion to issue execution, in the exercise of a sound legal discretion by the trial judge. If the claim had been paid no execution should issue.

Order affirmed.

We concur: BARNARD, P. J.; MARKS, J.

28 Cal.App.2d 253

MORRIS v. RICKMEYER.

Civ. 2077.

District Court of Appeal, Fourth District, California.

Aug. 24, 1938.

1. Mortgages ⊂⊃32(2)

Whether a deed, absolute in form, is to be considered in equity as a mortgage is a question of intention to be inferred from all circumstances of the transaction, taken in connection with the conduct of the parties after its execution.

2. Mortgages ⊂⊃297

Where plaintiff's note to defendant was secured by trust deed, plaintiff executed grant deed to defendant which was left in bank for delivery to defendant if plaintiff failed to make payment, plaintiff defaulted, obtained postponements of sale under trust deed, and filed petition under Bankruptcy Act in which plaintiff listed the realty as subject to trust deed, and plaintiff unsuccessfully sought to enjoin sale under trust deed, conduct of parties clearly showed continued recognition of validity of trust deed as security up to time of sale thereunder and plaintiff was not entitled to have sale set aside and grant deed declared an equitable mortgage. Bankr.Act § 75, 11 U.S.C.A. § 203; Civ.Code, §§ 1056, 2911.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Mark Morris against Otto Rickmeyer to cancel and set aside a sale of real property under a trust deed and to declare a grant deed to be an equitable mortgage securing an indebtedness which had previously been secured by the trust deed. Judgment for defendant, and plaintiff appeals.

Affirmed.

Wallace & Crandall, of Los Angeles, and Frank J. Macomber, of San Diego, for appellant.

Thomas C. McCarty and Fred E. Lindley, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to cancel and set aside a sale of real property under a trust deed and to declare a grant deed to be an equitable mortgage securing an indebtedness which had previously been secured by the trust deed.

The defendant held a note for $4,500 secured by a trust deed, both executed by the plaintiff on September 16, 1926, the note being payable three years after date. On January 28, 1933, while in default in the payment of principal, interest and delinquent taxes, the plaintiff executed a deed conveying the property to the defendant, which deed recited that the conveyance was made in full payment and cancellation of the above-described note. On the same day the parties hereto signed an agreement providing that the grant deed, together with the agreement, should be left with a certain bank in which both kept deposits; that the plaintiff, on or before June 1, 1933, should pay all delinquent interest and taxes on the property; that if he failed to do so the bank should immediately deliver the deed to this defendant; that the intention of the agreement was to convey the property to the defendant without expense and without foreclosure of the trust deed, in case the payments were not made before June 1, 1933; that if the payments were made the defendant would extend the note secured by the trust deed for a specified time; and that the plaintiff thereby instructed the bank to deliver the deed to the defendant at any time after June 1, 1933. The agreement and the deed were placed in escrow with the bank.

Nothing was paid prior to June 1, 1933. Shortly thereafter the plaintiff asked the bank not to deliver the deed until the parties could see if they could work out some other plan. On August 8, 1933, the plaintiff sent $50 to the bank for the defendant, saying in a letter that he could not understand "your mention of foreclosure, except that Mr. Rickmeyer thought I didn't keep my promise", and further saying that he would come on August 21, and "I would suggest that any foreclosure action await until that time." On September 23, 1933, the defendant caused to be recorded a notice of default and election to sell under the original trust deed. The plaintiff requested of the defendant and obtained various postponements of this sale from time to time until April 9, 1935. In the meantime he paid several payments amounting to $275, $240 of which was paid at the time of asking for postponements of the sale and upon condition that such requests be granted. In a letter dated June 28, 1934, requesting a further postponement of the sale the plaintiff stated that the defendant "holds a trust deed now in process of foreclosure".

On April 8, 1935, the plaintiff filed a petition in the United States District Court seeking relief under section 75 of the Bankruptcy Act, 11 U.S.C.A. § 203, in which he listed this property as one of his assets and stated that it was subject to a deed of trust securing a note for $4,500, identifying the deed of trust here in question by reference to the book and page of its recordation. After a hearing this petition was dismissed, all orders restraining this defendant were revoked, and that judgment became final. On May 20, 1935, the plaintiff filed an action in the superior court of San Diego county against this defendant and the trustee under this trust deed asking that a sale under the trust deed be enjoined for the reason that because of certain dealings between the beneficiary and trustor the default originally noticed and advertised had been cured, and for the further reason that the trust deed was no longer valid, since the lien thereof had been extinguished under the provision of section 2911 of the Civil Code. A demurrer was sustained and the judgment entered is now final. On June 8, 1935, the property was sold under the trust deed, a trustee's deed was issued to the defendant and he has since been in possession of the property.

The present action was filed on November 20, 1936. Among other things, the plaintiff alleges the making of the agreement of January 28, 1933; that on the same day the plaintiff executed and delivered to the bank for the defendant a grant deed; that this grant deed was deemed by the parties to be a mortgage securing the note and all obligations theretofore secured by the trust deed; that the grant deed was a substituted security in lieu of the trust deed; that the agreement of January 28, 1933, was later modified by mutual oral consent and between August 8, 1933, and January 24, 1935, the plaintiff paid various sums which were accepted by the defendant as interest on the indebtedness; and that no proceedings to foreclose the substituted mortgage (grant deed) have ever been taken by the defendant. Among other things, the answer denied that the grant deed was ever delivered to or accepted by the defendant and alleged that the agreement and grant deed were never intended to constitute a mortgage; that the plan outlined in these instruments and originally contemplated by the parties was abandoned; that the plaintiff by seeking to enjoin the sale under the trust deed had made an election of remedies and the judgment rendered in that action was res adjudicata; and that the plaintiff had made an election of remedies and recognized the validity of the trust deed by seeking relief under section 75 of the Bankruptcy Act.

The court found practically all of the facts above stated and further found that in holding the grant deed and agreement the bank acted as an escrow holder and not as an agent of the defendant; that this escrow and the arrangement contemplated therein were abandoned by the parties; that the grant deed was not deemed by the parties thereto to be a mortgage; that it was not given to secure an indebtedness and was not deemed to be a substituted security in lieu of the existing trust deed; that the agreement of January 28, 1933, was not modified by oral consent but that the same and the grant deed and the escrow were abandoned by the parties; that all proceedings in connection with the foreclosure sale were regular; and that the plaintiff had no right, title and interest in the premises since the completion of the sale under the deed of trust. Judgment followed and the plaintiff has appealed.

The appellant contends that the bank was the agent of the respondent; that since under section 1056 of the Civil Code delivery to an agent is delivery to the principal, the grant deed was delivered to the respondent; that this delivery, however, did not take place until June 1, 1933, when the requisite payments had not been made; that the agreement and the grant deed, purporting to be a conveyance in cancellation of the debt, were after delivery and after June 1, 1933, orally modified so as to continue the relation of debtor and creditor; that the continuing indebtedness, the fact that the appellant remained in possession of the property, and the fact that the land was worth more than it sold for at the trustee's sale conclusively establishes that this grant deed was an equitable mortgage; and that as such it must be foreclosed in the usual manner.

[1] Whether a deed, absolute in form, is to be considered in equity as a mortgage "is a question of intention to be inferred from all the facts and circumstances of the transaction in which the deed was executed, taken in connection with the conduct of the parties after its execution". Montgomery v. Spect, 55 Cal. 352. The unusual situa-

tion is presented of a party asking a court to strictly enforce a technical rule of law in order to lay the foundation for the granting of equitable relief. The appellant ignores the intention of the parties with respect to the delivery of the grant deed and, after invoking a rule of law to establish a delivery in spite of any such intention, argues that the subsequent conduct of the parties discloses a continuing indebtedness and that, therefore, the deed must be held to have been a mortgage. The argument that the bank received the deed as the agent of the respondent is based upon evidence that the bank held a general power of attorney executed by this respondent in 1930, prior to taking a trip abroad, which had never been revoked. If section 1056 of the Civil Code applies at all it provides that a grant cannot be delivered to the grantee conditionally, and it would follow that the deed was delivered on January 28, 1933. It clearly appears, however, that there was no intention to deliver the deed at that time. The court found that in receiving and holding these papers the bank was acting as escrow holder and not as agent of the respondent, and this finding is amply sustained by the evidence. It is admitted that the deed was never delivered to the respondent by the escrow holder and these facts are, in themselves, conclusive.

[2] While the agreement of January 28, 1933, would appear to have been later either modified or abandoned, any possible modification was not merely to continue the relation of debtor and creditor but was to grant further extensions of time and to delay the delivery of the deed. The most reasonable explanation of the subsequent conduct of the parties is that any contemplated delivery of the deed was abandoned, and the court so found. The appellant sought many extensions of time and in his letters continued to refer to the original trust deed as an existing encumbrance held by the respondent. He so referred to it, and asked relief from it, in his petition under the bankruptcy law, and in his action in the superior court he alleged that this trust deed was an encumbrance on his property, that the respondent "is now the beneficiary of said trust deed", that the default thereunder had been cured and that the lien of the trust deed had been extinguished by lapse of time, and prayed for a permanent injunction against any sale under it. He thus attacked the validity of the trust deed in that action and should have raised therein any claim that it had been extinguished by a substituted mortgage. Whether or not the judgment entered in that action should be held to be res adjudicata, it appears from the conduct of the parties that the existence and validity of the trust deed as security for the indebtedness continued to be recognized up to the time a sale thereunder took place. Many months later this action was brought and the evidence and the justifiable inferences therefrom fully support the findings and conclusions of the court.

The judgment is affirmed.

I concur: MARKS, J.

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28 Cal.App.2d 294

PEOPLE v. SPAHN.

Cr. 369.

District Court of Appeal, Fourth District, California.

Aug. 25, 1938.

1. Criminal law 🔑406(6)

In prosecution for robbery, accused's admission that accused at a place other than where robbery was committed had turned his head that he might not see accomplice break into a garage, and evidence that accused first denied and later admitted that he and accomplice returned to town where robbery was committed, were admissible against accused.

2. Robbery 🔑24(1)

Evidence sustained conviction of robbery with deadly weapon where act of robbery was committed by accomplice.

3. Criminal law 🔑369(2)

In prosecution for robbery committed by accomplice, evidence, that accomplice broke into a garage to and from which accused and accomplice had ridden in accused's automobile a few hours before the commission of the robbery, was admissible to show accused and accomplice were together on day and night robbery was committed.

4. Criminal law ⚿369(2)

That evidence of one offense may tend to establish the commission of another does not render such evidence inadmissible.

5. Criminal law ⚿1178

Question whether refusal to give accused's requested instructions was error, was not presented for decision where no argument on such question was submitted on appeal.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

John Spahn was convicted of robbery with a deadly weapon, and he appeals.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

GORDON THOMPSON, Justice pro tem.

John Spahn and one Raymond Peterson were jointly charged in an information filed by the district attorney of San Bernardino county, with the crime of robbing one C. H. Oliver of the sum of $15, and with perpetrating said robbery by means of a deadly weapon, to-wit, a pistol. A second information filed charged both defendants with the crime of burglary. At the trial both defendants were acquitted of the burglary charge and Peterson was convicted of robbery with a firearm. The jury disagreed as to the codefendant Spahn. He was later retried on the robbery charge and the jury returned a verdict finding him guilty as charged. Defendant Spahn has appealed from the judgment and the order denying his motion for a new trial.

Appellant urges: (1) Insufficiency of the evidence to justify the conviction; (2) error committed by the court in the reception of evidence; and (3) error of the court in refusing to give four of appellant's requested instructions.

The evidence discloses a meeting of the appellant and Peterson in the city of Los Angeles. Both started for Yermo, California, in a Chevrolet automobile owned by appellant. During this trip they went through Victorville, California, but did not stop. Approximately 5 o'clock in the evening they stopped at a place known as Miller's Garage. Peterson alighted from the automobile and broke into the garage. As the proprietor arrived, Peterson dropped the articles he had taken and went to the automobile, which was driven away by appellant. At the first trial, a part of which record was read in evidence, appellant testifid that he did not see Peterson break into the garage, as he had turned his head. He admitted that the only reason he turned his head was so he could not see Peterson break into the garage.

Later in the evening both Peterson and appellant drove back to Victorville where appellant parked his automobile immediately across the street from the liquor store known as the "Barrell House". Peterson entered the Barrel House and at the point of a gun robbed the proprietor of the sum of $15. There is no conflict in the evidence as to appellant and Peterson being together on the night of the robbery. There is, however, some conflict as to where the automobile was parked. Appellant testified the automobile was some distance away from the Barrel House where Peterson went to get some cigarettes. The proprietor, however, testified that the automobile was parked across the street.

[1, 2] Following the robbery, Peterson and appellant were apprehended in Barstow, California. Upon being questioned, appellant first denied having returned to Victorville, but later admitted that he and Peterson had returned there for the purpose of getting gasoline and groceries. He denied having parked his automobile across the street where it was observed by the proprietor of the Barrel House. Appellant was seen before the robbery was committed with Peterson, who was identified as the one who actually committed the robbery. He was near the scene of the robbery when committed. He drove Peterson from the scene. The jury was also entitled to consider the false statement made by appellant in first denying that he had returned to Victorville and then admitting that he had, together with the conduct of appellant at the time when he especially turned his head so as not to see Peterson enter the Miller garage. These were circumstances which could be considered in determining appellant's guilt. People v. Rolfe, 61 Cal. 540. The evidence was sufficient to support the judgment of conviction.

[3, 4] Appellant contends that the admission of the testimony of the witnesses Miller and his wife, with reference to the

entry of the garage by Peterson, constituted prejudicial error. We find no merit in this contention. Although both Peterson and appellant were acquitted of the burglary, nevertheless, this attempt was made only a few hours before the commission of the offense here involved. It was competent for the People to show that Peterson and appellant were together on the day and night in question. The fact that evidence of one offense may tend to establish the commission of another, does not render it inadmissible. People v. Nakis, 184 Cal. 105, 193 P. 92.

[5] No argument whatsoever is submitted in support of appellant's contention relative to error of the trial court in refusing to give his requested instructions. Consequently, there is nothing presented for an appellate court to decide. People v. Foss, 7 Cal.2d 669, 62 P.2d 372.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 259

PEOPLE v. YSABEL.

Cr. 435.

District Court of Appeal, Fourth District, California.

Aug. 24, 1938.

1. Criminal law 🔑1202(5)

Where defendant was charged with a felony and with prior convictions of a felony, inability of jury to agree on charge of prior convictions was not an acquittal of such charge. Pen.Code, § 1158.

2. Criminal law 🔑168

The statutory provisions for alleging and proving prior convictions do not have the effect of again placing defendant in jeopardy in connection with former offenses, but merely affect circumstances surrounding commission of new offense, and the resulting increased punishment relates solely to new offense. Pen.Code, §§ 644, 969, 1158; § 969a, as amended by St.1931, p. 1060.

3. Criminal law 🔑1202(4)

Where defendant is charged with an offense and a previous conviction, question of previous conviction, if issue is joined thereon, is fact which must be passed upon by jury. Pen.Code, § 1158.

4. Criminal law 🔑993

Generally, in absence of specific authority, court does not have power, after having once pronounced sentence, to modify judgment in such manner as to increase punishment.

5. Criminal law 🔑1202(6)

Whether or not judgment formally adjudges defendant an habitual criminal, it should disclose facts material to fixing of sentence. Pen.Code, §§ 644, 1158.

6. Criminal law 🔑1202(1)

Where jury returned a verdict finding defendant guilty of charge of felony, but jury was unable to agree on charge of prior convictions and was discharged, and judgment was pronounced and sentence imposed, court had no authority to retry issues relative to prior convictions, by themselves at another time and before another jury. Pen. Code, §§ 644, 969, 1158; § 969a, as amended by St.1931, p. 1060.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Tony Ysabel, also known as Alfredo J. Garcia, was charged with the crime of escape and with two prior convictions of felony. The jury returned a verdict finding defendant guilty of escape, but jury was unable to agree on charge of prior convictions. Proceedings for retrial of charge of prior convictions was dismissed, and the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and D. H. Wolford, Deputy Dist. Atty., both of Brawley, for the People.

W. I. Wilson, of Brawley, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of escape, a felony, and with two prior convictions of felony. After a plea of not guilty and a denial of the prior convictions he was tried with a jury on May

2, 1938. The jury returned a verdict finding him "guilty of escape as charged in the information", but was unable to agree on the prior conviction charges. The jury was discharged, the time for pronouncing sentence was fixed for May 6, 1938, and, over the objection of the defendant, the cause was "set for retrial at this time for Monday, May 16, 1938, on the question of prior convictions".

On May 6, 1938, judgment was pronounced, sentencing the defendant to imprisonment in the state prison at Folsom, and it was also ordered that he "be held in the county jail until the further trial of the case on May 16, 1938". The matter came on for retrial on that date, before another judge. Counsel for defendant then moved "that all further proceedings in this case be dismissed, particularly the going to trial at this time, upon the ground that the court has no further jurisdiction in this case". After argument the court granted the motion and entered an order that "the further proceeding upon the matter of prior convictions will be dismissed". From this order the People have appealed.

The appellant, in arguing that the order of dismissal was erroneous, contends that the failure of the jury to find on the prior conviction charges did not operate as an acquittal thereon, and that the court was not divested of jurisdiction to retry the respondent on these charges. It is respondent's contention that the failure to find was in effect an acquittal on the prior conviction charges and also that the court, having accepted the verdict on the escape charge, was without jurisdiction to retry the other charges.

[1] While it has been held in a number of cases that a general verdict of guilty, without mentioning a prior conviction charge, is a verdict in favor of the defendant on the latter issue (People v. Dueber, 34 Cal.App. 686, 168 P. 578; People v. Cordosco, 77 Cal.App. 780, 246 P. 461; In re Daniels, 119 Cal.App. 350, 6 P.2d 549; People v. Eppinger, 109 Cal. 294, 41 P. 1037), it cannot be held that the same result obtains where it affirmatively appears that a jury has been unable to agree on such an issue and has been discharged. People v. Lavine, 115 Cal.App. 289, 1 P.2d 496. The failure of this jury to find thereon was not an acquittal on the prior conviction charges. The real question presented is whether the court had the authority or jurisdiction to accept a partial verdict and, after pronouncing sentence, to proceed to retry the prior conviction issues at another time and before another jury, thus dividing the issues and trying them piecemeal.

[2-4] It is well settled that the statutory provisions for alleging and proving prior convictions do not have the effect of again placing a defendant in jeopardy in connection with the former offenses but merely affect the circumstances surrounding the commission of a new offense, and the resulting increased punishment relates only to the new offense. The matter of a previous conviction is a question of fact which is material to the aggravated offense for which the defendant is being tried and, if issue is joined, is one of the facts which must be passed upon by a jury. People v. Coleman, 145 Cal. 609, 79 P. 283. Being a material fact which affects the nature of the new offense it is not only one which should be tried therewith, but it is one which should be reflected in the judgment pronounced in order that the proper sentence may be determined. Ordinarily, in the absence of specific authority, a court has not the power, after having once pronounced sentence, to modify its judgment in such a manner as to increase the punishment. In re Garrity, 97 Cal.App. 372, 275 P. 480. See, also, In re Fontino, 135 Cal.App. 466, 27 P.2d 413. This should also be true where the modification of the judgment depends upon further findings of fact, particularly upon issues which had been presented and which should have been decided as a basis for the first judgment. It was here argued that to retry these issues as to previous convictions would make no change in the judgment which had been pronounced, and that all that remained after such a retrial was for the court to certify a fact which could be used by the prison board in determining the length of the sentence. However, a subsequent finding that the prior convictions had occurred, if valid and effective, would materially modify the facts represented in the judgment and furnish the basis for an increased punishment.

[5] It is necessary that the requisite facts be found, and whether or not the judgment formally adjudges the defendant an habitual criminal, it should disclose the facts material to the fixing of sentence. In the case of In re Boatwright, 216 Cal. 677, 15 P.2d 755, it was suggested that the better practice was for the court to make such

a formal adjudication. In People v. Vaile, 2 Cal.2d 441, 42 P.2d 321, relied upon by the appellant, it was held that while such a formal adjudication should be made it was not essential if the judgment as entered disclosed the necessary facts. In that case a second judgment pronounced after section 969a of the Penal Code was amended in 1931, St.1931, p. 1060, was not approved, but it was merely held that the original judgment was sufficient and that the second added nothing thereto. Nothing in the case is authority for the proposition that material facts can be determined after judgment is entered.

[6] Proving prior convictions is a statutory proceeding and the answer to the question before us must depend upon the meaning of the pertinent statutes. We are unable to find anything, either in these statutes or in the interpretation placed upon them by any of the cases cited, which authorizes a court to determine the facts regarding prior convictions except in connection with and as a part of a prosecution for a new offense. Formerly, a provision existed which, under certain circumstances, permitted such an issue to be raised and decided by another judge or jury, even after sentence had been pronounced. Section 969a of the Penal Code, as added in 1927, St.1927, p. 1064, provided not only that pending indictments or informations could be amended by including charges of subsequently discovered prior convictions but that, at any time after judgment and before the sentence had been served, prior convictions could be set up in a supplemental information, and, if denied, could be passed upon by a jury or by the court if a jury was waived. The latter provision, permitting the submission of the issue of prior convictions to a different jury, was eliminated in 1931 and that section now "provides only for an amendment of a pending indictment or information so as to set forth the prior conviction or convictions". People v. Fewkes, 214 Cal. 423, 6 P.2d 250, 251.

Section 644 of the Penal Code provides that a person convicted of a felony, who has suffered certain convictions of named felonies and served terms therefor, shall be adjudged an habitual criminal and shall suffer what amounts to an increased punishment. Section 969, after setting forth the form in which previous convictions may be alleged in an indictment or information, provides that "all known previous convictions * * * must be charged". Section 969a provides for the amendment of "pending" indictments or informations so as to charge prior convictions which have been discovered and that the defendant shall "promptly" be rearraigned and required to plead thereto, but now contains no provision permitting the raising or trying of issues as to prior convictions after sentence has been pronounced. Section 1158 provides that whenever a previous conviction is charged the jury, if they find a defendant guilty of the new offense charged, "must also", unless the prior conviction charges have been admitted, "find whether or not he has suffered such previous conviction".

We think it clearly appears, especially since the amendment of section 969a in 1931, that the intent of these statutes is that the charge of prior convictions shall be passed upon in connection with the new offense charged and by the same jury. No other procedure is in terms authorized and the whole spirit and intent of these statutes appear to be that a prior conviction charge is to be determined solely as one of the issues in the trial for the new offense. Prior convictions are to be considered for their effect upon the new offense charged and the statute provides that if the jury finds a verdict of guilty as to the new offense, or main issue, it shall also pass upon the other question. This can no longer be done here since the main issue has been determined, the judgment pronounced and the jury discharged. Doubtless a charge of prior conviction may be abandoned, if no verdict thereon is obtained, but where a jury disagrees on that question we are unable to find where any authority has been given the court to segregate the issues by accepting a partial verdict and separately trying one of the facts upon which the jury could not agree. The verdict here rendered was incomplete, but having been accepted in that form the remaining issues could not be tried by themselves, at another time and before another jury. It follows that further proceedings for that purpose were properly dismissed.

The order appealed from is affirmed.

We concur: MARKS, J.; THOMPSON, Justice pro tem.

28 Cal.App.2d 345

COTTINGHAM v. SMITH.

Civ. 6084.

District Court of Appeal, Third District, California.

Aug. 31, 1938.

As Modified Sept. 10, 1938.

Hearing Denied by Supreme Court Oct. 27, 1938.

1. Brokers 🔑84(2)

In action to recover broker's commissions for procuring a purchaser of realty, where evidence showed that purchaser was financially able to pay the price, burden shifted to owner to prove that purchaser was not financially able to purchase the land at the fixed price.

2. Brokers 🔑54

In the absence of an agreement to the contrary, when a broker who is regularly employed to sell realty on specified terms procures a purchaser within the designated term of the contract who is ready, willing, and able to buy the land on the terms expressed, or upon other terms satisfactory to the seller, the broker has earned his commissions.

3. Brokers 🔑49(3)

When a broker who is regularly employed to sell realty on specified terms obtains an offer to purchase the land which contains material conditions not expressed in the contract to sell the land, the offer to purchase is not an unqualified acceptance and the broker is not entitled to his commissions unless the new conditions are accepted by the vendor.

4. Brokers 🔑49(3)

Where ranch was mortgaged for $21,000, owner authorized realty broker to sell ranch for $35,000, broker to receive 5 per cent. commission, and broker obtained purchaser who offered $35,000 on condition that purchaser receive a conveyance free of all incumbrances, and offer further stated that, notwithstanding anything in the offer to the contrary, mortgage "may remain" on the ranch provided that the federal government, which was mortgagee, agree that amount of mortgage be deducted from purchase price and offer was rejected, offer of purchase imposed an additional condition of acceptance so that broker was not entitled to commissions.

5. Contracts 🔑147(1)

The intention of parties which is expressed in written instruments will control the construction of the instruments. Code Civ.Proc. § 1859.

6. Brokers 🔑49(3)

In determining whether a written offer to purchase land unconditionally complied with written authorization of realty broker to sell land so as to entitle broker to commissions for procuring purchaser, the essential statements of both instruments should be considered as a whole to ascertain the intent of the parties. Code Civ.Proc. § 1859; Civ.Code, § 1641.

7. Contracts 🔑152

The language of a contract is to govern its interpretation if it is clear and explicit, and when it does not lead to an absurdity. Civ.Code, § 1638.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by W. W. Cottingham against Gertrude H. L. Smith to recover a broker's commission for procuring a purchaser of real property deemed to be ready, willing, and able to buy defendant's land upon the terms of a written contract therefor. Judgment for plaintiff, and defendant appeals.

Affirmed in part and reversed in part, with directions.

H. L. Preston and Lilburn Gibson, both of Ukiah, and Leo L. Schaumer, of Los Angeles, for appellant.

Charles Kasch, of Ukiah, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against her for broker's commissions for procuring a purchaser of real property deemed to be ready, willing and able to buy the land upon the terms of a written contract therefor.

It is claimed the findings and judgment are not supported by the evidence for the reason that there is a fatal variance between the vendor's contract to sell and the written offer to buy the real property.

The defendant owned the "Fountain Ranch" in Mendocino county, consisting of 2862 acres of farm land, subject to a mortgage of $21,000 held by the Federal Land Bank. The plaintiff is a duly licensed real estate broker residing at Ukiah. March 17, 1937, the defendant executed and delivered to the plaintiff the following written agreement to sell her ranch:

"I, Gertrude G. L. Smith hereby give to W. W. Cottingham the exclusive right to sell or exchange my ranch at any time within the next 60 days from the above date for the sum of $35,000.

"The said ranch is located in Mendocino County about four miles southwest of Hopland and known as the old Fountain Ranch or the Smith Ranch, consisting of 2862 acres, together with all improvements, farm implements and equipment.

"In event of exchange or sale within said time, W. W. Cottingham is to receive a full 5% commission of the sale price. At any time after the expiration of this agreement, should the ranch be sold to any person or persons contacted by Mr. Cottingham, he is to receive a full 5% commission of the sale price.

"(Signed) Gertrude H. L. Smith,
"Charles T. Smith, Jr."

May 14, 1937, the plaintiff procured Frank B. Cook to submit an offer in writing to purchase the ranch for the sum of $35,000. Cook's offer was bona fide in every respect, but it includes a condition not contained in the defendant's agreement to sell the land. With the offer he deposited his check for $500 to bind the bargain. His agreement reads:

"To Gertrude H. L. Smith and to W. W. Cottingham, her agent:

"I hereby make you a bona fide offer of $35,000.00 in lawful money of the United States of America as and for the purchase price of that certain ranch owned by Gertrude H. L. Smith located in Mendocino County about four miles southwest of Hopland and known as the old Fountain Ranch or the Smith Ranch, consisting of Two thousand eight hundred sixty-two (2862) acres, together with all improvements, farm implements and equipment. I also herewith tender to you the sum of $500.00 as a down payment on the purchase price of said ranch in the event that my offer is accepted. This offer is good for thirty days from date hereof and if you fail within said period of thirty days to deliver to me a grant, bargain and sale deed to said premises conveying the same to me free and clear of all incumbrances, I may withdraw this offer and withdraw my deposit at my option, in which event I am to be immediately and automatically released from any and all further obligation hereunder. It is understood that anything hereinabove to the contrary notwithstanding, that the Government loan now on said premises, exclusive of any penalties or delinquencies thereon may remain on said property in the event that the said United States Government authorities agree and that the amount thereof is to be deducted from the amount of the purchase price actually paid to you.

"It is particularly understood that my offer of $35,000.00 is the total amount of my offer for the entire premises and equipment.

"(Signed) Frank B. Cook."

The defendant rejected Cook's offer to purchase the land and sold it to another person at an increased price.

The only question which is involved on this appeal is whether Cook's offer to purchase the property is in substantial compliance with the terms of the defendant's contract with plaintiff so as to entitle the broker to his commissions for procuring a purchaser ready, willing and able to buy the land *on the terms prescribed.* This question must be determined by construing together the terms of the two instruments which are involved in the proposed sale of the land. The appellant's opening brief correctly states the rule applicable to the present situation as follows:

"Whatever right the respondent has in this matter must be determined from a consideration of the two instruments, to-wit: the plaintiff's contract with Mrs. Smith, and the written offer submitted by Mr. Cook. If Mr. Cook's offer is strictly in accordance with Mr. Cottingham's contract with Mrs. Smith than Mr. Cottingham is entitled to his money. If Mr. Cook's offer is anything less than or different from those terms contained in the written authorization from Mrs. Smith to Mr. Cottingham, then Mr. Cottingham cannot recover. The issue is clean cut."

We therefore assume the appellant does not now contend that Cook was not ready, willing and able to buy the defendant's land for $35,000. The defendant's attorney stipulated at the trial that "Frank B. Cook was ready, able and willing to buy the property * * * for $35,000". During the course of the trial the defendant asked permission to withdraw that stipulation, which was denied. The court adopted a finding to the effect that Cook was ready, willing and able to purchase the land for $35,000, in the following language:

"Frank B. Cook was ready, able and willing to make good his said offer and the court further finds that at the date of said offer by the said Frank B. Cook he, the said Frank B. Cook had gross assets of the reasonable value of Sixty Thousand ($60,000.00) Dollars and that the indebtedness of the said Frank B. Cook on said day amounted to Four Thousand ($4,000.00) Dollars, and that at said time the said Frank B. Cook had Eight Thousand ($8,000.00) Dollars in cash."

[1] The evidence with relation to Cook's financial ability to pay $35,000 for the land is conflicting. There is, however, substantial evidence to support a prima facie showing of his financial ability to raise $35,000 with which to pay for the land. In view of that prima facie showing the burden shifted to the defendant to prove that Cook was not financially able to purchase the land at that figure. Russell v. Ramm, 200 Cal. 348, 254 P. 532; Hersh v. Garau, 218 Cal. 460, 23 P.2d 1022. The defendant failed to sustain that burden. The finding that Cook was financially able to purchase the land for $35,000 is therefore adequately supported by the evidence.

We shall devote our attention to a construction of the two instruments involved in this controversy to determine therefrom whether Cook's offer to purchase the land substantially conforms to the essential terms of the defendant's contract with the plaintiff so as to entitle him to his broker's commissions for securing a purchaser ready, willing and able to buy the land on the terms of the contract.

[2-4] It is the established rule of law in this state, in the absence of an agreement to the contrary, that when a broker who is regularly employed to sell real property on specified terms, procures a purchaser within the designated term of the contract who is ready, willing and able to buy the land on the terms expressed, or upon other terms satisfactory to the seller, he has earned his commissions. Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542; 4 Cal.Jur. 583, sec. 25. If the offer to purchase the land contains material conditions not expressed in the contract to sell the land, it is not an unqualified acceptance and the broker is not entitled to his commissions unless the new conditions are accepted by the vendor. Colton v. O'Brien, 217 Cal. 551, 20 P.2d 43. The question to be determined in this case is whether the written offer of Mr. Cook to purchase the land contains a condition which was not contemplated by the defendant in her agreement to sell the property. We think a fair construction of the two documents impels us to hold that an entirely new condition of acceptance was included in the offer to purchase the land, and that the broker therefore failed to earn his commissions.

[5-7] It is true that the intention of the parties expressed in written instruments will control the construction thereof. Sec. 1859, Code Civ.Proc. The essential statements of both instruments should be considered as a whole in determining the intention of the parties with relation thereto. Sec. 1641, Civ.Code; Balfour v. Fresno Canal & Irr. Co., 109 Cal. 221, 41 P. 876; 6 Cal.Jur. 258, sec. 165. The language of a contract is to govern its interpretation, if it is clear and explicit, and when it does not lead to an absurdity. Sec. 1638, Civ. Code. With the foregoing rules in mind, we have carefully examined the two documents to ascertain the intention of the respective parties with relation to the terms thereof. It is clear and undisputed that the defendant signed and delivered to the plaintiff her written agreement on March 17, 1937, to sell her 2862-acre Mendocino ranch, within 60 days from that date, for $35,000. She had previously mortgaged that land to the Federal Loan Bank to secure a debt which then aggregated the approximate sum of $21,000. It appears that in securing that federal loan it became necessary for the defendant to join the National Farm Loan Association which issued to her certain shares of its capital stock, which shares, by the express terms of the mortgage, were hypothecated to the mortgagee as additional collateral security for the debt, and that the shares were to be automatically transferred to any subsequent purchaser of the mortgaged premises. The mortgage provides in that regard:

> "In case the property hereinbefore described is sold or transferred by the grantor, his heirs or assigns, or by operation of law, *the National Farm Loan Association guaranteeing the payment of this loan may transfer on its books to the new owner the capital stock in said Association* held by said Association as collateral security in connection with its endorsement of this loan whether said stock was or was not transferred to said new owner, *said stock,* while outstanding, *being hereby declared to be appurtenant to said property."*

It will be observed that the defendant's contract to sell the land neither refers to the Federal Loan Bank mortgage, consenting that it may remain as a lien on the property with whatever personal obligation against her that it created, nor does it mention the sale or transfer of the capital stock which she owned in the National Farm Loan Association as an incident to the transaction of sale of the land. Since her selling price of the land was specifically fixed at $35,000, without mentioning either the mortgage or the capital stock, it is reasonable to assume she contemplated selling the ranch for cash with the intention of satisfying the mortgage lien so as to absolutely relieve her from the burden of that obligation in case of a deficiency judgment or otherwise, and that she did not propose to convey her stock in the Association as a necessary incident to the transaction of selling her land. In spite of the defendant's omission to mention in her contract the existing mortgage or the capital stock, Mr. Cook, after first clearly declaring in his written offer to purchase the land that:

"I hereby make you a bona fide offer of $35,000.00 in lawful money * * * as and for the purchase price of that certain ranch owned by (you) * * * This offer is good for thirty days from date hereof and if you fail within said period * * * to deliver to me a grant, bargain and sale deed to said premises *conveying the same to me free and clear of all incumbrances,* I may withdraw this offer * * * at my option",

deliberately nullified the preceding unqualified language by immediately thereafter saying:

"It is understood that anything hereinabove to the contrary notwithstanding, that the Government loan now on said premises, exclusive of any penalties or delinquencies thereon *may remain on said property* in the event that the said United States Government authorities agree *and that the amount thereof is to be deducted from the amount of the purchase price actually paid to you."*

Apparently the preceding paragraph was a deliberate attempt to inject into the offer to buy the land a condition that it was to be purchased *subject to the mortgage.* In the cross-examination of Mr. Cook the following colloquy occurred regarding that subject:

"Q. In other words, you was paying the difference between the $35,000 in cash, spot cash, and the Federal Land Bank mortgage? A. That's correct."

The respondent contends that the preceding quoted language because of its use of the word "may" is a mere permissive statement that the federal mortgage might remain on the property subject to the option of the vendor of the land, and that it therefore creates no new condition of purchase not contained in the defendant's contract with the plaintiff. We are unable to so construe the paragraph. That construction would render meaningless the sentence, "It is understood that anything hereinabove to the contrary notwithstanding", etc. The last-quoted language seems to imply that the foregoing unqualified *offer* to pay $35,000 upon the receipt of a deed to the property *free and clear of all incumbrances* was not to be controlling, but upon the contrary that "It is understood * * * the Government loan now on said premises * * * may remain * * * *in the event that the * * * Government authorities agree,* and that the amount thereof *is to be deducted* from the amount of the purchase price actually paid to you." Reading the entire context of Cook's offer it seems clear that he takes great pains to declare that in spite of what he previously said "it is (to be) understood" that he is only willing to buy the land subject to the federal lien, if the government agrees to permit the mortgage to remain against the land, and that he will then pay the defendant only the sum of $35,000 less the amount of the existing mortgage and accrued interest thereon. The last-quoted paragraph appears to be a very definite proposition to buy the land subject only to the mortgage remaining as a lien against it, provided the government consents to that procedure. The word "may" seems to have been used in a mandatory sense. It will be observed the written offer to purchase the land does not confer upon the defendant any option to decide whether the mortgage shall remain as a lien against the property. The declaration that it *may* remain, apparently means that it *shall* remain, and that the amount of the mortgage *will* be deducted from the selling price of the land. This plan is dependent only upon procuring the consent of the government, which holds the mortgage. The defendant has no option whatever to determine whether the mortgage shall remain as a lien against the property.

We are therefore convinced Mr. Cook's written offer to purchase the land is subject to an essential condition not contained in the defendant's contract with the plaintiff, and that it does not constitute a binding bargain to purchase the land on the terms of employment so as to entitle the broker to his commissions. We are of the opinion the evidence does not support the findings and judgment to the effect that the plaintiff procured a purchaser of the land who was willing to buy the property *on the essential terms* designated in the defendant's contract of sale.

It is conceded the plaintiff is entitled to judgment for the sum of $47.50 for money advanced to Mrs. Smith. With respect to that item the judgment is affirmed. Otherwise, the judgment is reversed, and the court is directed to render judgment in favor of the defendant. The appellant may recover her costs on appeal.

I concur: PULLEN, P. J.

28 Cal.App.2d 271

TALBOT v. CITY OF PASADENA et al.

Civ. 11824.

District Court of Appeal, Second District, Division 2, California.

Aug. 25, 1938.

1. Judgment 🔑948(2)

Complaint was not demurrable on ground that plaintiff had brought two prior actions to recover on same claim, where such facts did not appear on the face of the complaint.

2. Limitation of actions 🔑34(2)

The statute providing that an action on a liability created by statute, other than a penalty or forfeiture, must be brought within three years, will run against a claim for accrued pension payments due under city charter provisions regarding firemen's pension funds. Code Civ.Proc. § 338, subd. 1.

3. Pleading 🔑225(1)

The fact that some of the accrued pension payments sought to be recovered under city charter provisions regarding firemen's pension funds were, on the face of the complaint, barred by limitation, did not justify an order sustaining a demurrer without leave to amend. Code Civ.Proc. § 338, subd. 1.

4. Municipal corporations 🔑187

Complaint, in action to recover accrued pension payments under city charter provisions regarding firemen's pension funds, was not demurrable on ground that it stated no cause of action for recovery of payments accruing after date prior to which limitation barred recovery because no claim for benefits had been again presented to and rejected by proper city authorities after that date, since any claims made for pension prior to accruals which would be barred by limitation were applicable to those which would not be barred. Code Civ.Proc. § 338, subd. 1; St.1933, p. 2783, § 12.

5. Municipal corporations 🔑187

Complaint, in action to recover accrued pension payments under city charter provisions regarding firemen's pension funds, was demurrable, in so far as applicable to fire and retirement board of city and all other defendants except city itself, because of fact that plaintiff's sole remedy as to those defendants was mandamus proceeding.

6. Municipal corporations 🔑187

Complaint, in action to recover accrued pension payments for past six years under city charter provisions regarding firemen's pension funds, was not demurrable on ground that action was barred by laches, since laches could not apply to recent accruals.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Ida May Talbot against the City of Pasadena and others to recover trust funds allegedly held for benefit of plaintiff under charter provisions of the City of Pasadena regarding firemen's pension funds. From a judgment sustaining a demurrer to the complaint without leave to amend, the plaintiff appeals.

Judgment reversed as to the City of Pasadena and affirmed as to all other defendants.

Martin E. Geibel, of Los Angeles, for appellant.

Harold P. Huls, City Atty., and Thomas W. LeSage, Deputy City Atty., both of Pasadena, for respondent City of Pasadena.

CRAIL, Presiding Justice.

This is an appeal from a judgment sustaining a demurrer to a fourth amended complaint without leave to amend.

This fourth amended complaint was a suit to recover trust funds alleged to be held for the benefit of plaintiff under charter provisions of the City of Pasadena regarding firemen's pension funds. The action is brought for the recovery of the pension due to the plaintiff, a widow of Edgar R. Talbot, a deceased fireman, who it is alleged died within one hundred days after injury as a result of a wetting received in extinguishing a fire, which brought on influenza and developed into bronchial pneumonia.

The complaint states a cause of action unless it be for the reasons set forth in the defendant's brief and which are hereinafter referred to.

[1] The defendant first sets forth that the plaintiff has brought two prior actions to recover the same pension, numbers 319334 and 369043 of the superior court. The defendant says that the first of said cases was an application for a writ of mandamus which was tried in said court in July of 1932, and that after a full and fair hearing on the merits it was decided by said court that Edgar R. Talbot, deceased husband of the plaintiff herein, did not die as a result of injuries arising out of his employment as fireman of said city but that his death was proximately caused by a heart ailment of long duration and chronic condition, and that consequently the plaintiff is not entitled to the pension she is seeking to recover on this appeal. The answer to this contention is that said facts do not appear upon the face of the complaint, and in order to get this defense before the trial court it will be necessary for the defendant to plead the prior adjudications.

[2, 3] The defendant's next contention is that as the plaintiff's suit was filed on April 15, 1936, and alleges that Edgar R. Talbot died on April 15, 1930, therefore that all claims for pension payments accruing more than three years prior to the time of filing the complaint are barred by the statute of limitations. The period of limitation prescribed by subdivision 1 of section 338 of the Code of Civil Procedure will run against a claim for accrued pension payments. Hermanson v. Board of Pension Commissioners, 219 Cal. 622, 28 P.2d 21; Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 59 P.2d 104. From the allegations of the plaintiff's complaint all claims for pension payments accrued before April 15, 1933, would be subject to the bar of the statute of limitations. The fact that some of the payments may be barred does not justify an order sustaining the demurrer without leave to amend.

[4] The defendant next contends that the fourth amended complaint fails to state a cause of action for the recovery of any claimed pension payments accruing after April 15, 1933, because said complaint does not allege that the claim for benefit, as to said subsequent accruals, was presented for payment to and rejected by the proper city authorities previous to suit as required by provisions of article 11, section 12, of the Pasadena city charter, Statutes of 1933, page 2783. The defendant thus seeks to divide the plaintiff's cause of action into two parts, the pension which it is alleged accrued prior to April 15, 1933, and the pension which it is alleged accrued thereafter, and contends that there is no new allegation of a demand upon the city for accruals which were subsequent to April 15, 1933. It is true that the claims provisions of a charter apply to applications for a pension. Dryden v. Board of Pension Commissioners, supra. Section 338, subdivision 1, of the Code of Civil Procedure, the statute of limitations which applies, has nothing to do with the claims provisions of the city charter. The defendant cites us to no rule of law, and we know of none, which for the purposes of a demurrer would permit the dividing of a complaint by the statute of limitations, so that any claims made for a pension prior to the accruals which would be barred by the statute of limitations are not applicable to those which would not be barred. The right, if any, to a pension is a continuing one. We do not understand that where the owner thereof has once made proper demand, and the claim is flatly rejected by the city, he must continue to make demands for the accruals on said pension.

[5] The defendant next contends that the plaintiff's sole remedy for the recovery of any claim for pension would be to bring a mandamus proceeding, and it cites the case of Sheehan v. Board of Police Commissioners, 188 Cal. 525, 206 P. 70. In that case the court said (page 73): "The board of police commissioners, whether acting directly as such or acting ex officio as a board of police relief and pension fund commissioners * * * has no separate existence and is incapable of either suing or being sued, except as it may be required as an official body by mandamus to perform its official duties, or except as its official action

may be compelled or enjoined in some other special proceeding." This contention appears to be sound as to the fire and retirement board of the City of Pasadena and as to all other defendants except the City of Pasadena itself. As to all of said defendants except the said city the order of the court sustaining the demurrer without leave to amend will be affirmed.

[6] The defendant's final contention is that the plaintiff's complaint is defective because it does not allege any facts justifying the six-year delay which appears upon the face thereof and that the action is barred by laches, citing Ewald v. Kierulff, 175 Cal. 363, 165 P. 942, and other cases. The answer is that the plaintiff's right to a pension, if any, is a continuing one and that laches would not apply to the accrual, for instance, which occurred in the last month prior to the commencement of the action.

For the reasons stated, the judgment is reversed as to the City of Pasadena and affirmed as to all other defendants. Appellant to recover costs against the city and no other costs to be allowed.

I concur: WOOD, J.

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28 Cal.App.2d 267

SILVERSMITH v. BRAWLEY.

Civ. 11865.

District Court of Appeal, Second District, Division 2, California.

Aug. 25, 1938.

Appeal and error 🔑776

Under statute providing that appellant may abandon appeal by filing written abandonment in office of clerk of trial court, and that parties may effect a withdrawal of appeal by filing in trial court clerk's office stipulation therefor, the filing in such office of written request signed by both parties asking that case be set for trial and stating that it was at issue, coupled with stipulation of parties that appeal from denial of new trial had been dismissed, was sufficient to restore trial court's jurisdiction. Code Civ.Proc. § 954a.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Henry Silversmith against A. D. Brawley. From an order denying plaintiff's motion to vacate judgment on a verdict for defendant, and from an order that a stipulation for dismissal of appeal be filed nunc pro tunc, the plaintiff appeals.

Affirmed.

Carlyle Wynn, of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from (1) an order dated March 1, 1938, denying the motion of the plaintiff to vacate and set aside a judgment on a verdict, and (2) an order that a stipulation providing for the dismissal of an appeal dated October 9, 1936, be filed in the superior court nunc pro tunc as of March 15, 1937.

This case has been tried twice. Each time the jury returned a verdict for the defendant, and judgment was entered thereon. After the first trial the plaintiff moved for a new trial and this motion was granted. On September 4, 1936, defendant filed notice of appeal from the order granting a new trial. No transcript or bill of exceptions was ever filed in the appeal.

On October 9, 1936, the parties agreed to abandon and withdraw the appeal and try the case again in the superior court, entering into the following stipulation: "In the District Court of Appeal, Second Appellate District, State of California. Henry Silversmith, plaintiff and respondent, vs. A. D. Brawley, defendant and appellant. No. * * *. Stipulation to Dismiss Appeal. It is hereby stipulated by and between the parties hereto through their respective attorneys that the appeal now pending in the above entitled Court may and the same shall be ordered dismissed. It is further stipulated that the remittitur shall issue forthwith. Dated this 9th day of October, 1936."

Soon thereafter the parties by their respective counsel signed and filed in the superior court a setting card in which they asked that the case be set in the superior court and in which they stated that "the cause is at issue". On March 5, 1937, the court made a minute order that "by stipulation and order of Court" the case was set down for trial for March 15, 1937. Thereupon the case was again tried before a jury and judgment upon the verdict of the jury entered in favor of the defendant. Motion for new trial was denied.

On August 4, 1937, new counsel was substituted as attorney for plaintiff, who made the motion to vacate and set aside the second judgment. When the matter came on for hearing before the trial court the affidavit of the former attorney for the plaintiff was offered in evidence, which read as follows: "That on or about the 9th day of October, 1936, affiant prepared the stipulation to dismiss the appeal then pending in the District Court of Appeal, Second Appellate District, which said stipulation is annexed to the affidavit of Kenneth J. Murphy, on file herein; that affiant presented the same to the said Kenneth J. Murphy, procured his signature to the same and left him a true copy thereof; that affiant on said day caused to be certified the statement of L. E. Lampton, County Clerk, which said certificate is annexed to the said affidavit of Kenneth J. Murphy, and on said day presented them for filing to the clerk of the said District Court of Appeal; that the said clerk informed affiant that due to the enactment of section 954a of the Code of Civil Procedure in the last session of the legislature it was no longer necessary to bring the matter of the dismissal of an appeal by stipulation, where no record had been prepared or filed, before that court but that the same could be abandoned by the appellant by his filing a written stipulation or abandonment with the clerk of the Superior Court."

There was also presented the affidavit of the attorney for the defendant which read as follows: "That affiant signed the stipulation and immediately returned it to Mr. Brown; that thereafter, to-wit, on the 15th day of March, 1937, which was the trial date on the second trial of this action, affiant appeared at the master calendar department of the Superior Court and answered ready for trial as did both Mr. Werner and Mr. Brown. At said time and said place the presiding judge of the master calendar department noticing the notice of appeal and statement to the clerk in the original file inquired of counsel as to the pending appeal, whereupon Mr. Brown, attorney for plaintiff, stated to the court that a stipulation to dismiss the appeal had been signed and filed by him with the clerk of the District Court of Appeal. *Counsel thereupon, orally stipulated before the presiding judge that the appeal had been dismissed and the presiding judge of the calendar department assigned the case to trial.* * * *"

It is the contention of the appellant that the judgment for defendant of March 18, 1937, was void for want of jurisdiction of the court, and he relies upon Rosenberg v. Bullard, 2 Cal.App.2d 118, 37 P.2d 521, and People v. Sonoqui et al., 1 Cal.2d 364, 35 P.2d 123, and other cases in which the facts are greatly different from the facts of this case.

In 1935 the legislature enacted section 954a of the Code of Civil Procedure, which reads as follows: "At any time before the filing of the record or transcript in the court to which the appeal has been taken, an appellant may abandon the appeal by filing in the office of the clerk of the trial court a written abandonment thereof; and the parties may effect a withdrawal of the appeal by filing in said office the stipulation of their counsel therefor. Upon filing of either such document, the jurisdiction of the trial court over the subject matter of the judgment or order designated in the notice of appeal, will be completely restored."

This section created quite a change with regard to the jurisdiction of the superior court in case of an appeal, for under this section the jurisdiction of the superior court after an appeal might be restored in compliance with said section without the necessity of having the appeal dismissed in the appellate court.

The question for us to determine is whether the conduct and stipulations of the parties and the orders of the court amounted to a substantial compliance with said section 954a.

Under the circumstances of this case, the filing in the office of the clerk of the trial court of a written request signed by both parties asking that the case be set for trial and stating that "it is at issue", along with the stipulation of the parties in writing and also orally before the court that the appeal had been dismissed was a substantial compliance with the section. The minute order of the court of March 5, 1937, recited that the case was set for trial "by stipulation and order of court". This was an order of the court after a discussion about the appeal, a finding in effect that the appeal had been abandoned under the provisions of said section. Although it does not set out said facts in detail, we are of the view that under all the facts and circumstances of this case there was a substantial compliance with said section.

The plaintiff also contends that the order of the court directing that the stipulation in writing dismissing the appeal in the appellate court be filed in the superior court nunc pro tunc as of March 15, 1937, should be reversed. But in view of what we have already held, this question becomes moot, and we shall not enter into any discussion of it.

Orders affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 240

WEIS v. DAVIS.

Civ. 10759.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1938.

Hearing Denied by Supreme Court
Oct. 20, 1938.

1. Automobiles 🔑181(1), 201(8)

In action by prospective purchaser against salesman for injuries suffered while salesman was demonstrating automobile, evidence that salesman turned toward prospective purchaser while driving 72 miles an hour and discussed automobile's performance, and that immediately afterwards automobile struck an approaching automobile, authorized verdict for prospective purchaser on ground that salesman's negligence in failing to watch road was one of the proximate causes of the collision.

2. Automobiles 🔑224(8)

A prospective purchaser of automobile did not, by consenting to salesman's driving automobile at excessive speed during demonstration, assume all risk of injury so as to be barred from recovering for injuries resulting in part from salesman's negligence in failing to watch road.

3. Trial 🔑127

In action arising out of automobile collision, wherein plaintiff's counsel cross-examined defendant's witness on whether she had discussed her testimony with anybody else, and defendant tried on redirect examination to reinforce her negative reply, asking witness on recross-examination whether she had not seen a representative, to which witness answered that she saw "somebody from the insurance company," did not require declaring mistrial.

4. Trial 🔑133(6)

In action arising out of automobile collision, alleged error in plaintiff's eliciting on recross-examination a statement that witness saw "somebody from the insurance company" was cured by instruction that jury should discard from their minds any suspicion that insurance company was interested in this case, and that "there is no insurance company a party to this case."

5. Automobiles 🔑201(8)

In action arising out of automobile collision, defendant's negligent acts other than driving at excessive speed did not become immaterial merely because plaintiff consented to excessive speed and excessive speed was a proximate cause of injury.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Anthony H. Weis against Phil Davis, for injuries suffered in an automobile collision. From a judgment on a verdict for plaintiff, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK and CURTIS, JJ., dissenting.

Elliott Johnson, of Oakland, for appellant.

James R. Agee, of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff sued to recover damages for injuries suffered in an automobile collision. The jury returned a verdict in favor of the plaintiff and from the judgment entered thereon the defendant has appealed.

[1] His first point is that the plaintiff failed to prove by a preponderance of the evidence that there was any negligent act of the defendant which was a proximate cause of the injury suffered by the plaintiff. That point is based on the following facts: On the 16th day of February, 1937, the plaintiff and his brother were attempting to purchase automobiles. They called at the place of business operated by the defendant and plaintiff's brother purchased

a Chrysler automobile for which the defendant was a sales agent. Thereupon negotiations commenced in the course of which the plaintiff and the defendant entered into a discussion of the purchase by the plaintiff of another automobile. The plaintiff wanted a car that would travel approximately 80 miles an hour. He tried a demonstrator car and was not satisfied with the performance. Later the defendant planned to personally conduct a demonstration. At about 4 o'clock in the afternoon the defendant asked the plaintiff to ride with him. The defendant sat at the wheel, the plaintiff sat on his right. The plaintiff's brother, Nicholas, sat behind them. They at once started for the Hagenberger road. It is a paved two lane highway leading from Oakland south to the airport. It is level and straight and has a white line down the center. After leaving Oakland one crosses some railroad tracks and then enters the straight road. Soon after entering the straight road Nicholas Weis testified he looked ahead and saw four cars approaching from the south. The rear car was a coupe. At the time the witness observed the cars they were approximately 750 feet to the south. At the same time the witness made said observation he noted the coupe turn to its left and start toward the defendant's car. At about that moment Nicholas testified the defendant turned toward him (indicating to the court and jury the movement), and made the remark, "Well look here, I am going 72 miles in second gear and that is all you said you could do in high gear." Nicholas further testified that the defendant thereupon turned and pointed towards the speedometer. The witness followed his movements and read the speedometer. It indicated 72 miles per hour. He then looked up and, as he testified, he saw a car directly on top of him. It was the coupe. The transcript contains photographs of the road. One shows the road looking to the south and the other one shows it looking to the north. Except as to the objects we have mentioned there was evidence that there were no other obstructions to the view. The defendant testified he did not see but one car. He testified he did not see it until it was 100 feet distant. He did not apply his brakes until he was 30 feet distant from the coupe. He did not slacken his speed at any time. His car proceeded forward and struck the coupe, which at that time was still turning to the left. Conceding that there was evidence in the record from which it might be contended the defendant was not negligent, it is quite clear from the foregoing statements that there was evidence from which the jury could draw the conclusion one of the proximate causes of the collision was the negligence of the defendant in failing to keep his eyes on the road in front of him.

[2] The second contention of the defendant is that the high rate of speed at which his automobile was traveling and which was consented to by the plaintiff was a proximate cause or concurring proximate cause of plaintiff's injury and he, by his consent to the speed, assumed all risk of injury and therefore was not entitled to recover. That contention is too broad. Graff v. United Railroads, 178 Cal. 171, 176, 172 P. 603. The defendant asserts that his contention is flatly based on an instruction that has been duly approved by the courts of this state. He claims it was so approved in Valencia v. San Jose Scavenger Co., 21 Cal.App.2d 469, 471, 69 P.2d 480. That case involved a collision between a garbage truck and a Ford "pick up" truck. The latter car was being driven by de Los Rayes. He commenced an action for damages. Valencia and Tigero were riding with him and were seated at his side. They commenced an action for damages. The two actions were consolidated. At the request of the defendant in that case the trial court instructed the jury as follows: "If you find from the evidence that the plaintiffs' car was operated at a dangerous and excessive rate of speed which excessive rate of speed was a proximate cause of the collision, and you further find that the plaintiffs Valencia and Tigero knew the car was being so operated and consented thereto, then I instruct you that the further issue of what the defendant did or failed to do is no longer of any consequence since the plaintiffs are not entitled to recover, should you so find." As applied to the case that was then on trial it was held said instruction was not an erroneous statement of the law. We have no quarrel with that decision. In the instant case it is quite clear the facts that the defendant turned and looked to the rear when his car was traveling 72 miles an hour and that he then turned and looked at the speedometer with such a degree of attention he did not see four automobiles approaching from in front of him presents a very different combination of facts. Granting that the plaintiff assumed

the risk of traveling 72 miles an hour, there was nothing in the record showing he assumed the additional risks just mentioned above. Graff v. United Railroads, supra.

[3, 4] The defendant next contends that counsel for plaintiff was guilty of prejudicial misconduct in knowingly developing testimony to bring before the jury the fact that the defendant carried liability insurance. We think there is no merit in the point. It arose in this manner. Mrs. Latimer was an employee of the defendant. She was called as one of his witnesses. In reply to questions by defendant's counsel she testified to declarations made by Nicholas Weis to the effect that the accident was not the fault of Davis. That declaration was made, she claimed, later during the afternoon on the day of the accident. On cross-examination she was asked if she had discussed her testimony before coming into court with anybody. She replied she had not. On redirect examination, by a series of questions, the defendant sought to reinforce that statement. On recross-examination the following proceedings were had:

"By Mr. Agee: Q. Before Mr. Johnson got into the case, you did see a representative, in this matter, I understand, did you not? A. I saw somebody from the insurance company.

"Q. You did? A. Yes.

"Mr. Agee: That is all."

Thereupon the defendant made a motion for a mistrial. The motion was denied. Later, when instructing the jury, the trial court gave an instruction as follows: "If in this case you have gathered from the testimony or from any question asked, or any remark made by any counsel in the case, or by the Court, or from any other source whatsoever, that any accident insurance company is interested in this case, you must, under your oaths, entirely discard the same from your minds in arriving at your verdict. You are only concerned with the plaintiff and the defendant herein, and your verdict must be solely determined as between those parties and none other. There is no insurance company a party to this case." We think there was no error, however, if there was, it was clearly invited. Moreover, the error, if any was certainly cured by the instruction given by the court.

[5] The last point made by the defendant is that the trial court committed prejudicial error by refusing to instruct the jury that all other negligent acts of the defendant became immaterial if the plaintiff consented to excessive speed and further found that excessive speed was found to be a proximate cause of plaintiff's injury. The instruction referred to was closely paraphrased from the instruction numbered seventy set forth in Valencia v. San Jose Scavenger Co., supra. As hereinabove set forth we think the rule of law was not pertinent to this case and that the decisions of our own courts have so held. The same holding is to be found in other jurisdictions. National Motor Vehicle Co. v. Kellum, 184 Ind. 457, 109 N. E. 196, 199; Liston v. Reynolds, 69 Mont. 480, 223 P. 507, 508.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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28 Cal.App.2d 315

PEOPLE v. ENGLEHARDT.

Cr. 438.

District Court of Appeal, Fourth District, California.

Aug. 26, 1938.

Rehearing Denied Sept. 8, 1938.

1. Criminal law 🔑1081

The statutory requirement that written notice of appeal be filed within two days after rendition of judgment is mandatory and jurisdictional. Pen.Code, § 1239.

2. Time 🔑9(1), 10(1)

The ordinary rule for computing time within which a required act must be performed is to exclude the first day and include the last day, unless the last day falls upon a holiday, in which case the last day is also excluded.

3. Time 🔑9(8), 10(9)

The rule for computing time within which a required act must be performed, which excludes the first day and includes the last day, unless the last day falls upon a holiday, in which case the last day is also excluded, applies to appeals in criminal cases where the last day for filing notice of appeal falls upon a Sunday. Pen. Code, § 1239; Pol.Code, §§ 10, 12, 13.

4. Time ⚿10(9)

Under statute requiring notice of appeal to be filed within two days after judgment, where second day fell on Saturday, which by statute is a half holiday from noon, notice of appeal filed on the following Monday was not filed within required time and appeal was required to be dismissed. Pen.Code, § 1239; Pol.Code, §§ 10, 12, 13, 3259; Const. art. 6, § 5.

5. Criminal law ⚿1081

Under statute requiring notice of appeal to be filed within two days after judgment, where second day fell on Saturday, the leaving of a written notice at the home of clerk of trial court with clerk's wife, about 10 o'clock at night when clerk was not at home, was insufficient, especially in view of lack of any showing that clerk received the notice before midnight. Pen.Code, § 1239; Pol.Code, §§ 10, 12, 13, 3259; Const. art. 6, § 5.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Adolph Henry Englehardt was convicted of bigamy, and he appeals.

Appeal dismissed.

Morris Lavine, and Gladys Towles Root, both of Los Angeles, for appellant.

James B. Abbey, Dist. Atty., Frank T. Dunn, Asst. Dist. Atty., and William P. Mahedy, Deputy Dist. Atty., all of San Diego, for the People.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal upon the ground that written notice of appeal was not filed with the clerk of the court within two days after the rendition of the judgment, as required by section 1239 of the Penal Code.

It appears from the certificate of the clerk of the trial court that the defendant was, on June 7, 1938, found guilty of the crime of bigamy by the verdict of a jury; that no motion for a new trial was made; that time for the pronouncing of judgment was set for June 11, 1938; that an application for probation was made and the hearing thereon set for July 7, 1938; that at that time, the defendant being represented by an attorney, his application for probation was denied and judgment pronounced; that no oral notice of appeal was announced in open court; and that notices of appeal were filed on July 11, 1938, and July 12, 1938, respectively, copies of these notices being attached to the certificate.

It appears that July 9, 1938, the second day after judgment was pronounced, fell on Saturday. On the hearing of this motion the affidavit of one of the attorneys for the defendant was filed in this court, from which it appears that a notice of appeal, signed by the defendant, was left at the home of the clerk of the trial court at 9:40 p. m. on Saturday, July 9, 1938. It is contended that the notice of appeal filed on July 11, was filed within the time allowed and also that the leaving of such a notice at the home of the clerk on Saturday night constituted a substantial compliance with the statute and was, therefore, effective to give this court jurisdiction of the appeal.

[1] The first question presented is whether the notice of appeal filed on Monday, July 11, 1938, is effective. The statute requires such a written notice to be filed "within two days after the rendition of judgment." This provision has been held to be mandatory and jurisdictional. People v. Lewis, 219 Cal. 410, 27 P.2d 73. In that case the court said (page 74):

> "The time for filing notice of appeal cannot be extended by stipulation or other action of the parties to the proceeding, or by order of the court. See cases cited, supra. The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. Where, through inadvertence or mistake of a party or his attorney, notice is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice."

[2, 3] The ordinary rule for computing the time within which a required act must be performed is to exclude the first day and include the last day, unless the last day falls upon a holiday, in which case the last day is also excluded. Sec. 12, Pol.Code; Payne v. Hunt, 214 Cal. 605, 7 P.2d 302. That rule has been applied in connection with appeals in criminal cases where the last day fell upon a Sunday. People v. Malone, 213 Cal. 406, 2 P.2d 332; People v. Martino, 112 Cal.App. 548, 297 P. 965. We are now confronted with the question whether, when the last day falls upon Saturday, that day should also be excluded. Section 13 of the Political Code provides that whenever any

act is to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day. Section 10 of that code provides that every Saturday from 12 o'clock noon until 12 o'clock midnight is a holiday as regards the transaction of business in public offices of this state. In commenting upon statutory provisions essentially like the provisions of sections 10 and 12 of the Political Code, to which we have referred, the court in Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486, said (page 488):

"The provision is that the 'last day' must be included in the computation, unless such '*last day* is a holiday.' This means, under any fair construction, the *whole* of the day. Only a *portion* of the day was even the limited kind of a holiday prescribed for Saturdays by section 10, Code of Civil Procedure, viz., that portion 'from twelve o'clock noon until twelve o'clock midnight,' and the superior court was certainly open for the transaction of any and all business for at least a portion of the day. Const. § 5, art. 6. A day is defined by our law as being 'the period of time between any midnight and the midnight following' (section 3259, Pol.Code), and no rule of construction of which we are aware would warrant us in reading section 12 as excluding the last day, unless it was a holiday during the whole period of its existence."

In Starr v. Superior Court, 23 Cal.App. 670, 139 P. 241, where the court had held that an undertaking on appeal, the last day for filing which fell on Saturday, might be filed on Monday, the court said:

"If the ruling is correct, it must follow that where the last day for the performance of an act, such as the filing of a demurrer, answer, or service of a paper, falls upon Saturday, such act need not be done on Saturday, but may be as effectually performed on the following Monday, the effect of which ruling is to declare all of Saturday a holiday. Clearly, this was not the intent of the Legislature. The effect of the statute declaring Saturday from 12 o'clock noon to be a half holiday is to shorten in number the hours of such day during which the act required to be performed shall be done. Up to noon it is a business day, the same as any day other than those designated in section 10, Code of Civil Procedure, as holidays, and the fact that the business day ends at noon does not extend the time for performance of an act where the time therefor expires on such shorter day. The statute is peremptory in its terms and provides that, upon a failure of the sureties to justify within the time fixed therefor, the appeal shall be regarded as though no undertaking had been given. [Citing cases.] It follows that the court had no jurisdiction to entertain the appeal, and it should have been dismissed."

[4] To adopt the defendant's suggestion that the notice of appeal filed herein on Monday, July 11, 1938, was within the time permitted by section 1239 of the Penal Code would require us to read into that statute a provision that notice of appeal must be filed within two days after judgment unless the second day falls upon Saturday, in which event the notice may be filed upon the following Monday. This we cannot do. Under the statutes and authorities above referred to, the written notice of appeal filed on July 11, 1938, was not filed within the required time and we so hold.

The remaining question is whether a written notice of appeal was filed with the clerk of the court on Saturday, July 9, 1938, in such a manner as to constitute a substantial compliance with section 1239 of the Penal Code. The defendant relies upon that part of section 10 of the Political Code which, after providing that every Saturday from noon to midnight is a holiday, reads: "This shall not be construed to prevent or invalidate the issuance, filing, service, execution or recording of any legal process or written instrument whatever on such Saturday afternoon." This seems to relate to the preceding portion of that paragraph of the section, which in turn refers to the transaction of business in public offices. Assuming, but by no means holding, that this permits the filing of a notice of appeal by handing the same to the clerk outside of his office after noon on Saturday, and that such act is a filing of the notice with the clerk within the meaning of section 1239 of the Penal Code, there is no showing that such an act was here performed.

The only thing we have before us is the affidavit of one of the attorneys for the defendant. She therein alleges that on July 9, 1938, she was called to the county jail to interview the defendant, that the defendant told her that he had been informed by another attorney that he had five days within which to give notice of appeal, that she realized that he had but two days in which to do this, and that at about 9 o'clock p. m. of that day she "located the Chief Clerk of the Criminal Department of the Superior Court of San Diego County, one Mr. J. B. McLees, at his home in Mission Beach, San Diego County". She then alleges:

"That affiant, at that time, had in her possession a Notice of Appeal which was signed by A. E. Englehardt, defendant, in pro persona, and served upon the household of one Mr. McLees at the hour of 9:40 p. m., which is shown by the writing on the said Notice of Appeal, in pencil written in the handwriting of one Mrs. McLees, wife of the said Chief Clerk. That at said time and place Mrs. McLees informed affiant that Mr. McLees had stepped away from his home for a few moments, but would return shortly.

"That affiant left for filing with Mrs. McLees, on the return of her husband, Mr. McLees, the said Chief Clerk of the Criminal Department of the Superior Court of San Diego County, the said Notice. That it was affiant's intention that the said Notice of Appeal be filed when the said Clerk returned to his said home. Therefore, the Notice of Appeal was left with Mrs. McLees after the date and hour was written on the said Notice of Appeal."

[5] It does not appear from anything before us that there was not ample time to file notice of appeal before noon on that day, nothing being said as to the time of day when the affiant interviewed the defendant in jail. It does appear, however, that the affiant appeared at the home of the clerk about 9:40 p. m. of that day and on being told that the clerk would return in a few minutes, elected not to wait for him but left a notice of appeal with the clerk's wife, it being affiant's intention that the notice "be filed when the said clerk returned to his said home". There is nothing before us to show that the clerk returned to his home before midnight of that day, or that the notice of appeal was ever given to him, and nothing to show that the notice thus left at his home was ever filed. Regardless of whether or not the handing of a notice of appeal to a clerk of the court after business hours on Saturday, and outside of his office, constitutes a filing of such notice on that day, within the meaning of the statute, it cannot be held that the leaving of such a notice with a relative of the clerk in the hope that it will be delivered to the clerk before midnight of that day is, in the absence of any other showing, a compliance with the statute. To so hold would be to render the plain and definite provisions of the statute practically meaningless. In our opinion, no notice was filed within the required time.

The motion is granted and the appeal is dismissed.

I concur: MARKS, J.

GOLDEN STATE GLASS CORPORATION et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.*

Civ. 11904.

District Court of Appeal, Second District, Division 2, California.

Aug. 26, 1938.

Hearing Granted by Supreme Court Oct. 24, 1938.

1. **Prohibition** 🔑3(5)

Where ill feeling existed between plaintiffs and defendants, who constituted board of directors of corporation, so that corporate business could not be conducted, and plaintiffs obtained an ex parte order appointing a receiver, defendants were not entitled to writ prohibiting proceedings on the order, since authority to appeal from the order and to file an undertaking staying all proceedings on the order pending determination of the appeal constituted a plain, speedy, and adequate remedy at law. Code Civ.Proc. §§ 566, 943, 1103; § 963, subsec. 2.

2. **Constitutional law** 🔑312

Where ill feeling existed between plaintiffs and defendants, who constituted board of corporate directors, plaintiffs obtained ex parte order appointing receiver and at the hearing, court advised parties that if a motion were made the court would appoint an attorney to represent the corporation, but no motion was made, corporation was not denied due process of law by court's subsequent refusal to recognize, as the duly appointed attorney of the corporation, an attorney chosen by defendants.

3. **Corporations** 🔑558

Under statute requiring that an undertaking with sufficient sureties be given by applicant where a receiver is appointed upon an ex parte application, a bond executed by a surety company alone, and not by applicants for appointment of receiver for corporation, was sufficient. Code Civ.Proc. § 566.

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*For subsequent opinion see 90 P.2d 75.

4. Principal and surety 🔑5
Undertakings 🔑1

The distinction between a "bond" and an "undertaking" is that the principal should sign the bond and that he need not sign the undertaking.

[Ed. Note.—For other definitions of "Bond" and "Undertaking," see Words & Phrases.]

Original applications for writs of prohibition and mandamus, by the Golden State Glass Corporation and others against the Superior Court of Los Angeles County and others to restrain the court from any further proceedings in the case entitled G. C. DeGarmo and another against A. Goldman and others, and to compel the court to recognize Oscar C. Sattinger as attorney for the corporation.

Applications denied.

Oscar C. Sattinger, of Los Angeles, for petitioners Golden State Glass Corporation and Oscar C. Sattinger.

Mitchell, Silberberg, Roth & Knupp, of Los Angeles, for petitioner A. Goldman.

Frank M. Gunter, of Los Angeles, for petitioner N. E. Shenberg.

John H. O'Connor, Co. Counsel, Douglas De Coster, Asst. Co. Counsel, and Biby & Biby, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an original application, filed in the Supreme Court and by that court transferred to this court for decision, asking that a writ of prohibition issue directed to the respondent court restraining it from any further proceedings in the case entitled, G. C. DeGarmo and W. M. Crane, Plaintiffs, v. A. Goldman, N. E. Shenberg, Golden State Glass Corporation, a Corporation, et al., No. 528700, in the superior court of Los Angeles county, and prohibiting and restraining the respondents from enforcing any of the orders made by the said court appointing a receiver ex parte and pendente lite, and prohibiting Herbert Selig, as receiver, from taking any further steps pursuant to said order, and directing the said receiver to surrender possession of all the assets and business of said corporation to petitioners Shenberg and Goldman as vice-president and secretary, respectively, and (2) for a writ of mandamus ordering and compelling said respondent to recognize petitioner Sattinger as the attorney for said corporation, and to permit said Sattinger to appear before the respondent court as such attorney for such corporation, and for the court to hear and pass upon any and all motions made by said Sattinger on behalf of said corporation, and asking an order restraining and enjoining each and all of respondents from any further proceedings in the enforcement of said ex parte order appointing said receiver and the order appointing a receiver pendente lite, and that said orders be vacated.

Said action was commenced in the superior court on the 31st day of May, 1938, the complaint alleging that the directors of said corporation are now and ever since the 7th day of September, 1935, have been said DeGarmo and W. M. Crane on the one hand, and A. Goldman and N. E. Shenberg on the other, and further that, "Ill feeling, dissension, hatred, mutual hostility and distrust have arisen and now exist between the said plaintiffs and directors, G. C. DeGarmo and W. M. Crane, on the one side and the said defendant and directors, A. Goldman and N. E. Shenberg, on the other side. Because of said ill feeling, dissension, hatred, mutual hostility and distrust of said directors toward each other no business of the corporation has been transacted by said corporation since on or about the 1st day of January, 1938, and it is impossible because of said ill feeling, dissension, hatred, mutual hostility and distrust of the board of directors and the members of said board for them to transact any business of the corporation or to elect any person to act as manager or to give any person authority or power to transact business for said corporation, and because thereof said corporation is not now transacting any business and said corporation and its business, assets and property because thereof have been injured and said corporation has been greatly damaged."

Thereupon the court made an order ex parte appointing Herbert Selig as a receiver of all of the assets of said corporation and ordered the said corporation and the said Goldman and Shenberg to show cause before said court on the 8th day of June why said order should not be made pendente lite. At the said hearing both of the defendant directors filed answers and affidavits. At said hearing Oscar C. Sattinger attempted to appear on behalf of said corporation, having been appointed to do so by the two directors who were defendants. Upon objection of DeGarmo the court ruled that Sattinger was not authorized to appear for defendant corporation because a majority of the board of directors did not authorize his employment, but that he appeared in good faith. The court held that neither the plaintiffs nor the individual defendants can employ an individual to represent the corporation. The order appointing the receiver pendente lite was confirmed.

[1] This is the sole question necessary to determine: Do petitioners have a plain, speedy and adequate remedy in the ordinary course of law? In our view this question must be answered in the affirmative. Santa Ynez Mercury Corp., Ltd. v. Superior Court, Cal.App., 79 P.2d 185. In that case it was said: "It is the settled law of California that since an appeal lies from an order appointing a receiver, section 963, subsec. 2, Code Civ.Proc., and an undertaking may be given staying all proceedings upon said order pending the determination of the appeal upon its merits, section 943, Code Civ.Proc., this procedure constitutes a plain, speedy, and adequate remedy in the ordinary course of law within the meaning of section 1103 of the Code of Civil Procedure. Jacobs v. Superior Court, 133 Cal. 364, 365, 65 P. 826, 827, 85 Am.St.Rep. 204; Pacific Broadcasting Co. v. Superior Court, 100 Cal.App. 649, 650, 280 P. 991."

[2] The contention of Sattinger that the corporation was denied due process of law by the court's refusal to recognize him as the duly appointed attorney of said corporation is without merit. The court had appointed a receiver on the theory that the board of directors was deadlocked and could not transact the business of the company, and the court could not very well recognize Sattinger as the attorney for said corporation when he had been appointed by only two of the directors. Both of the defendant directors and their attorneys were present at the time of the hearing, and the trial court then advised them that if a motion were made he would appoint an attorney to represent said corporation. No such motion was made by any of the directors. Thus, it appears that instead of said court depriving said corporation of the privilege of having an attorney represent it, he offorded an opportunity which, if taken advantage of by said Goldman and Shenberg or their attorneys, would have resulted in said corporation being represented at said hearing on the order to show cause. The court also made an order then and there that no default be entered against said corporation until after the expiration of 10 days after giving of notice to said Goldman and Shenberg as directors of said corporation.

On the day of the oral argument before this court the petitioners were permitted to file an amendment to their petition in which they set forth that DeGarmo, one of the plaintiffs in the superior court, caused a bond to be executed by the Fidelity and Deposit Company of Maryland in the principal sum of $2,000 to be filed in said superior court action; that said bond did not comply with the provisions of section 566 of the Code of Civil Procedure in that said bond was not signed by DeGarmo and Crane, or either of them, and was not an undertaking by the applicants in said action as required by said section, and that the orders appointing a receiver ex parte and also pendente lite were void and without the jurisdiction of the superior court for the reason that the provisions of said section had not been complied with.

[3, 4] It is the contention of the petitioners herein that a bond executed by a surety company alone and not by the plaintiffs in the action does not comply with said section. The section reads as follows: "* * * If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking." There is no merit in this contention. The statute requires that the plaintiffs furnish an undertaking and not a bond. In the case of Alexander v. Superior Court, 91 Cal.App. 312, 315, 266 P. 993, 994 the court said: "It has been determined that the distinction between a bond and an undertaking is that the principal should sign the former and that he need not sign the latter. (Russell v. Chicago, B. & Q. R. Co., 37 Mont. 1, 94 P. [488], 501.)" In the case

of City of Sacramento v. Dunlap, 14 Cal. 421, 423, the court said, "There is no analogy between them [bonds] and undertakings required of sureties, by statute, in our civil and criminal practice. In the latter case, the *undertaking* is an original and independent contract on the part of the sureties, to which the signature of the principal is not essential. (Curtis v. Richards et al., 9 Cal. 33.)" The undertaking which was given by the plaintiffs was in compliance with the statute. Title Ins. & Trust Co. v. California Development Co., 164 Cal. 58, 127 P. 502.

The applications for writ of prohibition and writ of mandate are denied.

We concur: WOOD, J.; McCOMB, J.

28 Cal.App.2d 325

PEOPLE v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

Civ. 10660.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1938.

Rehearing Denied Sept. 30, 1938.

Hearing Denied by Supreme Court Oct. 27, 1938.

1. Statutes 🔑95(2)

The statute providing for payment of delinquent license taxes which were imposed by the Motor Vehicle Fuel License Tax Act, in monthly installments and postponing collection of the tax accordingly, affording the delinquent taxpayer an opportunity of financial rehabilitation and likewise affording the state an opportunity to collect, in full, taxes which could not be otherwise collected, was not, under the existing economic conditions, "special legislation" of the type prohibited by Constitution. St.1931, p. 107, § 2; Pol.Code, § 3900a, as added by St.1935, p. 795.

[Ed. Note.—For other definitions of "Local Law" and "Special Law," see Words & Phrases.]

2. States 🔑119

Where licensed and bonded motor vehicle fuel distributor failed to pay taxes and, under subsequently enacted statute, entered into an obligation with state, without surety's knowledge or consent, for payment of the delinquent taxes in 180 monthly installments, resulting release of surety from liability to state was not a "gift of public money" within constitutional prohibition, where the entire indebtedness was secured to the state by the installment agreement instead of merely the fractional part covered by the bond. St.1931, p. 107, § 2; Pol.Code, § 3900a, as added by St.1935, p. 795; Const. art. 4, § 31.

3. Constitutional law 🔑43(2)

Where licensed and bonded motor vehicle fuel distributor failed to pay taxes and, under subsequently enacted statute, entered into an obligation with state, without surety's knowledge or consent, for payment of taxes in 180 monthly installments, in state's action against surety on bond to recover for delinquent taxes, state could not attack constitutionality of the statute providing for payment of taxes in monthly installments under which state was receiving benefits. St.1931, p. 107, § 2; Pol.Code, § 3900a, as added by St.1935, p. 795.

4. Principal and surety 🔑97

Where there is a material change of the status of the parties to a bond, affecting their substantial rights, without knowledge or consent of surety, the surety is relieved from any obligations thereunder. Civ.Code, §§ 2819, 2840.

5. Licenses 🔑26

A surety bond which was given under the Motor Vehicle Fuel License Tax Act, the condition of which bond was to secure payment of taxes due under the act and to secure compliance with the act, was a surety for payment of the taxes and not a penalty for failure to pay them. St.1931, p. 107, § 2; Pol.Code, § 3900a, as added by St.1935, p. 795.

6. Licenses 🔑26

Where licensed and bonded motor vehicle fuel distributor failed to pay the taxes and, under subsequently enacted statute, entered into an obligation with state, without surety's knowledge or consent, for payment of delinquent taxes in 180 monthly installments, surety was thereby relieved from liability on bond for delinquent taxes, since subsequent statute materially changed the status of the party to the bond. St.1931, p. 107, § 2; Pol.Code, § 3900a, as added by St.1935, p. 795.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by the People of the State of California against the Fidelity & Deposit Company of Maryland to recover of defendant as surety on a bond. Judgment for plaintiff and defendant appeals.

Reversed with directions.

Thomas E. Davis and Thomas, Beedy & Paramore, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for the People.

MAXEY, Justice pro tem.

During the years 1931 and 1932 (and at other times not herein involved) David E. Brown and Owen M. Sullivan, doing business under the firm name and style of Brown & Sullivan, engaged in the business of refining, producing and distributing motor vehicle fuel in the state of California.

In April, 1931, pursuant to the provisions of the Motor Vehicle Fuel License Tax Act (Stats. of 1923, p. 572), as amended by the Statutes of 1931, page 107, said Brown and Sullivan applied to the state board of equalization of the state of California for a license authorizing them to engage in business as distributors of motor vehicle fuel.

In compliance with the provisions of said act and as a condition precedent to the granting of a license authorizing them to engage in business, Brown & Sullivan as principals, on May 2nd, 1931, made, executed, and delivered to the state of California a bond in the sum of $5,000, conditioned as provided in said act and which said bond was filed with the state board of equalization. The defendant and appellant, Fidelity & Deposit Co., of Maryland, executed this bond as surety for the said principals.

Thereafter Brown & Sullivan engaged in the business of refining, producing and distributing motor vehicle fuel and thereby became liable for the payment of the taxes due the state of California. They failed to pay the taxes for the month of April, 1932, in the sum of $12,278.76, which became due and payable on the 1st day of June, 1932, and the penalty of 10 per cent as provided in the act was added, making a total sum due and unpaid for said month of April, 1932, of $13,506.64; they failed to pay the taxes for the month of May, 1932, in the sum of $8,752.17, which became due and payable July 1, 1932, and a penalty of 10 per cent was added, making a total sum due and unpaid for the month of May, 1932, of $9,627.39, or a total indebtedness for the two months of $23,134.03.

On or about June 30, 1932, the state controller seized the property of Brown & Sullivan, and sold the same at public auction, and applied the net proceeds of the sale, in the sum of $4,976.94, to the indebtedness of Brown & Sullivan, leaving a balance due to the state of California of $18,157.09.

The complaint, setting forth the foregoing facts, was filed September 6, 1932, and prayed for judgment in the sum of $5,000 against the appellant herein. The action was predicated upon the bond and the principals thereon were not made parties to said action.

Appellant filed an answer on September 13, 1932, denying liability. The record is silent as to any further proceedings being had for a full period of four years after the action was at issue.

On September 14, 1936, appellant filed notice of motion for leave to file an amended and supplemental answer and on September 18, 1936, by leave of court, filed its amended and supplemental answer, pleading as an affirmative defense that appellant's principal, Brown & Sullivan, had entered into an obligation with the state of California under the terms and provisions of section 3900a of the Political Code of the state of California (Stats. of 1935, p. 795), without the knowledge or consent of appellant, whereby the time for the payment of the delinquent taxes by Brown & Sullivan had been postponed, and providing further for the payment by Brown & Sullivan of the entire amount of the delinquency to the state of California in monthly instalments at the rate of $113 per month for a period of 180 months, payable on the 1st day of each month, beginning on the 1st day of the calendar month next after the obligation was filed and accepted by the controller of the state of California, with interest at 4 per cent per annum for the first ten years, and 7 per cent per annum thereafter.

In order to fully comprehend the meaning and import of the legislature, the two statutory provisions are set forth in so far as pertinent to the matters involved herein: Section 2 of the Motor Vehicle Fuel License Tax Act (Stats. of 1923, p. 572) was amended by the Statutes of 1931, page 107, to provide as follows:

"Sec. 2. Every distributor before April 1, 1931, and after this act becomes effective every person, firm, association or corporation before becoming a distributor shall make an application to the state board of equalization for a license authorizing such distributor, person, firm, association or corporation to engage in business as a distributor. * * * Before granting any license authorizing any person, firm, association or corporation to engage in business as a distributor, the state board of equalization must require such person, firm, association or corporation to file with said board, in such form as shall be prescribed by said board, a bond duly executed by such person, firm, association or corporation as principal and a corporation such as is mentioned in section 1056 of the Code of Civil Procedure of this state, as surety, payable to the people of the State of California, conditioned upon faithful performance of all of the requirements of this act and expressly providing for the payment of all license taxes, penalties and other obligations of such person, firm, association or corporation arising out of this act."

Section 3900a provides as follows:

"3900a. When any license tax imposed by the Motor Vehicle Fuel License Tax Act, approved May 30, 1923 (being Chapter 267 of the Statutes of the forty-fifth session of the Legislature of this State), as amended, which tax accrued and became payable prior to January 1, 1935, remains unpaid, such delinquent license tax may be made payable in installments, and the collection thereof postponed accordingly, by the filing with the State Controller prior to January 1, 1936, of a written instrument (hereinafter referred to as an 'obligation') executed by such distributor (hereinafter referred to as 'original distributor') * * * and undertaking to make payment of the amount of all delinquent motor vehicle fuel license taxes becoming payable prior to January 1, 1935, by the original distributor, and of all penalties accrued thereon by reason of the nonpayment thereof as provided in said act, in equal monthly installments not exceeding one hundred eighty in all and payable on or before the first day of the calendar month next after the filing of said obligation and of each month thereafter until full payment of said delinquent taxes and penalties, together with interest on each such monthly installment from January 1, 1935, to, and payable at, the time of payment of such installment, at the rate of four per cent per annum for a period of ten years after filing of the obligation and at the rate of seven per cent per annum thereafter."

On December 31, 1935, Brown & Sullivan executed and filed with the controller of the state of California the obligation specified in section 3900a and have since that time made the payments provided in the said obligation, and complied with all of the terms and conditions of the said obligation.

It is appellant's contention that the execution and acceptance of the obligation from Brown & Sullivan, under the provisions of section 3900a of the Political Code, without the knowledge or consent of appellants, relieved appellants of any liability under the bond previously given by it to secure the payment of the taxes to the state, as it effected such a material change in the status of the respective parties as to affect the substantial rights of the appellant.

Respondent contends there has been no change that would affect the rights or liabilities of the parties, and that section 3900a of the Political Code is unconstitutional for the reason that it is special legislation of the type and kind prohibited by the Constitution of the state of California, and that it might result in a gift of public moneys in violation of section 31 of article 4.

The reason for the enactment of section 3900a by the legislature of this state is purely conjectural. Suffice it to say that the legislature of the state of California, in its wisdom, deemed it proper and expedient to enact such a provision, thereby following various similar enactments of our own and many other states, as well as the federal government, in an endeavor to relieve an existing economic condition that was proving an insurmountable burden to various branches of the business world.

[1] This particular enactment applied only to a limited field, and only to those persons in that limited field who had been delinquent in the payment of their taxes for a limited or specified time. It had a dual purpose, in that it afforded the delinquent taxpayer under the Motor Vehicle Fuel Act, whose taxes accrued and became payable prior to January 1, 1935, and who availed himself of the provisions of the enactment prior to January 1, 1936, an opportunity of financial rehabilitation, and to pay the moneys owing by him without too serious injury to his business; it likewise afforded the state an opportunity to collect in full,

taxes owing to it that could not be otherwise collected. Under then existing economic conditions, such legislation could not possibly be classed as special legislation.

[2] Nor could it be said that the failure of the state to collect upon the bond was or is a gift of public money, because under said section 3900a of the Political Code, an express effort is made to secure to the state, not alone the sum specified in the bond, but the entire indebtedness due and owing by Brown & Sullivan, which was in a far greater amount than that due and owing under the bond itself.

[3] Respondent is not in a position to attack the constitutionality of section 3900a of the Political Code. The state of California is the plaintiff and respondent herein; it is receiving the benefits of the provisions of section 3900a in the way of payments from the principals upon the bond in question, and cannot, while receiving such benefits, at the same time declare that the vehicle providing such benefits is illegal and void. Section 3900a is not an amendment to the Motor Vehicle Fuel License Tax Act of 1931, but is supplemental to and in assistance of the terms and provisions thereof. Neither justice nor common sense permit the state to accept the benefits of the enactment with one hand, and use the other to void the very provisions that create those same benefits.

[4] It is too well settled both by code enactment and by judicial determination to need any citations, that where there is a material change of the status of the parties to a bond, affecting their substantial rights, without the knowledge or consent of the surety, the surety is relieved from any obligation thereunder. Civ.Code, §§ 2819, 2840. First Congregational Church of Christ v. Lowrey, 175 Cal. 124–126, 165 P. 440.

[5] The condition of the bond in the instant case was to secure the payment of the taxes due to the state, and the compliance of the terms and conditions of the Motor Vehicle Fuel Act. So far as the record discloses, all conditions were complied with save and excepting the payment of the taxes. The bond was therefore a surety for such payment and not a penalty for failure to pay them. Had the delinquencies been in a sum less than the amount of the bond, the liability of the surety would have been the amount of such delinquency, and no more. The fact that the delinquencies amounted to more than the bond does not change its character.

During the interim from September 13, 1932, when the issue was originally joined, until the effective date of section 3900a of the Political Code, the plaintiff could have undoubtedly enforced the payment of the bond. This time was even extended until December 31, 1935, when Brown and Sullivan availed themselves of the opportunity to enter into the obligation with the state controller. Had judgment been entered against appellant upon the bond and that judgment paid by appellant, it could have, in turn, obtained judgment against Brown & Sullivan, and in due course enforced such a judgment. Brown & Sullivan were then delinquent and in default.

It cannot now be seriously contended the same situation prevails. The plaintiff has entered into an obligation with the principals of the bond for which appellant is surety. The amount of the obligation is the total amount of the prior delinquency; Brown & Sullivan are not in default under the obligation of December 31, 1935. The time of payment has been postponed, no provision for credit for moneys paid by the surety on behalf of Brown & Sullivan is contained in the obligation, nor in section 3900a of the Political Code.

[6] We must therefore conclude that the legislature omitted reference of any kind to the surety mentioned in the act of 1931 intentionally, and with full knowledge of the resulting consequences.

Since the principals are not now in default under the obligation entered into in December 31, 1935, the surety could not collect from them the amount it would be compelled to pay under the bond. This in our opinion constitutes such a material change in the status of the parties, so affecting the substantial rights of the appellant, as to release it from liability upon its bond.

The judgment is reversed, with directions to enter judgment for the defendant, appellant herein, in accordance with the views herein expressed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

In re CASE'S ESTATE.

Civ. 10865.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1938.

Hearing Denied by Supreme Court Oct. 24, 1938.

Wills 🔑467

A statement in will that testator had deeded certain property to claimant and that the deed, which was executed but never delivered, must be placed on record, was insufficient to create a devise of the property.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Proceeding in the estate of Frederick H. Case, deceased, wherein Harry Barling, executor of the last will of Frederick H. Case, deceased, filed a petition, and Mrs. Anna Barling Towne, formerly Miss Anna Louise Barling, Lottie Keller, formerly Lottie Bradley, and others, were claimants. From a decree construing the will, Lottie Keller appeals.

Affirmed.

Foltz & Rendon, of Stockton, for appellant.

Henry & Bedeau, of Sacramento, and J. W. Lenahan, of Monterey, for respondent Chester Harold Many Case.

SPENCE, Justice.

This is an appeal by Lottie Keller, formerly Lottie Bradley, from a decree of the probate court construing the will of the decedent.

Said decedent left an holographic will which contained numerous provisions. Among said provisions was the following:

"To my sister Mrs. Lottie Bradley sometimes called Mrs. J. R. Bradley I have deeded my property at the South West corner of Hopkins St and Dimond Ave in the City of Oakland Cal. Now leased to the Standard Oil Co The deed must be placed on record at the Hall of Records in the City of Oakland Alameda Co Cal."

The deed referred to was dated December 3, 1926, and was duly acknowledged before a notary public on that date. It was stipulated, however, that it was never delivered. The will was dated May 4, 1929, at the commencement thereof and was dated May 30, 1929, at the end thereof. The will and deed, together with other deeds, were found among the effects of the decedent.

The sole question presented on this appeal is whether under the foregoing facts the said real property was validly devised to appellant. The probate court concluded that the language found in the will constituted a mere recital of what had been done and that there was no valid devise of said real property. It therefore entered its decree accordingly.

We find no error in the trial court's ruling. The facts presented are analogous to those in Estate of Young, 123 Cal. 337, 55 P. 1011, and the decision in that case appears to be controlling here. The court there said on pages 342 and 343, 55 P. on page 1012: "There was no delivery of these deeds during the testatrix's lifetime. What validity they possess then comes from the will, and, therefore, if by act of the testatrix title to these lands passed, we must find in the will both an intent to devise them, and operative words to effect the intent." The court there held that directions in the will for delivery of the deeds was insufficient to show an intent to devise. On page 344, 55 P. on page 1013, it said: "Here, to repeat, there is no doubt as to the language, and its meaning. The testatrix merely mistook the legal effect which would follow a compliance with her directions. While no form of expression is required to create a devise, and while, considering that wills are frequently made by ignorant people in a great extremity of sickness, and under an impending fear of immediate death, and while, therefore, much liberality is and should be shown in construing the terms of such instruments, in every case some words must be employed from which, under the rules of law, an express intent to devise particular real estate must be found in the will itself; otherwise, the court is not carrying out the last will of the deceased, but is making testamentary disposition of his property for him,—not such disposition as the testator made, but such disposition as the court thinks he would have made. This can never be permitted."

The cases cited in 110 A.L.R. 264 et seq. sustain the rule as expressed in Estate of Young, supra, the editor there saying that with certain exceptions, which are in most instances reconcilable, "the decisions on the question of the effect of a recital in a will of a conveyance of land which was not made, or which proved to be ineffectual, seem uniformly to hold that such recital will not operate as a devise, but that the rights of persons interested must be determined by resort to the instrument referred to". See, also, Page on Wills, 2d ed., sec. 819, at p. 1396.

Appellant cites and relies upon Estate of Skerrett, 67 Cal. 585, 8 P. 181. We believe that case is distinguishable upon its facts, but if that decision may be said to be in conflict with Estate of Young, supra, we nevertheless feel bound to follow the later pronouncement of our Supreme Court upon the subject.

The decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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28 Cal.App.2d 275

EHRHARDT v. YOUNG WOMEN'S CHRISTIAN ASS'N OF LONG BEACH et al.

Civ. 11892.

District Court of Appeal, Second District, Division 2, California.

Aug. 25, 1938.

Hearing Denied by Supreme Court Oct. 24, 1938.

1. Appeal and error 🔑544(1)

A plaintiff who seeks an appellate review of a judgment of nonsuit must have a reporter's transcript. Code Civ.Proc. § 953a.

2. Appeal and error 🔑554(2)

An appeal from a judgment of nonsuit in which plaintiff failed to file a reporter's transcript was subject to dismissal on motion entered after trial court had terminated all proceedings to obtain a transcript. Code Civ.Proc. § 953a.

3. Appeal and error 🔑554(2)

A plaintiff could not excuse failure to file a reporter's transcript on appeal from judgment of nonsuit by alleging that illness of trial judge and his removal from the trial bench made proper settlement impossible, in absence of showing that diligence was exercised after cause had been removed from calendar because of the judge's illness. Code Civ.Proc. § 953a.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Stella Ehrhardt against the Young Women's Christian Association of Long Beach and others. Judgment of nonsuit, and plaintiff appeals, whereupon defendants move for dismissal of appeal on ground that no transcript has been filed and that no proceedings for preparation of a transcript are pending in the trial court.

Motion to dismiss appeal granted.

Stella Ehrhardt in pro. per.

Doyle, Clark & Thomas and H. O. Wallace, all of Long Beach, for respondent Y. W. C. A. of Long Beach.

J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for respondents Carter, Glenn and Dodge.

CRAIL, Presiding Justice.

This is an appeal by the plaintiff from a judgment of nonsuit in favor of the Y. W. C. A. of Long Beach, a corporation, and Martin C. Carter, Virginia J. Glenn and Genevieve Dodge, and from an order denying a motion for a new trial. The case comes before the court at this time upon a motion of the said defendants to dismiss the appeal on the ground that no transcript on appeal has been filed on behalf of appellant and that no proceedings for the preparation of a transcript are pending in the trial court.

A reporter's transcript has not been filed. The defendants furnish the court with a certificate of the county clerk which states that "Notice of appeal from said judgment was filed by appellant on the 16th day of January, 1936, and appellant did on the 20th day of January, 1936, request the clerk to prepare a transcript under section 953a of the Code of Civil Procedure. No bill of exceptions has been filed. On the 7th day of April, 1936, the Court refused to certify a transcript offered by plaintiff on the ground that such purported transcript was not a true, full or fair transcript of the proceedings had at the trial of said action. On the 16th day of October, 1936, proceedings for the settlement of such transcript were by the plaintiff allowed to go off calendar. On the 21st day of March, 1938, the Court on motion of counsel for defendants, ordered all proceedings for the preparation of a transcript on appeal terminated. No proceedings for the preparation of a bill of exceptions or transcript are now pending before the Court as to the defendants Martin C. Carter, Virginia J. Glenn and Genevieve Dodge."

[1-3] The matter came before the court for oral argument on July 25th, whereupon the plaintiff filed only the clerk's transcript. The plaintiff filed an affidavit in which she set forth that the proper settlement of the reporter's transcript was made impossible by the illness of the trial judge and by his removal from the trial bench where he had been sitting by order of the judicial council, and in which she states further the facts that "on the 16th day of October, 1935, the court was declared to be seriously ill from pneumonia, and pursuant to the order of the Presiding Judge the matter was taken off calendar until further notice". But she makes no showing of any diligence on her part from that time on. It is necessary for her appeal in this case where nonsuit was granted, when the correctness or incorrectness of granting such nonsuit is the question before this court, that she have a reporter's transcript, and the trial court has terminated all proceedings to obtain one.

Motion to dismiss the appeal is granted.

I concur: WOOD, J.

WEST KEY NUMBER SYSTEM

28 Cal.App.2d 287

PEOPLE v. GIST.

Cr. 366.

District Court of Appeal, Fourth District, California.

Aug. 25, 1938.

1. Criminal law 🔑339
Larceny 🔑49
Robbery 🔑23(1)

In prosecution for kidnapping, robbery, and grand theft of an automobile, where accused was positively identified by three witnesses who testified that they did not notice whether accused had scars on his face or had had his hair cut, accused's evidence that at the time the offenses were committed accused had not had his hair cut for about two months and that he had scars on his face was properly rejected as immaterial.

2. Criminal law 🔑339
Larceny 🔑49
Robbery 🔑23(1)

In prosecution for kidnapping, robbery, and grand theft of an automobile, where victim testified that he did not smell alcohol on accused, court properly excluded accused's testimony that about 4½ hours before commission of crimes accused had been intoxicated, as against contention that fact that victim did not smell alcohol on accused, would discredit victim's testimony in identifying accused.

3. Criminal law 🔑1168(4)

In prosecution for kidnapping, robbery, and grand theft of an automobile, court did not commit prejudicial error in striking accused's evidence that he could not write with his left hand, which was intended to refute evidence that accused had held gun in left hand when accused entered victim's automobile and had shut door with right hand.

4. Criminal law 🔑706

Where a witness at preliminary hearing gave testimony which tended to discredit testimony of other witnesses in support of accused's alibi, and, when called by state at trial, witness' testimony was different from that at preliminary hearing, state's impeachment of witness was not error, as against contention that district attorney was guilty of prejudicial misconduct in that he knew what witness' testimony was going to be.

5. Witnesses 🔑380(5)

That district attorney did not announce his surprise to the court when testimony of witness, who was called by state, differed from that given by her at preliminary hearing, did not preclude the showing of the contrary statements made by the witness at the preliminary hearing, to impeach witness.

6. Criminal law 🔑1037(2)

Where district attorney commented on failure of accused to call a witness who had appeared at preliminary hearing but accused, at the time, made no assignment of misconduct nor request of the court to admonish the jury to disregard the comment, accused could not complain thereof on appeal.

7. Criminal law 🔑721½(1)

The district attorney may comment upon the failure of an accused to produce witnesses who would substantiate accused's story.

8. Criminal law ⚷775(3)

Instruction that effect of an alibi, when established, was like that of any other conclusive fact and that, when credited, it was a defense of the most conclusive and satisfactory character, but that evidence of alibi should be carefully scrutinized to be sure it was not fabricated, was not reversible error.

9. Criminal law ⚷941(1)

Newly discovered evidence which was merely cumulative of evidence given in trial in support of alibi did not entitle accused to a new trial.

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Lawson O. Gist was convicted of kidnapping, robbery, and grand theft of an automobile, and he appeals.

Affirmed.

Fred D. Johnston, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and W. F. Menton, Dist. Atty., and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for the People.

GORDON THOMPSON, Justice pro tem.

The information in this case charged the defendant with the offenses of kidnaping, robbery and grand theft of an automobile.

Appellant urges all of the statutory grounds for a reversal of the judgment.

The evidence discloses that on the 25th day of February, 1938, at 10 p. m., one James K. Givens was seated in an automobile in front of the Coast Ice Cream Company on North Main street in the city of Santa Ana, California. As he listened to the news broadcast, defendant approached the automobile and inquired as to the location of Orange avenue. This conversation was through the open window of the automobile. After giving defendant directions to Orange avenue, Givens resumed listening to the broadcast. A few minutes later, defendant again approached the automobile, opened the door and entered. He seated himself to the right of Givens. Defendant had a gun in his left hand and closed the door of the automobile with his right hand. He placed the gun against the body of Givens and stated, "This is a holdup. Get your motor started and get going down the street." In compliance with this command, the automobile was driven some ten blocks from where the defendant had entered it. At this point, defendant demanded, at the point of a gun, that Givens stop the automobile, give him his money, get out of the car and start walking. Givens thereupon gave the defendant his wallet containing $1.15 and alighted from the automobile. The automobile was then driven away by the defendant. The defendant was tried by a jury and convicted of the three counts charged in the information. This appeal is from the judgment and the order denying his motion for a new trial.

[1] The appellant assigns as error the ruling of the trial court in sustaining objections to evidence offered as to his physical appearance, condition and characteristics on the night of the commission of the crimes. The proffered evidence consisted of testimony that appellant at the time of the commission of the crimes had not had his hair cut for a period of approximately two months and that he had scars on his face. This evidence was rejected as immaterial, and rightfully so. The appellant was positively identified by three witnesses. These witnesses testified that they did not notice whether or not appellant had scars on his face or had had a hair cut. Two of these witnesses observed the side of appellant's face and his general appearance. They were able to identify him at the county jail. The testimony offered by appellant was wholly immaterial and in no wise tended to impeach the testimony of these witnesses.

[2] Appellant also offered evidence as to his intoxication between five and six p. m. on the day of the commission of the crimes. This evidence was rejected as being too remote and immaterial. Givens testified he did not smell any odor of alcohol on the appellant at the time he was kidnaped and robbed. Appellant contends that because of this, he should have been permitted to introduce this evidence. It must be borne in mind that Givens was being kidnaped at the point of a gun. The fact that he did not smell alcohol on appellant would not discredit his testimony in identifying appellant. A person under a mental strain, such as being kidnaped, could not be expected to react as a normal

individual. We believe the ruling of the court was correct.

[3] Evidence was adduced by appellant that he could not write with his left hand. This evidence was stricken, on motion of the People. Appellant contends this evidence would have raised the inference that he could not have held the gun in his left hand, as testified by the witness Givens. This evidence, if admitted, would not establish that appellant could not have held the gun in his left hand. The testimony of the witness was that the door of the automobile was closed with appellant's right hand. The logical operation of a right-handed person would be to use the right hand in closing the door. Under these circumstances, to hold the gun in his left hand would be natural. The granting of the motion was not prejudicial error.

[4, 5] Appellant further assigns as error the impeachment of Neva Allsman, called as a witness for the People. This witness had given her testimony at the preliminary hearing. Appellant did not call her as his witness at the trial. She was called by the People in rebuttal. Answers given by her at the trial differed from those contained in the transcript of the testimony at the preliminary hearing. It appears from the record no one representing the People had talked to her. Appellant contends that the district attorney was guilty of prejudicial misconduct, since the witness was called for the purpose of impeachment. With this, we cannot agree. This witness was not called by appellant for a reason best known to himself. Her testimony given at the preliminary hearing had a tendency to discredit the testimony given by other witnesses in support of the defense of alibi. When called, the People had the right to assume she would testify the same as she did at the preliminary hearing. This she did not do and was impeached. Appellant contends the district attorney knew what her testimony was going to be, before she testified, and that it would differ from her testimony at the preliminary hearing. There is nothing in the record to justify this assertion. A statement by the district attorney, made during the argument, was to the effect that she was not called to the witness stand by appellant for the reason that she had testified she had not seen him after nine o'clock on the evening of February 25th. The People were justified in calling this witness. Her evidence at the trial was contrary to her former testimony. No error could be predicated upon her impeachment. While the district attorney did not announce his surprise to the court, nevertheless, this did not preclude the showing of the contrary statements made at the preliminary hearing. We find no error under these circumstances.

[6, 7] Error is also predicated upon a comment made by the district attorney during argument, of the failure of appellant to call the witness Neva Allsman. There is no merit to this contention, due to the fact that no assignment of misconduct nor a request of the court to admonish the jury to disregard the comment, was made at the time. However, it is undoubtedly the rule that the district attorney may comment upon the failure of the defendant to produce witnesses who would substantiate his story. People v. Fitzgerald, 14 Cal.App.2d 180, 58 P.2d 718.

[8] Appellant assigns as error the giving of an instruction on alibi. The instruction is as follows:

"The effect of an alibi established is like that of any other conclusive fact presented in a case. Showing, as it does, that the party asserting it could not have been present at the time of the offense, if you find beyond a reasonable doubt that there was an offense committed, and therefore did not participate in it, is when credited, a defense of the most conclusive and satisfactory character. The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated; that even when wholly false, its detection may be a matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance;—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court.

"These are, that while you are not to hesitate at giving this as a defense, full weight—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitled the defendant to an acquittal—still, you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

The court also gave the following instructions in addition to the one complained of:

"The defendant, Lawson Gist, has introduced testimony to prove an alibi. To entitle him to an acquittal, it is sufficient that such proof, considered with all other evidence, raises in your minds a reasonable doubt of his presence at the place and at the time of the crime or crimes charged in the information."

"The burden of proof is always on the prosecution. It never shifts to the defendant. He is not required to prove an alibi beyond a reasonable doubt or even by a preponderance of the evidence. It is your duty, therefore, to find the defendant, Lawson Gist, 'not guilty', unless from all the evidence you are satisfied beyond a reasonable doubt that he is guilty."

Many authorities are cited by both appellant and respondent, with reference to the questioned instruction. People v. Arnold, 199 Cal. 471, 250 P. 168, reviews earlier cases dealing with this instruction and, although criticized, holds that the giving of the instruction does not constitute reversible error. The Arnold Case, however, calls attention of district attorneys who continue to offer, and of trial courts who continue to give, the instruction, that in so doing they assume unnecessary risk. The instructions given by the trial court, when read together, do not constitute reversible error. The jury was adequately instructed on the defense of alibi.

[9] Appellant further contends that the denial of his motion for a new trial constituted error. Two affidavits were presented to the court. One was by a witness who had testified in the case, and one by counsel for appellant. Appellant relies on newly discovered evidence. The affidavit of the witness recited, in substance, that he resided in one half of the duplex house occupied by the Allsmans and the same was an old frame building with a thin partition between the two halves; that noises and voices in one half of the duplex are audible in the other half and can be distinguished. That affiant did not see appellant on the night of February 25, 1938, but did see him about 7:15 a. m. the next morning. Affiant avers that he found appellant asleep in his automobile. Said automobile was parked in front of the building occupied by affiant. That he knew the Allsmans moved there on February 25, 1938, as testified by them. That when called as a witness in appellant's behalf, affiant then realized for the first time that he had heard appellant talking at intervals of a few minutes, during the entire evening of February 25, 1938. That he did not realize the importance of this evidence and did not communicate this information to counsel for appellant until after the trial. The affidavit of appellant's counsel recites, in substance, that he learned of this evidence subsequent to the trial and conviction of appellant. Several defense witnesses had testified appellant was at this house practically all evening, and the offered evidence was cumulative. The appellant was convicted upon positive testimony. The defense of alibi created a conflict in the testimony, which was resolved in favor of the People. From the foregoing, no reversible error appears in the record.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

28 Cal.App.2d 340

In re MAYNE'S ESTATE.

MAYNE v. MAYNE et al.

Civ. S. C. 67.

District Court of Appeal, Second District,

Division 1, California.

Aug. 31, 1938.

Hearing Denied by Supreme Court Oct. 27, 1938.

1. Wills 🔑439

In interpreting will, the important thing is testator's intention. Probate Code, § 101.

2. Wills 🔑440, 441

Testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Probate Code, § 105.

3. Wills 🔑470

All parts of a will are to be considered in relation to each other so as to form, if possible, a consistent whole. Probate Code, § 103.

4. Wills 🔑456

In construing will, words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent, and unless that sense can be ascertained. Probate Code, § 106.

5. Wills 🔑457

In construing will, technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by testator and that he was unacquainted with such technical sense. Probate Code, § 106.

6. Wills 🔑457

A technical construction of words and phrases in will, though prima facie the one which should prevail, will not go to the extent of defeating any obvious general intention of testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas.

7. Wills 🔑467

Expressions in a will, when used to declare the disposition to be made of property at testator's death and not as a request or prayer directed to a devisee or legatee concerning such devise or legacy, is a dispositive command, testamentary in character, and not precatory, but a positive direction binding on the court in the distribution of the estate.

8. Wills 🔑6, 616(4)

Where testatrix' will provided that in case of her accidental departure from life she left all her property to her husband, and that her property was to be carefully kept and finally divided equally between her two children, if any property remained after husband's death, husband took only a life estate with remainder over to children and had no right to sell, convey, or dispose of the property by will.

◆

Appeal from Superior Court, Los Angeles County; Kenneth C. Newell, Judge.

Proceeding in the matter of the estate of Lucy Cushman Mayne, deceased, wherein Frank K. Mayne filed a petition for distribution of the estate, as the administrator with will annexed, and wherein Walter W. Mayne and Frances Bond filed an opposition to the petition. From a decree of the superior court making a distribution of the estate, Frank K. Mayne appeals.

Decree affirmed.

Frank P. Doherty and Gerald E. Kerrin, both of Los Angeles, for appellant.

Delamere F. McCloskey, of Los Angeles, for respondents.

WHITE, Justice.

The transcript presents an appeal by the surviving husband of the decedent from a decree of the superior court making distribution of her estate. The sole question presented is the construction of the last will and testament of the decedent.

The will reads as follows:

"In case of my accidental departure of this life, I leave all my property to my husband, Frank K. Mayne.

"To be carefully kept and finally divided equally between Frances and Walter—if any remains after Frank's passing on.

"Lucy Cushman Mayne."

Frances and Walter referred to in the will are children by a former marriage of the appellant, named respectively Frances Bond and Walter W. Mayne, and appear as respondents herein.

In the petition for distribution of his wife's estate, appellant, as the administrator with the will annexed, asked that distribution of the entire estate be made to him "pursuant to the will". The respondents Frances Bond and Walter W. Mayne filed an opposition to this petition and asked that distribution be made of a life estate only to the surviving husband, with the remainder over to the objectors. The court denied the petition for distribution and sustained the opposition thereto, ordering that said estate in its entirety be distributed to the surviving husband Frank K. Mayne, "for the period of his natural life, and upon his death the unused portion thereof to Walter W. Mayne and Frances Bond".

The contentions of appellant are that the language of the will passed a fee simple to him and not, as the court decreed, a limited life estate, and further, that if a life estate was intended by the terms of the will, the court erred in not decreeing that the life estate vested in appellant "with full and absolute right and power of disposal".

[1-6] The problem of the trial court, now presented to us, is to find the intention of the testatrix from the language used. In seeking for such intention, there are certain well-settled principles of interpretation and construction enumerated by the courts. These principles were epitomized by our

own Supreme Court in Estate of Peabody, 154 Cal. 173, 97 P. 184, as follows (page 185):

"The important thing is the intention of the testator [sec. 1317, Civil Code, now section 101, Probate Code]. This is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Section 1318 [section 105, Probate Code]. All parts of the will are to be considered in relation to each other so as to form, if possible, a consistent whole. Section 1321 [section 103, Probate Code]. Words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent, and that sense can be ascertained. Section 1324 [section 106, Probate Code]. Technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense. Section 1327 [section 106, Probate Code]. 'A technical construction of words and phrases, although prima facie the one which should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas.' * * *"

[7] The first clause of the will before us, if taken alone, would constitute an outright devise in fee simple of all of decedent's property to her husband, while the second clause of the will, standing by itself, would constitute a clear disposition of the remainder at the death of the husband to Frances Bond and Walter W. Mayne. Appellant contends that where, as in the first paragraph of the will in question, real estate is given to a person generally, with power of disposition, that person takes an estate in fee, and a limitation over of what may remain of the gift undisposed of by the first taker at his death, is void for repugnancy. To so hold we would necessarily have to decide that the second clause of the will would be wholly ineffectual, which is contrary to the rule of section 102 of the Probate Code that a will is to be so interpreted as to give some effect to every clause, rather than so as to render any expression inoperative. It is firmly established as the law that expressions in a will, when used to declare the disposition to be made of property at the death of the testator, and not as a request or prayer directed to a devisee or legatee concerning such devise or legacy, is a dispositive command, testamentary in character, and not precatory, but a positive direction binding upon the court in the distribution of the estate. Barney v. Hayes, 11 Mont. 571, 29 P. 282, 28 Am.St. Rep. 495; Stewart v. Stewart, 61 N.J.Eq. 25, 47 A. 633; Weber v. Bryant, 161 Mass. 400, 37 N.E. 203; Appeal of City of Philadelphia, Trustee, 112 Pa. 470, 4 A. 4; Meehan v. Brennan, 16 App.Div. 395, 45 N.Y.S. 57; Taylor v. Martin, 8 A. 920, 6 Sad., Pa., 125; Oyster v. Knull, 137 Pa. 448, 20 A. 624, 21 Am.St.Rep. 890; Brasher v. Marsh, 15 Ohio St. 103, 111; Wood v. Camden etc. Co., 44 N.J.Eq. 460, 14 A. 885; Phillips v. Phillips, 112 N.Y. 197, 19 N.E. 411, 8 Am. St.Rep. 737. In view of these authorities, it cannot be said that the words of the second paragraph of the will before us are not equally clear and distinct as those of the first paragraph. In clear and unequivocal language the testatrix directs that any of the property bequeathed to her husband which remains at the time of his death is to pass to Frances Bond and Walter W. Mayne.

In equally clear and decisive language the first paragraph in the will, standing by itself, indicates an intention on the part of the testatrix that the surviving husband was to have all of her property in fee. Construing both paragraphs together, however, leaving out for the time being the words "if any remains after Frank's passing on", it cannot be doubted that what was intended by the testatrix was to give a life estate to her husband with remainder over to her stepchildren.

The meaning of the final words of the will, "if any remains after Frank's passing on", is not at all clear and is susceptible of any one of several interpretations. The testatrix may have had in mind that the property might be lost through nonpayment of taxes; inability to meet assessments; by flood, or other act of God. She might also have had in mind the thought of protecting her husband from liability in the event, without fault upon his part, he lost the property in any way. Whatever may have been in the mind of the testatrix when she wrote the will in question, it will not admit of denial that she enjoined upon her surviving husband the duty of carefully keeping the property during his lifetime so that it would finally be divided equally between his children. The very words of the will, "to be carefully kept", immediately foreclose the assumption that the testatrix intended that the surviving husband should have the right to consume the estate either in whole or in part. To nullify the direct and positive language, which creates a life estate in the surviving husband with remainder over to the children, by holding that the final words, uncertain and conjectural as they are, qualify and limit that portion of the will which is definite and certain, would not be warranted either by the rules of logic or by the tests laid down for the guidance of courts in the interpretation of wills. The direct and positive should prevail over the indirect, uncertain and equivocal language.

[8] Considering the wording of the will as a whole, it certainly did not give the surviving husband the right to sell, convey or dispose of the property by will. The words in the will that the property was "to be carefully kept and finally divided equally between Frances and Walter" belie the existence in the mind of the testatrix of any intention to bequeath a fee simple estate to her husband. In the face of the language last above quoted, it would do violence to reason to deduce therefrom a right upon the part of the surviving husband to impoverish, impair, diminish or consume the corpus. The language in the will last referred to is repugnant to the conclusion that the surviving husband should have anything more than a life estate with remainder over to his children.

For the foregoing reasons the order and decree appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

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28 Cal.App.2d 299

PEOPLE v. CROWL.

Cr. 364.

District Court of Appeal, Fourth District, California.

Aug. 25, 1938.

1. Robbery 🔑**15**

One who aids and abets in the commission of robbery is punishable as a principal. Pen.Code, § 31.

2. Robbery 🔑**24(1)**

Evidence *held* sufficient to sustain conviction as a principal in commission of robbery in the first degree.

3. Criminal law 🔑**1159(3)**

The District Court of Appeal cannot reverse a conviction merely because of conflicts in the evidence or because the court believes that one of two witnesses for the people was untruthful in part of his testimony.

4. Criminal law 🔑**1159(3)**

The jury's determination from conflicting evidence that defendant was not so drunk as to be incapable of forming an intent to commit robbery would not be disturbed on appeal.

5. Robbery 🔑**11**

A "dangerous or deadly weapon," as used in definition of robbery in the first degree, is any weapon or instrument which, from the manner that it is used or attempted to be used, is likely to produce death or cause great bodily injury. Pen.Code, § 211a.

[Ed. Note.—For other definitions of "Dangerous Weapon" and "Deadly Weapon," see Words & Phrases.]

6. Criminal law 🔑**800(2)**

The phrase "rolled up kit of car tools" is a phrase of general use, with well-understood meaning, and needs no special definition, since involving facts of universal knowledge, as regards question whether the kit could be considered a dangerous weapon though not described as such. Pen.Code, § 211a.

7. Robbery 🔑**11**

A rolled up kit of automobile tools is a "dangerous weapon," within definition of robbery in the first degree. Pen.Code, § 211a.

8. Witnesses 🔑**269(4)**

In prosecution for robbery, where witness testified as to portions of conversation between arresting officers and defendant but arresting officers were asked nothing concerning the statements on direct examination, refusal to permit cross-examination of the officers concerning the conversation was proper.

9. Criminal law 🔑**517(5)**

Where an admission or confession is resorted to as evidence, the exclusion of any portion made at the same time is error unless the excluded portion is an immaterial and irrelevant portion of a conversation which does not relate to or explain the admitted portion. Code Civ.Proc. §§ 1854, 2048; Pen.Code, § 1102.

10. Witnesses 🔑268(3)

In prosecution for robbery, where witness testified on direct examination as to portion of conversation between arresting officers and defendant, cross-examination as to other portions of conversation in an effort to prove that defendant had been offered inducements to make the statements referred to on direct examination was improperly refused. Code Civ.Proc. §§ 1854, 2048; Pen.Code, § 1102; Const. art. 6, § 4½.

11. Criminal law 🔑768(1)

In prosecution for robbery, instruction that evidence of intoxication might be considered by the jury to determine the degree of the crime and in determining the purpose, motive, or intent with which committed, but for that purpose should be received with great caution, was subject to criticism because of concluding clause but was not made reversibly erroneous thereby. Pen. Code, § 22.

12. Robbery 🔑1

"Robbery" contemplates the stealing of property from possession of the owner by means of violence, force, or fear with intent to permanently deprive the owner thereof. Pen.Code, § 211a.

[Ed. Note.—For other definitions of "Robbery," see Words & Phrases.]

13. Criminal law 🔑772(5)

Where an actual intent is a necessary element of a crime, a requested instruction that act and intent must combine to constitute the offense should be given. Pen. Code, § 20.

14. Criminal law 🔑774

In prosecution for robbery, where defendant's only available defense was that of intoxication to a degree making intent to steal impossible, refusal to instruct that act and intent should combine to constitute the offense was error. Pen.Code, § 20.

15. Criminal law 🔑396(2)

In prosecution for robbery, where witness testified on direct examination as to portions of conversation, between defendant and arresting officers, containing a purported confession, defendant should have been permitted to present other material portions of the same conversation to show that he was offered inducements by the arresting officers to make the purported confession. Code Civ.Proc. §§ 1854, 2048; Pen.Code, § 1102; Const. art. 6, § 4½.

16. Criminal law 🔑516

A "confession" is an acknowledgment of guilt, whereas an "admission" relates to matters of fact which do not involve a criminal intent.

[Ed. Note.—For other definitions of "Admission" and "Confess; Confession," see Words & Phrases.]

17. Criminal law 🔑516

A "confession" does not include admissions of mere acts of guilty conduct or of subordinate facts that do not constitute guilt of offense in question.

18. Criminal law 🔑406(3), 517(3)

A confession in which guilt of crime charged is acknowledged, as contrasted with an admission, is not admissible unless preliminary proof has established that the confession was voluntary.

19. Criminal law 🔑698(1)

The jury was entitled to consider testimony received without objection or motion to strike to the effect that defendant had admitted participating in robbery, and had assumed blame for the whole thing, although it was largely in the form of legal conclusions.

20. Criminal law 🔑516

Statements made by one who was accused of participating in a robbery, admitting that he had been a party thereto, that he and another had thrown away stolen wallet, and that stolen watch was hidden in a certain place, and that he assumed the blame for the robbery, constituted a "confession," as an acknowledgment of guilt including all necessary elements of the crime, since intent to steal could be inferred from the admitted acts and from unexplained possession.

21. Criminal law 🔑531(4)

Exclusion of evidence tending to show that confession was involuntary was error.

22. Criminal law 🔑814(16)

Where evidence presented no issue as to the involuntary character of confession, refusal to give requested instruction on the effect of an involuntary confession was not error.

23. Criminal law ⚷1186(4)

Under constitutional provision prohibiting reversal of a conviction unless error has resulted in a miscarriage of justice, the District Court of Appeal must direct a reversal when it is unable to say whether appellant would or would not have been convicted but for the errors alleged. Const. art. 6, § 4½.

24. Criminal law ⚷1186(4)

In prosecution for robbery, where defendant's sole defense was that of intoxication, as that condition bore on his intent to commit crime charged, failure to properly instruct on question of intent, coupled with refusal to admit evidence that alleged confession was made under promise of reward, was prejudicial error. Pen.Code, §§ 22, 211a; Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Thomas Crowl was convicted of robbery in the first degree, and he appeals.

Reversed and new trial ordered.

Archie M. Hall, of Needles, and Wardwell D. Evans, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant after a jury had found him guilty of robbery in the first degree, and from the order denying his motion for new trial.

Defendant and his nephew, Lloyd Crowl, were arrested for the robbery of C. M. Johnson, committed on February 3, 1938, on the highway leading from Needles to San Bernardino. Lloyd Crowl was a minor of the age of sixteen years. He was certified to the juvenile court and was not made a defendant in this action.

Defendant relies upon the following grounds for reversal of the judgment: (1) That the evidence was insufficient to justify the verdict and judgment; (2) errors in law in sustaining objections to questions propounded to witnesses; (3) errors in instructions given and proposed instructions refused; (4) misconduct of the district attorney; (5) error in refusing to grant the motion for new trial because of newly discovered evidence.

Lloyd Crowl was called as a witness for the people. His evidence was in direct conflict with that of the complaining witness and that of defendant. It is quite apparent that neither Lloyd Crowl nor defendant confined himself to the exact truth in the evidence he gave before the jury.

The first specification of error is divided into three sections: (a) That the testimony of Lloyd Crowl is so untrue that the conviction should not be permitted to stand because it is supported by false evidence; (b) that defendant was so intoxicated as to be unconscious during the commission of the crime and did not know that a robbery had been committed until the next day; (c) that it was not shown that a dangerous or deadly weapon was used to bring the offense within the definition of robbery in the first degree. Sec. 211a, Pen.Code.

C. M. Johnson testified that on the night of February 3, 1938, he was walking from Needles to Los Angeles. When he was about six or seven miles west of Needles an automobile traveling west passed him. It was driven several hundred feet beyond him when it was turned and driven back to where he was standing. The driver of the car, whom he identified as Lloyd Crowl, alighted, went to the back of the automobile and secured a rolled up kit of automobile tools with which he hit Johnson twice, once on the temple cutting his scalp and once on the jaw, dislocating it. A fight ensued in which defendant took part. Johnson was badly beaten by the two men. They took his clothes from him and carried away a wallet or bill fold, a watch and chain and $4.63 in money. After defendant was arrested he secured and returned the stolen watch which had been hidden in a pump house in Amboy where Lloyd Crowl lived and where defendant was then staying.

The arresting officer had a conversation with defendant. Johnson described portions of this conversation as follows:

"Q. Do you recall what he said to them or what they said to him? A. Well at first he said he hadn't anything to do with it and sort of laughed it off, and finally Mr. Oxnevad convinced him from the evidence against him that he was connected with it, and finally he admitted he did.

"Q. When he admitted he did, do you recall definitely what he said? A. No, I don't, not the exact words.

"Q. If you don't recall the exact words can you give the substance or drift or effect of what he said? A. No, I don't believe I can recall exactly what he said, other than he admitted that he had.

"Q. Admitted that he had what? A. Had been a part of it.

"Q. A part of what? A. Of the robbery.

"Q. On that occasion, that is on that trip to Amboy did you see or was there shown to you any of the articles that you had lost at the time of the robbery? A. Yes, the watch.

"Q. Who had the watch when you saw it? A. After Mr. Oxnevad had convinced him that he was a part of that he admitted that he was, and said that the watch was hidden in a place there at Amboy. * *

"Q. Did you have a conversation with him on that day or did the officers in your presence have a conversation with him, about the other pieces or parcels of property you lost, that is the wallet or stickpins or pen or pencil, any of those things? A. He said they had thrown the wallet away and he didn't know anything about the other articles.

"Q. Did he say where they were when they threw the wallet away? A. He said someplace along the roadside. * * *

"Q. Now I believe you were unable to remember just what words Mr. Crowl used when you say he admitted he had been a part of it. Has your memory been refreshed since that so as to tell the court and the jury just how Mr. Crowl expressed himself? A. In regard to what?

"Q. In regard to what Mr. Oxnevad had said. A. The only thing he said he assumed the blame and told them where the watch was.

"Q. He said to the officers that he would assume the blame? A. Yes.

"Q. And at the same time told them where the watch had been hid? A. Yes, assumed the blame for the whole thing."

Lloyd Crowl was a witness for the people. His testimony closely followed that of Johnson as to the actual happenings at the time of the robbery, except that Lloyd maintained that defendant was the driver of the automobile and the one who started the fight, made the assault with the kit of tools, and took the property off from Johnson's person.

Defendant testified that he had been drinking heavily on the night of the robbery; that he remembered leaving a roadhouse called "Myra's" in Lloyd's automobile and knew nothing more until he was awakened by the noise of the fight between Lloyd and Johnson; that he alighted from the passenger's seat of the car and took part in the scuffle; that in a few moments he became sick and returned to the car where he fell asleep again; that he knew nothing of the robbery until the next day.

[1] Unless the testimony of the defendant be accepted as true in its entirety, the evidence is ample to support the verdict and judgment. According to Johnson's testimony, defendant aided and abetted in the commission of the crime although he did not strike the blows with the rolled up kit of automobile tools. He was, therefore, a principal in the commission of the crime and punishable as such. Sec. 31, Pen. Code. If the testimony of Lloyd Crowl be believed, defendant was the principal actor in the robbery and guilty of the crime.

[2, 3] It is true that one or the other of these witnesses must have been mistaken, but the testimony of either of them was sufficient to hold defendant as a principal in the commission of the crime. Conflicts in the evidence are first addressed to, and resolved by, the jury. We cannot reverse a judgment simply because of conflicts in the evidence or simply because we believe that one of two witnesses for the people was untruthful in part of his testimony.

[4] Defendant's real defense was that he was so drunk that he did not know that a crime was committed and was incapable of forming an intent to commit a robbery. The testimony of defendant as to the extent of his intoxication is contradicted by that of two witnesses other than Lloyd Crowl. The testimony of Johnson shows quite clearly that defendant was not as seriously intoxicated as he claimed; that defendant did know what he was doing and did have an intent to rob. The bar keeper at "Myra's" saw defendant shortly before and shortly after the robbery. He talked with defendant and observed him and his conduct. He said that while defendant had been drinking he was not

intoxicated. This state of the record produces the familiar situation of conflicts in the evidence which the jury resolved against defendant.

[5] Defendant urges that there is not sufficient evidence in the record that a dangerous or deadly weapon was used in the robbery to support the conviction of robbery in the first degree. The only description of the instrument with which Johnson was hit is found in his testimony. He testified that he was hit twice with a "blunt instrument" and that "it looked to me like a rolled up kit of car tools".

"A dangerous or deadly weapon has been frequently described in our authorities as any weapon or instrument which, from the manner that it is used or attempted to be used, is likely to produce death or cause great bodily injury." People v. O'Neal, 2 Cal.App.2d 551, 38 P.2d 430, 433.

[6, 7] Automobiles are in universal use throughout the state. When a new automobile is sold it is equipped with a kit of tools which include a hammer, wrenches, and other metal instruments. These tools are usually carried in a cloth container. These facts are of such universal knowledge that the expression, "rolled up kit of car tools", needs no special definition. It is a phrase of general use and its accepted meaning is well understood. A blow struck with a hammer and other metal tools rolled up in a cloth container can produce great bodily injury and therefore comes within the definition of a dangerous weapon.

[8] The alleged errors of law are found in the trial court's rulings sustaining objections to questions propounded to several witnesses, by counsel for defendant, in an effort to prove that defendant had been offered inducements to make the statements already quoted, and other incriminatory statements made in the office of the district attorney in San Bernardino.

After Johnson had testified on his direct examination to portions of the conversation between the arresting officers and defendant he was asked the following question on cross-examination:

"Mr. Johnson did you at any time in any of these conversations that you have testified concerning between the officers and yourself and Mr. Crowl hear the officers promise any immunity to Mr. Crowl of prosecution on a felony charge if he would plead guilty to a misdemeanor charge and accept 6 months sentence in the county jail?"

An objection to this question on the ground that it was immaterial was sustained. The following question was then asked:

"Did you at any time overhear the officers offer to Mr. Tom Crowl in any of these conversations you have related or you have testified concerning to permit Mr. Crowl to plead guilty of a misdemeanor charge in the Needles justice court if he would assume the entire blame?"

An objection to this question was sustained on the ground it was hearsay and immaterial.

When the arresting officers were on the witness stand the trial court refused to permit counsel for defendant to cross-examine them concerning these conversations with defendant. These rulings were technically correct because they had been asked nothing concerning them on direct examination. Defendant called officer Bland as his witness. During his examination by defendant's counsel the following occurred:

"Q. Did you overhear a conversation which took place between Mr. Oxnevad and Mr. Thomas Crowl in the car after you left Amboy?

"The Court: Answer that 'yes' or 'no'. A. Yes sir.

"Q. (By Mr. Evans): Will you repeat that conversation?

"Mr. Kavanaugh: Objected to on the ground it is immaterial, and self serving.

"Mr. Evans: If the court please, we offer this on this theory: That there have been statements in the record here as to alleged confessions made by the defendant, Thomas Crowl. We wish to show by this witness and his testimony, as well as the testimony of Mr. Oxnevad, that those confessions were made by Mr. Crowl under a promise of immunity and reward, and they were given prior to the filing of the charges in this case.

"Mr. Kavanaugh: I have not heard any testimony about any confessions at all.

"Mr. Evans: Well, the statements speak for themselves.

"The Court: I think I recall the testimony, counsel. I don't think there are any confessions. There are statements, but not confessions. Objection sustained."

While defendant was a witness in his own behalf his counsel made repeated efforts to draw from him the entire conversation between defendant, the arresting officers and Johnson concerning a part of which Johnson had testified. Objections to these questions were sustained. Like rulings were made when defendant was asked to give his full conversation which occurred in the office of the district attorney. It is clear from the record that defendant would have testified that he made the statements Johnson attributed to him because one of the deputy sheriffs told him in substance that "if you would go back to Needles and plead guilty to an assault and battery charge or simple assault, that it would make it easier for Lloyd and that he would see the judge and do what he could to help you out?" It is also clear that, if permitted to have done so, he would have testified that he had the same inducements in mind when he made the incriminating statements in the office of the district attorney. Defendant denied the truth of these statements while admitting making them.

[9, 10] Section 1854 of the Code of Civil Procedure provides in part as follows: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other * * *." See, also, sec. 2048, Code Civ.Proc.; sec. 1102, Pen.Code.

In the early case of People v. Navis, 3 Cal. 106, it was held that, "Where the admission or confession of a party is resorted to as evidence, it is error to exclude any portion of it made at the same time as the part which is related". With the exception that it is now held that immaterial and irrelevant portions of a conversation which do not relate to or explain the admitted portions need not be received in evidence, the rule announced in People v. Navis is still the law in California. See People v. Murphy, 39 Cal. 52; People v. Yeaton, 75 Cal. 415, 17 P. 544; Hinton v. Welch, 179 Cal. 463, 177 P. 282; People v. Tugwell, 28 Cal.App. 348, 152 P. 740; People v. Stevenson, 103 Cal.App. 82, 284 P. 487. The attorney-general admits that the rulings we are considering were erroneous and to escape the effect of the errors urges the provisions of section 4½ of article 6 of the Constitution.

[11] Defendant complains of an instruction on the defense of intoxication which goes somewhat beyond the provisions of section 22 of the Penal Code. In it the jury was instructed that evidence of intoxication "may be considered by the jury for the purpose of determining the degree of the crime, and in determining the purpose, motive or intent with which he committed the act, and for this purpose it must be received with great caution". The closing clause of this portion of the instruction has been criticized though held in itself not to be reversible error. People v. DeMoss, 4 Cal.2d 469, 50 P.2d 1031.

[12-14] Defendant requested and the trial judge refused to give an instruction based on section 20 of the Penal Code to the effect that "in every crime or public offense there must exist a union, or joint operation of act and intent * * *." The substance of this instruction was not elsewhere given.

"Robbery contemplates the stealing of property from the possession of the owner by means of violence, force, or fear, with the intention of permanently depriving the owner of his property." People v. O'Neal, 2 Cal.App.2d 551, at page 561, 38 P.2d 430, at page 434. Where an actual intent is a necessary element of a crime the requested instruction should have been given. People v. Sheffield, 108 Cal. App. 721, 293 P. 72, 77. This is especially true where, as here, the only available defense was that of intoxication to a degree making it impossible for defendant to have had any intent to steal. Under such circumstances the failure to give proper instructions on the question of intent becomes serious error. The jury was not fully instructed on the only possible defense presented by the defendant.

Defendant proposed, and requested the trial court to give, the customary instruction on the necessity of a confession being freely and voluntarily made. This request was refused and this ruling is now urged as prejudicial error. No instruction was given on this subject.

This brings us to the question: Is there a confession in the record? The trial judge held that the statements of defendant, to which Johnson testified, did not amount to a confession. The attorney-general attempts to support this conclusion of the trial judge with the mere assertion that the evidence of Johnson concerning these statements does not amount to the recital of a confession, to which he adds the arguments that there is nothing in the record to show that the purported confession was not voluntarily given. This last argument brushes aside the very apparent fact that defendant's repeated efforts to introduce evidence to show that the arresting officers gave inducements for the purported confession were rendered abortive by objections of the district attorney, which were erroneously sustained by the trial judge.

[15] As Johnson was permitted to testify to portions of the conversation containing the purported confession, defendant should have been permitted to bring to the attention of the jury all other material portions of the same conversation. If defendant was offered inducements by the arresting officers to make the purported confession, he should have been permitted to prove that fact as it would have had an important bearing on the weight to be given by the jury to the purported confession.

[16-18] What amounts to the confession, as distinguished from statements against interest, was considered by the Supreme Court in the case of People v. Fowler, 178 Cal. 657, 174 P. 892. It was there said (page 894):

"A confession, in criminal law, is an admission or statement, by a person accused of a crime, to the effect that he is guilty thereof. 'An admission is distinguished from a confession by the fact that the term "admission," in criminal matters, relates to matters of fact that do not involve a criminal intent, and a "confession" is an acknowledgement of guilt.' 2 Wharton on Crim.E., (10th Ed.), § 622a. The author goes on to show that the term 'confession' does not include admissions of mere acts of guilty conduct, or of subordinate facts that do not constitute guilt of the offense in question, the reason being that a 'confession' is an 'acknowledgement, in express terms, by a party in a criminal case, of the truth of the crime charged,' and that it is only with respect to confessions, thus defined, that the rule prevails that preliminary proof that they were voluntary must be made before they can be admitted in evidence. Id., § 622b. This doctrine has often been declared and enforced in this state. People v. Strong, 30 Cal. [151] 157; People v. Dennis, 39 Cal. [625] 637; People v. Le Roy, 65 Cal. [613] 614, 4 P. 649; People v. Hickman, 113 Cal. [80] 86, 45 P. 175; People v. Ammerman, 118 Cal. [23] 32, 50 P. 15; People v. Miller, 122 Cal. [84] 87, 54 P. 523; People v. Jan John, 144 Cal. [284] 286, 77 P. 950; People v. Weber, 149 Cal. [325] 339, 86 P. 671; People v. Wilkins, 158 Cal. [530] 534, 111 P. 612. The matter is well illustrated by the decision in State v. Knowles, 48 Iowa, 598. Defendant was charged with forgery of a promissory note. Evidence was given that he had admitted that he wrote the name constituting the signature thereon. The court said: 'A confession implies that the matter confessed is a crime, and unless the defendant admitted that he wrote the name of Daniel Slack to the note with a fraudulent intent, his statement is not a confession, because he may have intended by such confession to imply that the act was done rightfully.' Also, in State v. Thomas, 135 Iowa [717], 725, 109 N.W. 900, where the defendant was charged with the murder of another by means of poison and had stated that he had given too much of the poison by mistake—the poison being also a medicine—the court said: 'The defendant's statement was not that he had unlawfully or wrongfully or with bad motive administered poison. The statement itself negatives any unlawful intent, and what is said in regard to the act cannot be separated from the accompanying declaration as to intent, so as to make the admission of the act itself a confession of crime.' See, also, State v. Abrams, 131 Iowa [479], 484, 108 N.W. 1041. The present case is almost identical with that of Owens v. State, 120 Ga. [296] 298, 48 S.E. 21. The defendants were charged with murder, and, being confronted with the dead body of deceased, one of them said the deceased was himself to blame, and that, 'We had to do it to save ourselves.' It was held that this was not a confession, the court saying: 'Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against him, it cannot be said to be an admission of guilt. * * * If the main fact is admitted with a qualifying exclusion of a necessary ingredient of the crime charged, the crime is not confessed. The qualification is a part of the admission, and both must be considered in interpreting the meaning of the statement. It would be manifestly unfair to hold a person legally bound by a statement which admits the commission of an act and in the same breath legally justifies or excuses the same.'"

[19, 20] The purported confession to which Johnson testified may be summarized as follows: That defendant admitted that he had been a part of the robbery; that defendant stated that he and Lloyd had thrown the stolen wallet away at some place along the road side; that defendant assumed the blame for the robbery and told the officers where the watch was hidden; that he "assumed the blame for the whole thing"; that after his arrest, he produced the stolen watch and gave it to the arresting officers.

While this testimony, summarizing the conversation between the arresting officers and the defendant, is largely in the form of legal conclusions, the evidence was received without objection or motion to strike and the jury was entitled to consider it as given. When considered as a whole it amounts to a confession within the rules announced in People v. Fowler, supra. Before making the statements defendant was accused of participating in the robbery. After being so accused, defendant admitted that he had been a party to the robbery; that he and another had possession of the stolen wallet and had thrown it away; that he had sufficient possession of the watch to produce it from its hiding place. He also stated that he took the blame for the entire robbery. These replies to the accusation made admit every necessary element of the crime of which he was accused, including the intent to steal Johnson's property, as the intent to steal may be inferred from the acts which defendant admitted and from the unexplained possession of part of the fruits of the robbery.

We are assisted in reaching this conclusion by the decision in the case of People v. Oliveria, 127 Cal. 376, 59 P. 772. In that case the defendant admitted, in effect, that "he was guilty of the crime, and that he assisted in forcibly taking the money from Nevis" (page 774), the party who was robbed. These statements were held to amount to a confession. We cannot distinguish the statements in the Oliveria Case from the statements of the defendant in the instant case.

The record before us presents an unusual situation in that the evidence of the confession was admitted without prior objection on the part of defendant that it was induced by promises of reward. Usually, where a defendant contends that a confession was involuntarily made, objection on that ground is made to its admission in evidence. It then becomes the duty of the trial judge to take evidence, including any offered by the defendant, on the question of the voluntary character of the confession. It is the duty of the trial judge to admit or reject the confession upon the evidence so taken. If it be admitted, the weight to be given to it is a matter to be determined by the jury under proper instructions, if such instructions are requested by the defendant. People v. Oliveria, supra; People v. Fowler, supra; People v. Castello, 194 Cal. 595, 229 P. 855; People v. Columbus, 49 Cal.App. 761, 194 P. 288; People v. Black, 73 Cal.App. 13, 238 P. 374; People v. Dutro, 75 Cal.App. 138, 242 P. 84; People v. Nelson, 70 Cal.App. 476, 233 P. 406.

[21, 22] It certainly was error for the trial judge to exclude evidence of the defendant that would tend to establish that the confession was not voluntarily given. The question remains—was it error to refuse to give the requested instruction on the effect of an involuntary confession? We think not, as the evidence presented no issue on the involuntary character of the confession. This conclusion renders obvious the serious nature of the error that resulted in the exclusion of the evidence tending to show that inducements were offered defendant to confess.

In People v. Cahill, 11 Cal.App. 685, 106 P. 115, it was held that where a confession was received without objection, that it was not error to exclude proffered testimony showing that the confession was involuntary and was induced by promises of reward. However, in view of the numerous cases already cited, we believe that the rule of the Cahill Case should be confined to its own facts and should not be extended to the facts of the instant case where evidence of the involuntary character of the confession, if believed, would have had an important bearing on the weight to be given the confession.

We have examined the record carefully and can find no merit in the remaining contentions of defendant, namely, misconduct on the part of the district attorney, and that a new trial should have been granted because of newly discovered evidence.

[23] In view of the errors in the record, it remains for us to determine the effect to be given them under the provisions of section 4½ of article 6 of the Constitution.

In discussing a similar question, in People v. Black, supra, it was said (page 383):

"Can we say that there has not been a miscarriage of justice in the one particular disclosed by the error of the court in excluding from the jury the evidence upon the question whether the confessions were freely and voluntarily made? Can we say that the jury would have been bound under the evidence to reach the same conclusion upon that point as was arrived at by the judge? Can we say that they possibly would not have arrived at that conclusion, upon a just consideration of the evidence upon the subject which is unfolded to us from the cold record? * * *

"It is the law that, when applying the provisions of section 4½ of article 6 of the Constitution to an entire cause, we must direct a reversal when we are unable to say 'whether appellant would or would not have been convicted but for the errors of the court.' People v. Degnen, 70 Cal. App. 567, 234 P. 129. The same rule is susceptible of an application to the special feature of the present cause which is now under consideration. Can we say whether or not the jury would have decided that the confessions were to be considered if its members had been permitted to pass upon the question whether they were freely and voluntarily made? We certainly cannot say that."

In People v. Taber, 13 Cal.App.2d 27, 55 P.2d 1189, this court said (page 1193):

"The question remains whether this error was sufficiently prejudicial to justify a reversal, in view of the provisions of section 4½ of article 6 of the Constitution. In People v. O'Bryan, 165 Cal. 55, 130 P. 1042, 1046, the court said:

"'On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'

"In People v. Salaz, 66 Cal.App. 173, 225 P. 777, 781, the court said:

"'While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the entire evidence upon which a conviction was had, still "we are not substituted for the jury. We are not to determine, as an original inquiry, the question of defendant's guilt or innocence." We are to "decide whether, in our judgment, any error committed *has led* to the verdict which was reached." People v. O'Bryan, 165 Cal. 55, 130 P. 1042. (Italics ours.) And whenever we are unable to determine whether the defendant would have been convicted had erroneously admitted testimony been withheld from the jury's consideration, this section of the Constitution cannot be applied to uphold the judgment.'

"In Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 973, the court said:

"'Whether the error found to be present "has resulted in a miscarriage of justice" presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies.'" See, also, People v. Romo, Cal.App., 74 P.2d 306; People v. Morales, Cal.App., 79 P.2d 771.

[24] The confession of defendant must have had an important bearing on the conclusions reached by the jury. If there was evidence that the confession was made under promises of reward, the jury should have had that evidence before it in order to properly determine the weight to be given to the confession. Defendant's sole defense was that of intoxication, as that condition bore on his intent to commit the crime charged. The failure of the trial court to properly instruct the jury on the question of intent might have had the effect of relieving the jury from serious consideration of that defense. With these

errors in the record, we do not believe that the provisions of section 4½ of article 6 of the Constitution should be invoked to sustain the judgment.

The judgment and order denying the motion for a new trial are reversed and a new trial is ordered.

I concur: BARNARD, P. J.

28 Cal.App.2d 333

CORNWELL v. BUCK & STODDARD, Inc., et al.

Civ. 11555.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1938.

Hearing Denied by Supreme Court Oct. 27, 1938.

1. Mines and minerals 🔑48

Although oil may be regarded as a "mineral" its production is not always considered "mining," "mineral" meaning any chemical element or compound occurring naturally as a product of inorganic processes, which are usually solids, the only ones which are liquids at ordinary temperatures being water and mercury.

[Ed. Note.—For other definitions of "Mineral" and "Mining," see Words & Phrases.]

2. Evidence 🔑20(1)

It is a matter of common knowledge that those who are engaged in the operation of drilling for oil are never referred to as "miners".

[Ed. Note.—For other definitions of "Miner," see Words & Phrases.]

3. Constitutional law 🔑67
Statutes 🔑181(2)

It is the function of the court to determine what is intended by a statute, and the court's interpretation must be reasonable. Civ.Code, § 3542.

4. Statutes 🔑181(1)

The court, in interpreting a statute, must pursue the legislative intent, if possible. Code Civ.Proc. § 1859.

5. Constitutional law 🔑70(1)

In construing a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained in the statute and not to insert what has been omitted or to omit what has been inserted. Code Civ.Proc. § 1858.

6. Sales 🔑465

The phrase "mining purposes" as used in statute requiring conditional sales contracts of equipment used for mining purposes to be recorded within 20 days after its execution, does not include oil wells or drilling operations for the purpose of extracting oils from the ground. Civ.Code, § 2980.

[Ed. Note.—For other definitions of "Mining Purposes," see Words & Phrases.]

7. Attachment 🔑180

Where assignee of lessor of oil well drilling equipment brought action for rent and attached oil well tubing which lessee had purchased under an unrecorded conditional sales contract, and conditional vendor filed third party claim and recovered possession of tubing, vendor was not liable to lessee in conversion because conditional sale was unrecorded, under statute requiring conditional sales of mining equipment to be recorded within 20 days, since the tubing was not equipment to be used for "mining purposes." Code Civ.Proc. § 689; Civ.Code, § 2980.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by M. Cornwell against Buck & Stoddard, Inc., for conversion of oil well tubing. Judgment for plaintiff, and defendant appeals.

Reversed.

Jennings & Belcher, of Los Angeles, for appellant.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment in an action for conversion. The facts briefly are as follows: On the 30th day of July, 1935, plaintiff's assignor rented to Anglo American Petroleum, Inc., on a month to month basis, certain oil well machinery to be used by such company in the drilling of an oil well. The rental agreement provided that the rental be the sum of $50 per day, payable thirty days in advance, and the sum of $37.50 per day payable out of oil produced from the proposed well. No time was specified during which the term was to continue. The agreement further provided that if any default occurred in the payment of the cash rental, plaintiff's assignor had the right to terminate the agreement and to enter the company's property and remove his equipment.

On November 25, 1935, Anglo American Petroleum, Inc., purchased from the defendant oil well tubing for use in the oil well, such purchase being made on a conditional sales contract under which title was reserved in the vendor. The conditional sales contract was not recorded.

On the 3rd day of April, 1936, an action was commenced by the plaintiff, as assignee for collection, against the Anglo American Petroleum Corporation to recover the rental accrued after November 25, 1935, in the sum of $7,500, as well as for the sum of $82.50 for material furnished on an open book account. The sheriff levied a writ of attachment upon the tubing covered by the conditional sales contract of defendant herein. Defendant filed its third party claim under the provisions of section 689 of the Code of Civil Procedure with the levying officer, based upon the conditional sales contract, and in pursuance thereof such officer delivered possession of the tubing to the defendant. Thereafter judgment for a sum in excess of $8,000 was obtained in such action against the Anglo American Petroleum Corporation, which said judgment remains unsatisfied.

Plaintiff commenced the within action in conversion against the defendant and appellant herein, basing such action on the grounds that the third party claim was void for the reason that the same was based on the above-mentioned conditional sales contract which had not been recorded with the county recorder in accordance with the provisions of section 2980 of the Civil Code, in that the equipment described in the aforesaid conditional sales contract and in the aforesaid third party claim was "equipment and machinery used or to be used for mining purposes." The findings of fact and conclusions of law in substance support the allegations relied upon in that regard by plaintiff and respondent.

Section 2980 of the Civil Code in so far as it applies to the questions herein involved is as follows: "Every conditional sales contract * * * of equipment and machinery used or to be used *for mining purposes,* must be * * * recorded, within twenty (20) days after its execution in the office of the recorder of the county * * *." (Italics added.)

The construction and interpretation of section 2980 of the Civil Code, and in particular the meaning of the phrase "for mining purposes", is determinative of the question involved in the within appeal.

With regard to the above-mentioned provision appellant contends that "Oil drilling is one of the principal industries in this state, and every member of the legislature was familiar with it. If it had been intended that this section applied to equipment used in drilling for oil, a statement to this effect would have been included." Respondent, on the other hand, contends "* * * that had the legislature intended to exclude oil development from the operation of the enactment, that it would have used language appropriate to clearly accomplish such exclusion".

The question has not been decided by any appellate tribunal in California. In re Great Western Petroleum Corporation, 16 F.Supp. 247, supports respondent's contention, in which case, with regard to the term "mining purposes", the District Court of the Southern District of California held that (page 249) "The discovery of petroleum has led to a change in terminology. Persons engaged in the industry, geologists and courts generally began to consider oil as a 'mineral' and the process of extracting oil from the ground as 'mining.' Such they are considered at the present time. See Westmoreland & Cambria Natural Gas Co. v. De Witt (1889) 130 Pa. 235, 18 A. 724, 5 L.R.A. 731; Isom v. Rex Crude Oil Company (1905) 147 Cal. 659, 82 P. 317; Callahan v. Martin (1935) 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Burke v. Southern Pacific R. Co. (1913) 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527; Crain v. Pure Oil Co., C.C.A. 8, 1928, 25 F.2d 824; Rice Oil Co. v. Toole County (1930) 86 Mont. 427, 284 P. 145; Shell Petroleum Corp. v. Caudle, C.C.A. 5, 1933, 63 F.2d 296. By common usage, the word 'mining' has thus ceased to be confined to the extraction by excavation from the earth of metals and solid minerals. It is now applied to the extraction from the earth of all substances which are classified geologically as 'minerals.' * * * But oil is *now* so generally considered a mineral and the extraction of oil is *now* so generally considered as mining, that we must assume that the California Legislature of 1933, in using the word 'mining' in the section [sec. 2980 of the Civil Code], used it in the sense in which that word had come to be used *at that time* and not in the sense in which a similar word might have been used by the California Legislature of 1872."

It may be conceded that oil extracted from the ground may be regarded as a mineral but, the conclusion reached in the above opinion, to the effect that the process of extracting oil from the ground is now generally considered as "mining", to say the least, is doubtful. That it has been considered as "mining" in certain instances and for certain purposes there can be no question. For example, referring to the authorities quoted in the above mentioned opinion, an oil well was held to be a mine within the meaning of certain tax assessment laws (Rice Oil Co. v. Toole County, supra); and again, in Texas, where "A mining partnership arises by operation of law where co-owners work a mine", the court held that a certain purported partnership agreement "contemplated a mining partnership" (Shell Petroleum Corp v. Caudle, supra, pages 297, 298). In Oklahoma, where the question affected the character of a purported conveyance, the court held that "Whatever these instruments may technically be called, it seems clear, from all the terms thereof and the circumstances surrounding the transactions, that the intention of the parties thereto was merely to grant rights to go upon the lands, prospect for oil and gas and other minerals * * *; hence they were nothing more than mining leases." Crain v. Pure Oil Co., supra (page 830). The United States Supreme Court has held that petroleum or mineral oil is a "mineral" within the meaning of the acts of Congress reserving mineral land from the railroad land grants. Burke v. Southern Pacific R. Co., supra. The supreme court of Pennsylvania has observed that "Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining * * * have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals feræ naturæ." Westmoreland & Cambria Natural Gas Co. v. De Witt, supra (18 A. page 725).

The California cases, Callahan v. Martin, supra, and Isom v. Rex Crude Oil Company, supra, also hold that oil is recognized as a mineral within the purview of certain laws therein under consideration.

[1] On the other hand, although oil may be regarded as a mineral, its production is not always considered mining. In 40 Corpus Juris 735, appears the following: "Ordinarily, however, the extraction of oil or gas from the earth is not spoken of as mining, and an oil or gas well is not a 'mine' in its primary and restricted sense." To the same effect see Hollingsworth v. Berry, 107 Kan. 544, 192 P. 763, 11 A.L.R. 151; Carter v. Phillips, 88 Okl. 202, 212 P. 747; Barton v. Wichita River Oil Co., Tex.Civ.App., 187 S.W. 1043; Kreps v. Brady, 37 Okl. 754, 133 P. 216. In the case last cited, referring to the process of drilling "a well for water would be performed in the same manner as if drilling for oil or gas", the court declared: "By no stretch of the imagination could such an operation be held to be mining." (Page 220.) The term "mining operation" was also held not to apply to oil production in Guffey Petroleum Co. v. Murrel, 127 La. 466, 53 So. 705. It is significant to note, moreover, that in the definition of the word "mineral" in Webster's New International Dictonary, 2nd edition, the word "oil" is not to be found. "Mineral" is defined therein as "Any chemical element or compound occurring naturally as a product of inorganic processes. Minerals are usually solids, the only ones which are liquids at ordinary temperatures being water and mercury." Nor is the word "mineral" to be found in the definition of the word "petroleum". The definition of "mine" does not include the words "oil" or "oil well", nor any reference thereto either directly or indirectly, or even by implication or suggestion.

[2] It should be noted, also, as a matter of common knowledge, that those who are engaged in the operation of drilling for oil are never referred to as "miners". For

a comprehensive discussion of the question involved herein see Barton v. Wichita River Oil Co., supra.

Thus it will be seen that the attempt to characterize the process of drilling for oil as "mining" has been frequently challenged by reputable authority, and has not thus far been endorsed by that authority primarily and generally relied upon for the definition of words, namely, accredited dictionaries. The courts are disposed to follow rather than to lead in extending the meaning of words common to the English language. The reason therefore is plain, for to rely upon a common authority for such purposes manifestly results in a uniformity of decisions, whereas widespread, independent ideas and opinions only tend to confuse.

In an early opinion (1866) the supreme court of Pennsylvania used the expression "mining for oil", but in the light of the foregoing, manifestly it cannot be said that the expression has become general and common, or indeed even peculiar to the industry. It was to be expected that in the beginning when less was known as to its origin, oil produced from the ground was regarded as a mineral, for in the old general classification of things into three kingdoms, namely, the animal, the vegetable and the mineral kingdoms, it could fall into no other class. It does not follow, however, that because it has been classified as a mineral that the process of extracting oil from the ground is generally understood to mean "mining."

[3-5] The courts are frequently called upon to settle disputes similar in character to the one herein involved, and in that connection are guided and limited by rules and doctrines of interpretation and construction that are sufficiently well known to require no citation of authority. It is the function of the court to determine what is intended by the statute, in which connection the legislature has declared that such "interpretation must be reasonable" (Civ.Code, § 3542) and that the intention of the legislature is to be pursued if possible (Code Civ.Proc. § 1859); furthermore, in the construction of a statute the office of the judge is simply to ascertain and declare what is in terms or in substance contained in the statute and not to insert what has been omitted, or to omit what has been inserted. Code Civ. Proc. § 1858.

[6, 7] That the word "mining" refers to and includes quartz and placer mining operations there can be no question, but by extending its evident meaning to include something doubtful would add to the statute that which may have been intentionally omitted. Such interpretation and construction would be mere speculation. The word "mining" occurs frequently in the codes, and to give the word the meaning contended for by respondent could lead to incalculable mischief. Any asserted doubt as to the meaning of the word "mining" as used in the statute under consideration would appear to be an artificial doubt rather than a warranted doubt resulting from that which is not clear. It must be held, therefore, that the word "mining" and the phrase "mining purposes", as used in section 2980 of the Civil Code, do not include oil wells or drilling operations for the purpose of extracting oil from the ground.

For the foregoing reasons the judgment is reversed.

We concur: YORK, P. J.; WHITE, J.

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28 Cal.App.2d 364

MILLER v. CITY OF MARTINEZ et al.

Civ. 10596.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1938.

Rehearing Denied Oct. 1, 1938.

Hearing Denied by Supreme Court Oct. 31, 1938.

1. **Municipal corporations** 🔑231(1)

Public officers may not make contracts in their official capacity with themselves or become interested in contracts thus made on principle that no person can faithfully serve two masters representing inconsistent interests. Gen.Laws 1931, Act 5233, § 886.

2. **Municipal corporations** 🔑231(1)

A member of city council is ineligible as such official to make or assist in making a contract with his private employer, and a contract so made is void as against public policy. Gen.Laws 1931, Act 5233, § 886.

3. Municipal corporations 🔑231(1)

Statute prohibiting public officers from having interest in contracts executed in their official capacity removed grounds for equitable considerations in such cases. Gen. Laws 1931, Act 5233, § 886.

4. Municipal corporations 🔑231(1)

Under statute prohibiting public officers from having an interest in contracts executed in their official capacity, the disqualifying interest of a public official need not be financial. Gen.Laws 1931, Act 5233, § 886.

5. Municipal corporations 🔑231(1)

Under statute prohibiting public officers of a city from having an interest in contracts executed in their official capacity, the disqualifying interest of a public official may be any interest which would prevent him from exercising absolute loyalty and undivided allegiance to best interest of the city. Gen.Laws 1931, Act 5233, § 886.

6. Municipal corporations 🔑231(3)

A city councilman who was office manager of oil company from which city purchased petroleum products and in which councilman was also a stockholder was "interested in contract," within meaning of statute invalidating contracts executed by public officials who are personally interested therein. Gen.Laws 1931, Act 5233, § 886.

7. Municipal corporations 🔑255

The price of goods received by city under a contract with oil company in which city councilman was interested as a stockholder and of which he was office manager could be recovered without an offer to return the goods. Gen.Laws 1931, Act 5233, § 886.

8. Evidence 🔑65

An oil company was presumed to know the law prohibiting public officers from having interest in contracts executed in their official capacity when it dealt with a city council on which company's office manager sat. Gen.Laws 1931, Act 5233, § 886.

9. Municipal corporations 🔑255

An oil company which negotiated contract with city council on which company's office manager sat could not be heard to urge equitable considerations as defense to action for recovery of the purchase price paid. Gen.Laws 1931, Act 5233, § 886.

10. Municipal corporations 🔑255

A statute providing that any claim for compensation for work done or supplies or materials furnished city under a contract in which officer of the city was interested should be void provided merely a cumulative remedy and did not prohibit recovery of compensation already paid, since such recovery was based on express language making such transactions void and on the broad principle of public policy which recognized no equities or estoppels. Gen.Laws 1931, Act 5233, § 886.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by R. Miller, as a taxpayer and resident of the City of Martinez, against the City of Martinez and others to recover a certain sum under a statute forbidding a public officer from being interested in contracts made by a governing body of which he is a member. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Aaron Turner and John Felton Turner, both of Oakland, for appellant.

McCutchen, Olney, Mannon & Greene, F. F. Thomas, Jr., and Ray Vandervoort, all of San Francisco, for respondents City of Martinez, Severns, Winkelman, Connolly, Claeys and Shell Oil Co.

Tinning & DeLap, of Martinez, for respondent F. P. Brady.

TUTTLE, Justice pro tem.

By this action plaintiff as a taxpayer and resident of the City of Martinez seeks to recover the sum of $4,639.89, under the provisions of a statute which forbids a public officer from being interested in contracts made by a governing body of which he is a member. The trial court sustained demurrers to the third amended complaint in this action, and upon a failure to amend, judgment was entered for defendants.

The following facts appear in the complaint: Plaintiff is a citizen, resident and a taxpayer of the City of Martinez. Martinez is a municipal corporation of the sixth class governed by a city council consisting of five members, and at the time of the transactions in question in this action the defendants Severns, Winkelman, Connolly, Claeys and Brady constituted the city council. Shell Oil Company maintained and operated in the City of Martinez a plant and office at which it carried on the business of refining and manufacturing petroleum products and other merchandise which were intended for sale and were to be sold in Martinez; City Councilman Severns was Shell Oil Company's manager in charge of this office; the defendants who constituted the Martinez city council knew that products which the company refined and manufactured at Martinez were intended for sale and were to be sold in Martinez. The company was also engaged in the City of Martinez in the business of selling in Martinez the petroleum products and other merchandise which it refined and manufactured at the Martinez plant for sale in Martinez. During all the times here involved defendant Severns was not only a member of the city council and a paid employee of Shell Oil Company in charge as office manager of the company's said Martinez office, but he was also the owner of a large number of shares of said Shell Oil Company's stock. These facts were known to all of the defendants. During the time that defendant Severns was in the employ of Shell Oil Company as manager of its said Martinez office, the owner of a large block of Shell Oil Company's stock and at the same time a member of the Martinez city council, the company sold to the city council at Martinez and the City of Martinez through its city council purchased from Shell Oil Company petroleum products and other merchandise which the company had refined and manufactured at its Martinez plant for sale by the company in Martinez. The company presented to the city council claims for the products which it had sold to the city and which the city had purchased through the city council. The city council and every member thereof, including defendant Severns, voted in favor of the approval of these claims and ordered warrants drawn on the city treasury for their payment. Warrants were accordingly drawn on the city treasury in favor of Shell Oil Company, were delivered to it and were paid out of funds in the city treasury. Plaintiff as a taxpayer demanded of the city council that it authorize and institute in the name of the city an action against the Shell Oil Company and against the individuals who constituted the city council to recover from them and to require them to pay into the city treasury for the benefit of the taxpayers of the city all money paid out of the city treasury on claims presented by Shell Oil Company for sales made by the company to the city while the defendant Severns was at the same time a member of the city council and in the employ of Shell Oil Company as manager of its said Martinez office. The city council by resolution rejected the demand and refused to authorize or institute such action. This action by plaintiff as a citizen, resident and taxpayer of Martinez followed.

The grounds of demurrer were both general and special. Taking up the general demurrers, it is contended by respondents that the complaint fails to show that defendant and City Councilman Severns was "interested" in the sale to the city by the Shell Oil Company, within the purview of section 886 of the Municipal Corporation Act (Deering's Gen. Laws, Act 5233, § 886), which reads as follows: "No officer of such city * * * shall be interested, directly or indirectly, in any contract with such city * * * or in doing any work or furnishing any supplies for the use of such city * * *; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void * * *."

[1] It is alleged in the complaint that defendant Shell Oil Company operated and maintained a plant and office for carrying on its business in the City of Martinez, that defendant Severns was the office manager in charge of its said office; that the latter was a stockholder in said company, and that the company at Martinez made the sale in question to the City of Martinez. The basic reason for the enactment of laws of this character is succinctly stated in the case of Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, at pages 601, 602, 229 P. 1020, at page 1024, as follows: "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed. * * * The personal interest of an officer in a contract made by him in his official capacity may be indirect only, still such interest would be sufficient to taint the contract with illegality. If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as such should be absolutely free from any influence other

than that which may directly grow out of the obligations that he owes to the public at large."

[2, 3] In the case last cited, one Charlesworth was an employee of the corporation with whom the city of Stockton was about to enter into a contract. He was also a member of the city council when the contract was awarded. The sole question was whether or not he was "interested" in such a contract. Holding that he was "interested", and that the contract was therefore void, the court said: "In this case, Charlesworth was the sheet metal foreman of the petitioner's establishment and the contract proposed to be awarded to the petitioner was connected directly with that department of the petitioner's business. Under these circumstances, it would be exceedingly strange if Charlesworth were not, to a considerable extent, desirous of the awarding of the contract to his employer. Indeed, we think it cannot well be denied that, abstractly speaking, the interest which Charlesworth had in the petitioner's business would be sufficient to invalidate any contract made by a public officer in which he had a similar interest. In a sense, Charlesworth, to the extent of his authority as foreman of the sheet metal department of the petitioner, is the latter's agent. While it may truly be said that he would not derive direct pecuniary gain from the contract, he certainly would indirectly be so benefited, since upon the success of petitioner's business financially primarily depends the continued tenure of his position and the compensation which he receives for performing the service required of him as the foreman of the department referred to. Cases are numerous in which it has been held that one who is an employee of another, or a corporation or firm, and at the same time a member of the city council of a municipality is ineligible as such official to make or assist in making a contract with the person or corporation in whose employment he is, and that a contract so made is void upon the principle that such act would contravene public policy. See Nunemacher v. Louisville, 98 Ky. 334, 32 S.W. 1091; Byrne & Speed Coal Co. v. Louisville, 189 Ky. 346, 224 S.W. 883; Bradley, etc., Co. v. Jacques (Ky.) 110 S.W. 836; Gillen Co. v. Milwaukee, 174 Wis. 362, 183 N.W. 679; Harrison v. Elizabeth, 70 N.J. Law 591, 57 A. 132. It should be added that the statutory provisions emphasizing the general or common-law rule as to such contracts remove all grounds for equitable considerations in such cases. City of Northport v. Northport Townsite Co., 27 Wash. 543, 68 P. 204, 205."

[4] The case of Mumma v. Town of Brewster, 174 Wash. 112, 24 P.2d 438, is relied upon by respondents. It is there held that the disqualifying interest of the public official must be a financial one. While this may be the rule in the state of Washington, we are satisfied that in our own jurisdiction it is otherwise. In the case of Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 293 P. 145, the manager of the company was also a councilman of Crescent City. Holding void a transaction between the company and the city the court said (page 147): "It is argued that since the councilman, Dressler, was merely employed and worked for a salary as manager of the mercantile corporation, that he was not a stockholder and that he had no pecuniary interest therein, he was therefore not interested in the business to such an extent or in such a manner as to invalidate the transaction, since the supplies were purchased for the city in perfect good faith. The statute declares that a transaction consisting of the 'furnishing of any supplies' for a city or town, in which an officer is 'directly or indirectly' interested, shall be void. As manager of the mercantile business, which employment demanded strict loyalty to his employer, it may be inferred Dressler, as a councilman, was not free to negotiate a bargain in behalf of the city as favorable to the municipality as though these conflicting interests did not exist. Dressler's membership on the council may reasonably be expected to influence his associates in purchasing supplies for the city. The desire to favor a fellow councilman, unwarranted confidence, or carelessness in bargaining for supplies might result in a substantial loss to the city. It is not necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. The purpose of the statute is to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty. Nothing in the relationship of a public officer should prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves. Although Mr. Dressler had no greater interest in the transaction than is shown by the mere agency as business manager of the store from which the supplies were purchased, even though they were

obtained in perfect good faith at favorable prices, still the transaction was void and the claims were illegally allowed."

[5] It would thus appear that the "interest" need not involve any direct financial gain upon the part of the public official. It may be any interest which would prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves. He should be absolutely free from any influence other than that which may grow out of the obligations he owes the public.

[6] Here, accepting the allegations of the complaint, the city councilman is office manager of the Shell Oil Company in Martinez. The city purchases petroleum products from his company. Is he a free agent in respect to this transaction? If he voted against the purchase would he not believe that such a course would be prejudicial to his standing with the corporation? Obviously, applying the ordinary rules of human conduct and behavior, he would consider that it would be to his interest to approve the transaction, and this is not impugning the good faith and honesty of Severns. As was stated in the Hobbs, Wall & Co. Case, supra, "The purpose of the statute is to remove all *indirect influence* of an interested officer as well as to discourage deliberate dishonesty". (Italics ours.)

Concluding this phase of the case, we are satisfied that the complaint shows that defendant Severns was interested in the transaction within the language of the statute.

[7] It is contended that the purchase price of the goods cannot be recovered without an offer to return them. The contention is devoid of merit. It is directly answered in the following language taken from the case of County of Shasta v. Moody, 90 Cal.App. 519, 523, 524, 265 P. 1032, 1034: "Appellant strenuously contends that the county is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. The contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels. Berka v. Woodward, supra [125 Cal. 119, 128, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31]; Stockton Plumbing & Supply Co. v. Wheeler, supra [68 Cal.App. 592, 229 P. 1020]; Nielsen v. Richards, supra [75 Cal.App. 680, 243 P. 697]; 21 Cal.Jur. 888. The appellant relies upon such cases as Riverside County v. Yawman & Erbe Mfg. Co., 3 Cal. App. 691, 86 P. 900, and County of Sacramento v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, as supporting his contention that the respondent is estopped to maintain this action. The facts in those cases are decidedly different from the facts in the case at bar and are not in point. The contracts in the case at bar, as we have seen, *are against the express prohibition of the law, and courts will not entertain any rights growing out of such a contract, or permit a recovery upon a quantum meruit or quantum valebat.* Berka v. Woodward, supra."

It is contended by respondent that the decision in the above case is based upon a statute (Pol.Code, § 4005b) which expressly authorizes a recovery of the money paid under such circumstances. The section last cited *empowers* the district attorney to bring such an action. It will be observed, however, that the holding is not predicated upon an express authority given, but is based upon the general principle that the statute is against public policy, and therefore there is no ground for equitable considerations and estoppels. It would appear that the portion of the Political Code last cited which relates to the duty of the district attorney is a mere *direction* to a public official and is not a portion of the substantive law. The case of City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 48 P.2d 87, does not bear out the position taken by respondent. Furthermore, in that case only equitable considerations were discussed, and contravention of public policy was not mentioned or considered.

[8-10] The contention that "the statute permits only withholding, not recovery, of payment" is answered by what we have had to say upon the question of recovery of the price paid. There is nothing in the wording of the statute under consideration which would prohibit a recovery of payment. The selling company was presumed to know the law when it dealt with a city council upon which its office manager sat. It will not now be heard to urge equitable considerations arising out of such a breach of public policy. Our courts have been very scrupulous in the enforcement of the spirit of statutes such as the one we have before us. The withholding remedy mentioned in the law is merely a cumulative remedy, and in no manner restricts the recovery which

is based upon express language making such transactions void, and the broad principle of public policy which recognizes no equities or estoppels upon the part of a participant.

Several other points are urged in support of the judgment. Some of them have been discussed above. Others have no substantial merit.

We are of the opinion that the complaint states a cause of action. It is therefore ordered that the judgment be reversed and the trial court directed to overrule the demurrer.

We concur: CASHIN, J.; KNIGHT, Acting P. J.

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28 Cal.App.2d 321

COOPER v. WEATHERHOLT.

Civ. 11851.

District Court of Appeal, Second District,
Division 2, California.

Aug. 29, 1938.

1. Sales 🔑354(6)

In action on a written contract for the purchase of an engine, wherein buyer alleged delivery of a different engine than one having the characteristics represented at time of execution of contract, answer alleged sufficient facts to constitute a defense on basis of seller's fraud in absence of special demurrer, notwithstanding failure to allege seller's intent to deceive or knowledge that representations were false or made recklessly as a fact without knowledge or investigation as to their truth. Const. art. 6, § 4½.

2. Trial 🔑76, 82

The practice of permitting an examination without interposing objection or merely interposing general objections when specific ones should be mentioned is improper.

3. Appeal and error 🔑241

In action on a written contract for the purchase of an engine, wherein buyer alleged delivery of an engine with characteristics different than represented at time of execution of contract, motion to strike evidence of misrepresentation and fraud on ground that evidence tended to vary the terms of the written contract did not authorize reversal because answer did not present an issue of fraud, where case was fully tried by both parties on theory that defense of fraud was being advanced.

4. Appeal and error 🔑219(2)

Alleged error in a finding which was not pointed out was unavailing.

5. Sales 🔑52(7)

In action on a written contract for the purchase of an engine, wherein buyer alleged delivery of an engine with characteristics other than represented at time of execution of contract, evidence sustained finding of misrepresentation.

6. Sales 🔑181(11)

In action on a written contract for sale of an engine wherein buyer alleged delivery of an engine with characteristics other than represented at time of execution of contract, evidence sustained finding that seller had not substantially performed his contract.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Charles B. Cooper, doing business under the fictitious firm name of Charles Cooper & Company, against Annette L. Weatherholt on a written contract for the purchase of a stationary engine and for goods sold and delivered to the defendant at her special instance and request. Judgment for defendant, and plaintiff appeals.

Affirmed.

Proctor K. Perkins, of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the defendant in an action upon a written contract for the purchase of a stationary engine and for goods sold and delivered to the defendant at her special instance and request.

[1] The answer admits the execution of the contract, but denies that the plaintiff delivered or installed the property purchased, and alleges that the plaintiff deliv-

ered and installed an entirely different engine, and that the engine delivered to her does not perform the purposes for which it was intended when ordered; that prior to the time the defendant executed the contract she made known to the plaintiff that she desired to purchase a full Diesel engine, and that both parties went to Las Vegas, Nevada, and inspected a semi-Diesel engine there, and that the defendant told plaintiff she must have a full Diesel engine and would not consider buying any other kind; that plaintiff stated that he would deliver to her a full Diesel engine, to-wit a Victor horizontal, 85 horsepower, 210 revolutions per minute Diesel engine; that the defendant, believing and relying upon the representations of the plaintiff executed the contract, and that a semi-Diesel engine was delivered and installed. Further, that the plaintiff represented at the time the contract was entered into that the *full type* Diesel engine which he was then selling to the defendant was equipped with a 72-inch diameter driving pulley, but that the engine installed was equipped with a 50-inch diameter pulley; that a full Diesel of the type purchased burns approximately 90 gallons of oil per day and will run continuously unattended as long as the same is supplied with oil; that the engine delivered uses water in addition to oil and consumes approximately 120 gallons of oil per day, and in case of change in temperature said engine will sputter and stop, with the result that it requires almost the constant attention of one man.

The contention of the plaintiff is that there is no allegation of an intent on the part of plaintiff to deceive or of knowledge on the part of the plaintiff of the falsity of the representations or that the representations were made recklessly as a fact without knowledge or investigation as to their truth or falsity. It is true that no such allegations are made in the answer.

The case was tried by the defendant and the court as if the answer set up sufficient allegations, and it is the contention of the defendant that the allegations in the answer state sufficient facts to constitute a defense on the basis of plaintiff's fraud, particularly in the absence of a special demurrer.

In the case of Pembrook v. Houston, 41 Cal.App. 54, 181 P. 828, it was contended that the complaint did not state facts sufficient to constitute actionable fraud. In discussing this point the court said (page 830): "However, the only question of the sufficiency of this complaint was raised by general demurrer, and, as it is obvious that there has been an attempt to plead the facts relied on as establishing fraud, and that the weakness of the complaint is in the insufficiency of their statement, rather than an entire failure of statement, we are disinclined to hold the complaint insufficient, in the absence of special demurrer."

In the case of Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, the court said (page 1013): "The lack of a direct allegation that the statements were untrue, conceding it to be a defect, is one of that character which, in the absence of a special demurrer, is cured by the verdict of the jury or the finding of the court, and which cannot be taken advantage of when urged for the first time on appeal. [Citing cases.] The same rule applies to the defective allegation of fraudulent intent on the part of Gorrill. * * * The lack of a more definite averment of an intent to deceive is immaterial. If one makes material false statements to another, to induce that other to buy an article and which does induce him to buy to his injury, the defrauding party either knowing them to be untrue, or believing them to be true, but having no sufficient ground for such belief, he will not be protected from liability for his fraudulent conduct by the fact that he did not intend to deceive the other party."

In the case of Cameron v. Evans Securities Corporation, 119 Cal.App. 164, 6 P.2d 272, the complaint for fraud was held good against a general demurrer in spite of the failure to allege that the representations alleged were known by the defendant to be untrue.

Article 6, section 4½, of the Constitution declares that no judgment shall be set aside or new trial granted in any case on the ground of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The judgment in this case was for a return of such part of the purchase price as had been paid to the defendant, and a return to the plaintiff of the pump. After an examination of the entire record we cannot say that there has been a miscarriage of justice.

The defendant moved to file an amended answer to conform to the proof, but this motion was denied. The trial court no doubt felt at that time that the answer was sufficient in the absence of a special demurrer pointing out to defendant particular objections to her answer.

[2, 3] The plaintiff's second contention is that the court erred in admitting evidence of misrepresentation and fraud. No definite objections to the evidence on such ground were made. The evidence with regard to fraud was offered and received by the court without any objection from plaintiff's counsel upon the ground that defendant's answer did not present an issue of fraud. The objections from counsel were in the form of motions to strike after a question had been answered, and the ground upon which the motions were based in each case was that the evidence tended to vary the terms of a written contract.

In the case of In re Estate of Wahlefeld, 105 Cal.App. 770, 288 P. 870, the court said (page 871): "The practice of permitting an examination without interposing objection or merely interposing general objections when specific ones should be mentioned is improper. It gives a litigant an opportunity to weigh the testimony and if unsatisfactory to present a belated objection or motion." The case was fully tried by both parties on the theory that the defense of fraud was being advanced, and we are not inclined to reverse the case on the ground of the erroneous admission of evidence.

[4] The plaintiff's next contention is that the court erred in finding that there was a breach of warranty. But he does not point out the finding to which he refers.

[5] The plaintiff's next contention is that the court erred in finding that there was misrepresentation by the plaintiff. There was substantial evidence to sustain said finding.

The plaintiff next contends that the court erred in not finding that the defendant accepted the engine. But there is substantial evidence in the record that at all times the defendant complained about the engine and was never satisfied with it.

[6] The plaintiff's final contention is that the court erred in finding that the plaintiff has not substantially performed his agreement with the defendant. This contention is not elaborated upon by the plaintiff, but we are of the view that there is substantial evidence to sustain the finding.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 354

WHITTELL v. PINNEY et al.

Civ. 6055.

District Court of Appeal, Third District, California.

Aug. 31, 1938.

Rehearing Denied Sept. 30, 1938.

Hearing Denied by Supreme Court
Oct. 27, 1938.

1. Mortgages 🔑25(2)

A note and mortgage given by defendants to plaintiff to induce plaintiff to purchase oil stock and to insure plaintiff against loss were based on sufficient consideration, where sum was advanced by plaintiff at urgent solicitation of defendants, who were stockholders in oil company, to protect investments of defendants and their friends to whom defendants had sold stock. Civ. Code, § 1605.

2. Mortgages 🔑25(2)

Where note and mortgage were given by defendants to plaintiff to induce plaintiff to purchase oil stock and to insure plaintiff against loss, after urgent solicitation by defendants, who were stockholders in oil company, in order to protect the investments of themselves and their friends to whom they had sold stock, note was not a mere agreement to indemnify plaintiff for loss of his money, but was an original promise to pay, based on a sufficient consideration therefor. Civ.Code, § 1605.

3. Bills and notes 🔑92(1)

To constitute a valid consideration for note, it is not necessary that payer shall be benefited by transaction, but it is sufficient if payee suffers prejudice thereby. Civ. Code, § 1605.

4. Bills and notes ⚷108

A note was not invalidated by provision of mortgage securing note that mortgagee purchased oil stock in amount of note, that mortgage was given to insure mortgagee against loss by reason of purchase, and that mortgage should be deemed satisfied if mortgagee should receive amount of purchase price of stock or if stock attained that book value.

5. Mortgages ⚷414

The transfer and deposit of oil stock in bank, as provided by mortgage given by defendants to plaintiff to induce plaintiff to purchase oil stock and to insure plaintiff against loss, were not necessary prerequisites to right to foreclose mortgage, where the stock was absolutely worthless.

6. Mortgages ⚷408

Commencement of action to rescind purchase of oil stock was not a waiver by mortgagee of his right to foreclose mortgage providing that mortgagee purchased oil stock in amount of mortgage note, that mortgage was given to insure mortgagee against loss by reason of purchase, and that mortgage should be deemed satisfied if mortgagee should receive amount of purchase price of stock or if stock attained that book value.

◆

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Alfred Whittell against Harry J. Pinney and Annie L. Pinney for foreclosure of a mortgage, wherein the defendants filed a cross-complaint praying for cancellation of mortgage. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Hearing denied by Supreme Court; HOUSER, J., not participating.

Ernest C. Griffith, of Los Angeles, for appellants.

W. W. Kaye and Homer Johnstone, both of Los Angeles, for respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

The defendants have appealed from a judgment of foreclosure of mortgage, which was rendered against them. The mortgage contains a clause to the effect that it was executed to insure the mortgagee against loss on account of his purchase of certain shares in a Texas oil company. It is contended this clause creates a condition precedent to the right of foreclosure of the mortgage, and that the mortgage was rendered invalid by plaintiff's commencement of an independent action to rescind the purchase of the oil stock.

In October, 1931, the defendant, Harry J. Pinney, bought from E. S. Price for the sum of $2,000 twenty shares of stock in the E. S. Price Oil Corporation of Texas. It was represented by Price that the oil corporation was the owner of 15,000 acres of valuable oil land in Texas containing producing wells, and that its affairs were in thriving condition. The defendant, Pinney, was so enthusiastic over the prospects of the success of the company that he not only bought shares of stock for himself but he also persuaded many of his friends to purchase stock in it. He procured the sale of stock to his friends in the aggregate sum of $11,000. By means of false representations on the part of Price the plaintiff was induced to purchase 100 additional shares of the stock in that enterprise in January, 1932, for which he paid $10,000. The plaintiff then owned 120 shares of the stock. That transaction took place at San Francisco. A few days later Price notified the plaintiff that "something had happened" to his enterprise, and that Mr. Pinney was coming to San Francisco from Los Angeles to explain the situation. February 1st Mr. Pinney arrived in San Francisco, and the plaintiff then met the defendant for the first time. Mr. Pinney assured the plaintiff that the oil property was exactly as it had been represented to him by Mr. Price; that he, Pinney, owned stock in the company and that it was a "wonderful deal" and he had sold large amounts of the stock to his personal friends. He told the plaintiff that Price required $30,000 immediately with which to pay certain judgment liens existing against the corporation property; that he, Pinney, had undertaken to raise $15,000 of that amount, but was unable to do so for the reason that pending litigation against him had created a cloud upon the title to his land, and that if they were not able to raise the $15,000 at once, the company would lose its valuable property. The defendant Pinney then made the proposition to plaintiff that if he would advance to the company $15,000 in addition to the sum of $10,000 he had already invested in stock, Pinney would give him a mortgage on his San Pedro property to secure the repayment of the first mentioned sum. The plaintiff testified in that regard:

> "Mr. Pinney told me that if I would put up $15,000.00 he would give me a mortgage to secure me against loss of the principal for $15,000.00 * * * that I would have the return of my principal, which would be $15,000.00, and after that [sum was repaid] half of the dividends [on my stock] on the $25,000.00 would go to him for three years."

Subsequently Mr. Pinney changed his proposal slightly, by agreeing to give plaintiff a mortgage on his property, under the terms suggested, to secure the repayment of the principal sum of $12,000 of the $15,000 advanced, and that when plaintiff had been repaid that sum of $12,000, Pinney would be entitled to receive one-half of the dividends which were paid on plaintiff's stock for the following three years thereafter. This was agreed upon. The plaintiff then drew from his bank and paid to Price the additional sum of $15,000. In accordance with the preceding agreement, the defendant, Harry J. Pinney, executed and delivered to plaintiff his promissory note for $12,000, dated February 5, 1932, due three years from the date thereof, without interest. On the following day the defendants executed and delivered to the plaintiff the mortgage in question, containing the following clause:

> "This mortgage and the note secured hereby are given and accepted upon the express condition that it shall only be paid or become payable in the following event, and then only in the manner and to the extent herein stated: The Mortgagee has purchased 120 shares of the E. S. Price Oil Company, a Texas Corporation. *This mortgage is given to assure mortgagee against loss by reason of such purchase to the extent of $12,000.* In the event the Mortgagee shall receive within three years from the date hereof $12,000 either as dividends or as proceeds from the sale of said stock, or if notwithstanding the failure to so receive such amount said stock shall be of the book value of $12,000 at any time within such three years, then this mortgage and the note secured hereby shall in any of such events become ipso facto null and void and shall be forthwith duly released of record and the said note cancelled; otherwise to remain in full force and effect, diminished by amounts so received and/or the book value of the stock. It is agreed that the said 120 shares are divided into two certificates—one in Mortgagee's name and the other in the name of Harry J. Pinney. Said last named certificate shall be deposited in escrow with the Crocker First National Bank of San Francisco, endorsed in blank, under instructions that all dividends to hereafter accrue thereon shall be paid to Mortgagee up to $6000. A credit for double the amount so received shall be made by Mortgagee upon the note secured hereby; after dividends totaling $6000 shall be so received on such 60 shares all dividends shall be paid to Harry J. Pinney as his property up until February 6, 1935; on the 6th day of February, 1935, the said 60 shares so held in escrow shall be delivered to mortgagee or be subject to his order.
>
> "In the event this mortgage is not satisfied, mortgagor, as a condition to its enforcement, shall be entitled to demand and receive said 120 shares."

After the execution of the mortgage the plaintiff and Mr. Pinney visited the oil fields in Texas and then discovered the fraud that had been perpetrated upon them. The plaintiff had been told by Price that the company owned 15,000 acres of good oil land; that it had two wells capable of producing oil of the value of $6,000 per day, and that it was solvent and prosperous, together with many other false statements which induced him to invest in the stock. When the plaintiff reached Texas he discovered that the company did not own 15,000 acres of land, and upon the contrary that it merely held an equitable title to 3000 acres, which stood in the name of a trustee; that there were no active wells in operation on the premises, but only two abandoned dry holes; that there were then no derricks or active operations under way on the premises; that litigation was pending against the corporation; that it was indebted in the sum of $80,000; that it was apparently bankrupt, and that the stock was valueless.

Numerous suits were commenced in Texas against the corporation. Among other actions the plaintiff commenced a suit in Texas to cancel the stock which he had bought and to recover his purchase price thereof on the ground of fraud. That suit was not prosecuted to judgment. The defendant, Pinney, Mr. Price and a man by the name of Rankin undertook to rehabilitate the oil corporation. Pursuant to that effort, 950 additional shares of the corporation stock were transferred, without consideration, to Mr. Pinney. The endeavor to restore the solvency of the company was a failure. Litigation and debts accumulated. Price had misappropriated the funds of the corporation, for which he was subsequently indicted. In a suit which was instituted against the corporation in Texas, a receiver was appointed who took charge of the property. All efforts to develop oil or gas on the premises failed. The stock was absolutely valueless.

The plaintiff returned to California and commenced this suit against the appellants in the superior court of Los Angeles county, under section 1060 of the Code of Civil Procedure, to construe the preceding clause of the mortgage with respect to the security of payment of the $12,000 purchase price of 120 shares of the corporation stock which he owned and to declare the mortgage a lien on defendant's property, described therein, for the payment of said sum. The defendants denied the material allegations of the complaint, and filed a cross-complaint praying for a cancellation of the mortgage on the ground that there was a failure of consideration for the promissory note secured thereby and a breach of contract on the part of plaintiff for the reason that he had sought to rescind the purchase of the stock and to recover the purchase price thereof, for security of which the mortgage was executed. The cause was not brought to trial until March, 1935. After the note matured, February 6, 1935, and upon default of payment thereof, by leave of court first obtained, the plaintiff filed in this suit February 14, 1935, his amended and supplemental complaint asking for foreclosure of the mortgage. Defendants answered the supplemental complaint and the cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in every essential respect. A judgment of foreclosure of the mortgage was accordingly rendered. From that judgment this appeal was perfected.

The court found that the plaintiff was induced to purchase his 120 shares of stock last acquired solely because the defendant, Pinney, agreed to secure the repayment of the cost thereof to the extent of $12,000 by the execution of the note and mortgage in question; that those instruments were given to secure the repayment to plaintiff of said sum of money; that the note and mortgage were executed for a valuable consideration; that the corporation stock was absolutely valueless and that no dividends were ever paid thereon; that they were sold to plaintiff by means of false pretenses on the part of Price, and by means of untrue statements made to him by Pinney regarding the oil mining enterprise which were not warranted by the information or knowledge thereof which he possessed; that the defendants defaulted in their payment of the promissory note, no part of which has been paid; that the defendants failed to demand a delivery of the 120 shares of stock, and on the contrary that plaintiff nevertheless tendered to them a valid assignment thereof together with all benefits to be derived therefrom; that the mortgage constitutes a valid lien on defendants' property described therein to secure the payment to plaintiff of the sum of $12,000 represented by the promissory note, and that the plaintiff is entitled to a judgment of foreclosure to satisfy the mortgage.

[1] The foregoing facts are adequately supported by the evidence. The appellants do not contend there is a lack of evidence to support the findings except that it is asserted the note and mortgage were executed without consideration, and that the mortgage was rendered void for a breach of its terms by failure on the part of the plaintiff to assign and deliver the stock to the defendants. We are of the opinion the record discloses sufficient evidence to furnish adequate consideration for the note and mortgage. The repayment of the purchase price of the 120 shares of stock which were acquired by plaintiff was secured by the mortgage to the extent of $12,000. That sum was advanced by plaintiff at the urgent solicitation and for the partial benefit of the defendants. The plaintiff also suffered a detriment thereby. Pinney was a stockholder in the corporation and he was interested in protecting the security of the stock which he had sold to his numerous friends. He promised Price to raise $15,000 with which to pay the judgment liens against the corporation property and save it from execution sales, but was unable to do so on account of litigation which was pending against him. A financial crisis existed with relation to the affairs of the corporation. Pinney told the plaintiff that unless he advanced the $15,000 the corporation

property would be sold and they would all lose their investments. That was the only reason which induced the plaintiff to make the further investment of $15,000. The appellants benefited from that transaction and the plaintiff suffered a loss thereby. Those facts furnish an adequate consideration for the execution of the note pursuant to the provisions of section 1605 of the Civil Code, which reads:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[2] The note was not a mere agreement to indemnify the plaintiff for the loss of his money. It was an original promise to pay him $12,000 based on a sufficient consideration therefor. Fratessa v. Roffy, 40 Cal. App. 179, 180 P. 830. It has been held under similar circumstances that such transactions furnish adequate consideration for a promise to pay money. Vickrey v. Maier, 164 Cal. 384, 129 P. 273; Fites v. Marsh, 171 Cal. 487, 153 P. 926; Parker v. Beach, 176 Cal. 172, 167 P. 871; Howard v. Galbraith, 13 Cal.App. 373, 109 P. 889; Hudson v. Seeley Specialties Co., 19 Cal.App. 213, 124 P. 1051; McCampbell v. Obear, 27 Cal.App. 97, 148 P. 942.

[3] It is not necessary that the payer shall be benefited by the transaction in order to constitute a valid consideration. It is sufficient if the payee suffers prejudice thereby. Sec. 1605, Civ.Code; Rusconi v. California Fruit Exchange, 100 Cal.App. 750, 754, 281 P. 84; Irving v. Irwin, 133 Cal. App. 374, 378, 24 P.2d 215.

[4] The note in question contains a direct promise to pay Alfred Whittell $12,000 on or before three years from February 5, 1932. The terms of that note are not invalidated by the provision of the mortgage above quoted. That paragraph first declares that the mortgagee purchased and is the owner of 120 shares of stock in the oil enterprise. It then says: "This mortgage is given to assure mortgagee against loss by reason of such purchase to the extent of $12,000.00." It further provides that the mortgage shall be deemed to have been satisfied, and shall become void if, (1) the mortgagee receives the $12,000 within three years from the date of the note, which is the time when it matures, either from sale of the stock or from dividends therefrom, or, (2) if the stock attains a book value of $12,000 within that period of time. Otherwise the mortgage is to remain in full force and effect.

The undisputed evidence shows, and the court found, that the plaintiff received no portion of the $12,000 during that period of time, or at all, that no dividends on the stock were ever declared or paid, and that the stock had absolutely no value. The clear terms of this disputed paragraph of the mortgage therefore indicate that the obligation represented by the note was never satisfied to any extent whatever, and that the mortgage therefore remained in full force and effect.

The balance of the challenged paragraph of the mortgage provides for a mere contingency which, under the undisputed evidence of this case, never occurred. The remaining portion of that paragraph is therefore not material to the determination of this appeal. However, it may be stated the latter portion of the paragraph merely provides that the 120 shares of oil stock shall be divided into two certificates of 60 shares each, one of which was to be deposited in escrow with the Crocker First National Bank of San Francisco in the name of Harry J. Pinney, where payments of dividends on the last-mentioned certificate were to be made. It is asserted that after dividends aggregating the full amount of $6,000 were made on the Pinney certificate "All [further] dividends [thereon] shall be paid to Harry J. Pinney as his property up until February 6, 1935"; that, when the dividends paid on the 120 shares of stock aggregating the sum of $12,000 shall have been paid the mortgage would be deemed to be satisfied in full; that on February 6, 1935, the escrow terminated and the plaintiff was entitled to the return of the 60 shares of stock in Pinney's name.

[5] This latter portion of the paragraph in question was rendered ineffectual and void for the reason that no dividends were ever paid on that stock prior to February 6, 1935, or at all. The transfer and deposit of the stock in the bank were not necessary prerequisites to the right to foreclose the mortgage under the circumstances of this case. The defendants may not complain of a failure to transfer and deposit in the bank

the certificates in question for the reason that they were absolutely valueless and no dividends thereon were available or paid according to the contract or at all. The transfer of the stock under such circumstances would be a useless and idle act.

Finally the paragraph in question provides that:

"In the event this mortgage is not satisfied, mortgagor, as a condition to its enforcement, *shall be entitled* to demand and receive said 120 shares."

The evidence shows and the court found that the appellants never made a demand for the shares of stock. They are of no intrinsic value. Moreover, the court found that plaintiff tendered to the defendants an assignment and transfer of the stock together with all right and title thereto, and in pursuance of that tender the plaintiff executed and deposited with the clerk of the court where this action was pending a valid assignment of the stock to the appellants subject to their demand therefor. There is no merit in the contention that the plaintiff failed to assign or transfer to them the stock in question.

[6] The plaintiff did not waive his right to foreclose his mortgage by commencing an action in Texas for the purpose of rescinding the purchase of his stock. The suit was not prosecuted to judgment. The purchase of the stock was not rescinded and the plaintiff recovered no portion of the purchase price thereof.

The judgment is affirmed.

I concur: PULLEN, P. J.

12 Cal.2d 121

COSTA v. NEVES.

WILLIAMS v. COSTA et al.

Sac. 5198, 5199.

Supreme Court of California.

Sept. 2, 1938.

Rehearing Denied Sept. 29, 1938.

1. Fraudulent conveyances ⚷205, 271(1)

A conveyance cannot be set aside by a creditor no matter how tainted with fraud, unless some specified property on which creditor has a right to file his claim has by the fraudulent conveyance been placed beyond his reach, and the mere intent to delay or defraud is not sufficient, but there must also be an injury to the creditor which must be affirmatively shown. Civ.Code, § 3441.

2. Fraudulent conveyances ⚷176(3)

Where ranch owner's judgment creditor purchased ranch at execution sale and thereafter executed quitclaim deed to owner's brother and satisfaction of judgment to owner in consideration of cash payment and transfer of personalty by owner, and owner executed deed to brother without consideration, and without intent to transfer title, brother held ranch in trust for owner notwithstanding that owner allegedly intended to defraud creditor by conveyance to brother, and that conveyance was allegedly valid as between the parties, since, regardless of intent, the conveyance was not in fact fraudulent. Civ.Code, § 3441.

3. Quieting title ⚷44(2)

In an action to quiet title by deceased ranch owner's administrator against owner's brother, where brother introduced deeds showing title to ranch in himself, set up his legal title, and claimed possession of ranch, administrator was entitled to show that he was the equitable owner of the ranch, and that brother held title in trust for him.

4. Forcible entry and detainer ⚷14

A deceased ranch owner's brother who held ranch in trust for owner and after his death for his administrator could not maintain unlawful detainer action against lessee in possession under owner and administrator.

◆

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action to quiet title by Amos O. Williams, as administrator of the estate of Alfonso Bastos, deceased, against A. P. Costa and wife, and action for unlawful detainer by A. P. Costa against Frank B. Neves. From a judgment for defendants in the action to quiet title, plaintiff appeals, and from a judgment for plaintiff in the unlawful detainer action, defendant appeals. The cases were consolidated on appeal.

Judgments in both cases reversed, with directions.

Prior opinion, *72 P.2d 906*; *73 P.2d 926*.

C. Ray Robinson, Willard B. Treadwell, and James D. Garibaldi, all of Merced, and John H. Machado, of San Jose, for appellant.

Andrew R. Schottky and Edward Bickmore, both of Merced, for respondents.

PER CURIAM.

This cause was transferred to this court after decision by the District Court of Appeal, Third District. We are of the opinion that the District Court of Appeal arrived at the correct conclusion in its decision of the case. There was, however, certain language in the opinion which we deemed inappropriate. This language we have deleted from the opinion at places therein indicated by asterisks. As thus modified we adopt the same as the opinion of this court. It is as follows:

"In this appeal two cases have been consolidated, an action for unlawful detainer, and an action to quiet title by the administrator of the estate of Bastos, deceased.

"The facts upon which each action is based are so intermingled that one statement will cover both.

"For some time prior to March, 1933, Alfonso Bastos was the owner of a ranch in the county of Merced. About that time Bastos, being in some financial difficulty with Larry Ferreira, executed to his brother A. P. Costa, a mortgage thereon for $10,000. Shortly prior to the giving of this mortgage Ferreira had filed an action against Bastos alleging that Bastos was indebted to him in a sum in excess of $5,000. The court found, and the facts are apparently not in dispute, that Bastos received no consideration from Costa for the execution of said note and mortgage and that these instruments were executed with the intention to delay and defraud Ferreira, the creditor of Bastos and in the collection of any judgment he might obtain against Bastos.

"In November, 1933, Ferreira recovered a judgment of $5,000 against Bastos, and thereafter an execution was issued on said judgment directed to the sheriff of the county of Merced, which officer duly levied upon the ranch property of Bastos.

"Thereafter and in December, 1933, the real property was sold under execution by the sheriff to Ferreira, for the sum of $500 and the sheriff's certificate of sale under said execution was delivered and duly recorded. About two months after the sale Bastos deeded said real property to A. P. Costa which deed was duly recorded. As to this transaction the court found that said Alfonso Bastos received no consideration for the making and execution of said deed. Some two or three months after the recording of this deed Ferreira made and executed a quitclaim deed of said real property to Costa. This deed was never recorded but was delivered to an attorney for Bastos. The consideration for the quitclaim deed made by Ferreira was paid by Bastos by a cash payment, and the transfer of certain personal property belonging to Bastos, the quitclaim deed being made by Ferreira in consideration of said cash payment and transfer of the personal property. At the same time Ferreira delivered to Bastos a full satisfaction of the judgment against him.

"Prior to the foregoing and in November, 1933, Bastos had by parol lease rented this ranch to Frank Neves, one of the defendants and appellants herein. Neves entered into possession of the property under the terms of the lease with the understanding that in March, 1934, Bastos would execute a written lease of the property for a term of five years, but during the interim Neves was to continue in possession of said property under the terms of the parol lease.

"In May, 1934, Bastos died, without making any written lease to Neves, and letters of administration were issued to Amos O. Williams as public administrator, plaintiff and appellant herein. Thereafter the administrator entered into a written lease with Neves, since which times Neves has continued to occupy said premises and to pay the rents specified therein.

"Thereafter Costa filed an action in unlawful detainer against Neves, the possessor of the real property. Neves in his answer denied that he had ever been a tenant of Costa and denied that Costa was the owner of or entitled to the possession of said premises.

"Upon the trial, judgment in the unlawful detainer suit was entered in favor of plaintiff Costa, the court holding that Neves was guilty of unlawful detainer, and awarded judgment against defendant for unpaid rentals.

"In the action to quiet title, judgment was entered in favor of defendants Costa and wife. It is from these judgments that these appeals have been taken.

"Respondent contends that the judgments as entered by the trial court are fully supported by the law and the facts in the case; as to the action to quiet title it is maintained that the holder of an equitable title * * * cannot quiet title as against the holder of the legal title, and that a resulting trust cannot be declared in favor of a plaintiff in a quiet title action where the complaint contains no allegations with reference to any resulting trust. It is also maintained that a conveyance of real property with intention to defraud creditors is valid and is effective between the parties thereto and their successors in interest.

* * * * * *

"Taking up appellants' contention, that if the grant deed was not fraudulent the appellants must prevail, they point out that Ferreira became the owner of the property by virtue of the sheriff's sale based upon the judgment recovered by Ferreira against Bastos, and that anything that Bastos may have done after Ferreira became vested with the title was not fraudulent as far as Ferreira was concerned. Ferreira became the owner of the property by virtue of the sheriff's sale in December, 1933. It was not until February, 1934, that Bastos attempted to deed this property to Costa.

[1] "Section 3441 of the Civil Code provides that a creditor can void the obligation of his debtor for fraud only when the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation. A conveyance therefore, cannot be set aside by a creditor no matter how tainted with fraud, unless some specified property upon which he has a right to file his claim has by the fraudulent con-

veyance been placed beyond his reach. The mere intent to delay or defraud is not sufficient, but there must also be an injury to the creditor which must be affirmatively shown. (12 Cal.Jur., p. 976; Brown v. Campbell, 100 Cal. 635 [35 P. 433, 38 Am.St.Rep. 314]; Sewell v. Price, 164 Cal. 265 [128 P. 407]).

[2] "Therefore, inasmuch as Ferreira had already obtained the legal and equitable title to the property by execution on a judgment against Bastos he was not deprived of the property, and there is nothing to show that either Bastos or Costa succeeded in placing the equity of redemption beyond the reach of Ferreira. As a matter of fact it appears that Bastos exercised his right to redemption and paid off and satisfied the judgment of Ferreira and therefore it is apparent that Ferreira was in no way defrauded. It is therefore obvious that no matter with what intent this conveyance may have been made, it was not in fact fraudulent.

* * * * * *

"In regard to the quitclaim deed from Ferreira to Costa, the court found that Costa paid no consideration for such quitclaim deed to either Ferreira or to Bastos, but the consideration was paid by Bastos to Ferreira. Inasmuch, therefore, as Costa paid nothing for the quitclaim deed, and the consideration moved from Bastos to Ferreira, Costa is not entitled to the property, but it must be that he held the property in trust for Bastos, the party paying the consideration, and who had title thereto before said deed was executed.

"These findings are all amply supported by the evidence, and there can be no doubt that the consideration for the transfer of the title of Ferreira to Costa was paid by Bastos, and that Costa became the constructive trustee for Bastos of the title to the property received by him from Ferreira during his lifetime.

[3] "Respondents contend that even conceding the administrator had an equitable title, under the pleadings of this case, that is, an action to quiet title, he cannot set up this defense; that is, in an ordinary action to quiet title, a trust cannot be established.

"The complaint in this action alleges that Bastos, through his representative Williams, is the owner of the property and entitled to the possession thereof and that Costa, the defendant, is claiming the same without right. Costa, upon his part, introduced the deeds showing title in himself and set up his legal title, and claimed thereby possession of the property. As against this evidence the plaintiff was entitled to show that he was the equitable owner of the property, and that defendant held the title in trust for him. That this is the rule and has been already recognized is held in Calkins v. Calkins, 63 Cal.App. [292], 293 [218 P. 611]. The court there said:

"'* * * The plaintiff may allege that he is the owner of the property and that the defendant without right withholds from him its possession, and if the defendant sets up title in himself the plaintiff may be permitted to show that he is the equitable owner and the defendant holds the title in trust for him. In other words, under such pleadings the plaintiff may introduce evidence to avoid the affirmative defense and to recover, if in good conscience he ought.'

"See, also, Marsh v. Smith, 46 Cal. App. 692, 189 P. 1037.

[4] "If we are correct, therefore, in holding that Costa did not secure any interest or title in the real property, then Costa is not entitled to recover the lands from Neves. Neves dealt with Bastos during his lifetime, and after the death of Bastos entered into a lease with the administrator and has paid all the rents reserved thereunder to the administrator. Under these facts we cannot find that Neves is guilty of unlawful detainer.

"We are therefore of the opinion that in the action to quiet title brought by Williams as administrator, the court erred in finding that Costa was the owner of the property, and in the action brought by Costa against Neves the court erred in finding defendant Neves guilty of unlawful detainer."

It is therefore the judgment of this court that judgment in both cases be reversed and that the trial court enter judgment in accordance herewith.

12 Cal.2d 116

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Sac. 5226.

Supreme Court of California.
Sept. 2, 1938.

1. Workmen's compensation ⚷1778

The right of the Industrial Accident Commission to alter or amend an award which has become final is limited to those cases where good cause appears therefor. St.1917, p. 850, § 20(d).

2. Workmen's compensation ⚷1778

The existence of good cause for Industrial Accident Commission's alteration or amendment of a compensation award which has become final depends largely upon the particular circumstances of each case. St. 1917, p. 850, § 20(d).

3. Workmen's compensation ⚷1072

An employer who knows that injured employee is seeking compensation and who chooses to disregard the proceeding and allows an award against him to become final has no equitable ground for then charging his insurance carrier with liability, particularly where the employee's claim was barred by the statute at the time the application for compensation was filed. St.1917, p. 850, § 20(d).

4. Workmen's compensation ⚷1196, 1782

The Industrial Accident Commission could not reopen final award of compensation to bring insurance carrier into proceeding on application of employer, where employee's right to compensation was barred when employee filed his claim, insurance carrier had no notice of injury or the compensation proceeding until long after the award became final, and employee was not attempting to assert any claim against insurance carrier but was satisfied with claim against employer, notwithstanding statute providing that as between the employee and the insurance carrier, knowledge of occurrence of injury on part of employer should be deemed knowledge of insurance carrier. St.1929, p. 1167, § 30(c).

HOUSER, J., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act by Eugene Szanik, employee, opposed by C. W. Caletti & Co., employer, and the Ocean Accident & Guarantee Corporation, Limited, insurance carrier. The Industrial Accident Commission awarded disability indemnity to the employee. Thereafter the Commission made an order that the award be amended to provide that the Ocean Accident & Guarantee Corporation, Limited, was the compensation insurance carrier of C. W. Caletti & Co.

Order annulled.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, Asst. Atty., both of San Francisco, for respondents.

EDMONDS, Justice.

In this proceeding, a decision of the Industrial Accident Commission by which disability indemnity was awarded to an employee of C. W. Caletti, doing business as C. W. Caletti & Company, is challenged by the petitioner, which the commission found was the employer's insurance carrier at the time the compensable injury was received. The record of the proceedings resulting in the decision and award are before this court in response to a writ of review.

The facts concerning the controversy are not disputed. It appears that in 1935 Eugene Szanik was working as a bridgebuilder for Mr. Caletti. He received an injury to his arm for which his employer provided no medical attention. Thereafter he was unable to work and the employer terminated his services. He procured medical treatment and did nothing for a number of months. More than six months after the injury he filed a claim before the Industrial Accident Commission against C. W. Caletti & Company. The employer was given notice of this claim but paid no attention to it. Later the commission held a hearing, at which the applicant appeared in person without counsel and introduced evidence. Following this hearing, after notice of intention to issue an award had been served upon the parties, the commission made a decision and award against C. W. Caletti & Company in favor of Szanik for a total amount of $1,240.84.

Four months after the award was made the employer filed with the commission an application for its modification to include the insurance carrier. This application, filed on February 9, 1937, recited that eight days earlier Szanik had procured a judgment and execution upon the award of the commission in the superior court of Mendocino county, and that execution had been levied upon the employer's bank account. It also alleged that at the time the employee was injured C. W. Caletti & Company had a policy of workmen's compensation insurance issued by the petitioner, and that if the injury to Szanik is compensable the insurance carrier is liable therefor. The application expressly stated that from time to time the respondent employer received notices of the proceedings before the Industrial Accident Commission and a copy of the award, but that he did not refer the matter to an attorney nor make any inquiry concerning the case because he assumed the insurance carrier was attending to it. The employer asked that the commission make an order rescinding the award and staying execution of the judgment. Upon the filing of this petition and an undertaking the commission ordered execution stayed pending a final determination of the matter.

Szanik by written answer to his employer's application objected to any modification or rescission of the award other than an amendment as of its date to add the petitioner as an additional defendant. The petitioner by answer alleged that it had received no notice of injury to the employee and "that the employer had not acted with due or any diligence and had been negligent in the premises; that the commission was without jurisdiction to entertain such application; that it further appeared on the face of the record that the statute of limitations had barred any recovery against said carrier; and that the application should be dismissed to prevent a multiplicity of actions and because said carrier had not been given an opportunity to defend said claim or minimize damages by supplying proper medical attention". Upon a hearing of the application the commission ordered the insurance carrier joined as a party defendant and further hearings were had. Thereafter it made an order that the findings and award be amended to provide that at the time of the injury complained of the petitioner was the compensation insurance carrier of C. W. Caletti & Company and all parties were then subject to the provisions of the Workmen's Compensation Act. The commission also found that the employer is not "presently entitled to be relieved from liability" but that if and when the award becomes final, "the employer may petition to be discharged from liability".

The first point made by the petitioner is that the commission has no jurisdiction to reopen a final award of compensation against an employer after the period for rehearing has expired and to substitute the insurance carrier where the application therefor is made by the employer upon the ground that it negligently failed to respond to various notices concerning the pendency of the proceedings. The insurer contends that although the commission may alter or amend any order or decision or award made by it within 245 weeks from the date of an injury, this right may only be exercised "upon good cause appearing therefor" (Workmen's Compensation Act, Stats.1917, p. 850, § 20(d); now sec. 5803, Labor Code, St.1937, p. 301); that its continuing jurisdiction is expressly limited by the statute and may only be exercised when the challenged award is inequitable.

The record shows without question that the employee's right to compensation was barred at the time he filed his claim and that the insurer had no notice of the injury or of any step in the proceedings. When the employer filed his application for a modification of the award the injured man had procured a judgment for the amount which the commission awarded to him. There is no contention that the employee was not fully secured by the levy of execution upon this judgment; indeed, he would undoubtedly have received the amount of the award in full if the commission had not granted the employer's application to bring the petitioner into the proceedings. This is, therefore, not a case where an employee is seeking the means to collect an award made in his favor. On the contrary, he resisted the employer's application for modification of the award, taking the position that it should be denied and the order staying execution vacated. The employee contends that the controversy between the insurer and his employer "is not a matter of proper concern to this applicant".

[1-3] Although the commission may alter or amend an award which has become final, its right so to do is limited to those cases where good cause appears therefor. Good cause, it has been held, depends largely upon the particular circumstances of each case. Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P.

195. But this court has also said that "the existence of some fact or circumstance which warrants the conclusion that the challenged award is inequitable is a necessary element to the exercise of the continuing jurisdiction of the commission". Merritt-Chapman & Scott Corp. v. Industrial Accident Commission, 6 Cal.2d 314, 57 P.2d 501, 502. No such facts are shown in the present case. All of the equities are in favor of the insurer who had no notice of the injury or of the application for compensation until long after the award became final. If an employer who knows his employee has been injured and is seeking compensation chooses to disregard the proceeding and allows an award against him to become final, he has no equitable ground for then charging his insurance carrier with liability therefor, particularly where the injured person's claim was barred by the statute at the time his application for compensation was filed.

[4] The commission seeks to justify its action under section 30 of the Workmen's Compensation Act, supra, as amended by St.1929, p. 1167, now section 11651 et seq., Insurance Code, St.1935, p. 717. This statute requires a provision in every contract insuring against liability for compensation that "as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this act, be jurisdiction of the insurance carrier; and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer under the provisions of this act, to the extent provided in and subject to the provisions, conditions and limitations of the policy". Section 30 (c). But the employee is not attempting to assert any claim against the insurer in the present proceeding. He is satisfied with the award rendered against his employer and the judgment thereafter obtained upon it. The Industrial Accident Commission under the circumstances shown in this case had no jurisdiction to amend the award; therefore, the provisions of the Workmen's Compensation Act which are relied upon have no application.

The order of the Industrial Accident Commission dated November 8, 1937, is annulled.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

I dissent: HOUSER, J.

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28 Cal.App.2d 372

PERNA v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 2061.

District Court of Appeal, Fourth District, California.

Sept. 2, 1938.

1. Executors and administrators 🔑513(3)

Where bank, which was controlled by corporation, was appointed executor of an estate, an order settling the final account of bank as executor, notice of hearing of which was allegedly not given to plaintiff personally, as bank had agreed to do, was final and conclusive and could not be collaterally attacked in an action against bank and corporation for fraud and conspiracy in not selling corporate stock of the estate and thus causing loss to the estate, where statutory notices were given.

2. Executors and administrators 🔑509(6)

Where bank, which was controlled by corporation, was appointed executor of an estate and court entered order settling final account of bank as executor, in action against bank and corporation for fraud and conspiracy in not selling corporate stock of the estate and thus causing loss to the estate, allegations of the complaint were insufficient to show extrinsic fraud requiring the order to be set aside.

3. Executors and administrators 🔑513(12)

Where bank was appointed executor of an estate, any negligence or fraud of bank as executor in failing to sell corporate stock of the estate and thus causing loss to the estate should have been raised in the hearing on bank's final account as executor.

4. Executors and administrators 🔑513(9)

Where bank, which was controlled by corporation, was appointed executor of an estate, and order was entered settling the final account of bank as executor, in action against bank and corporation for fraud and conspiracy in not selling corporate stock of the estate and thus causing loss to the estate, the order was conclusive as regards corporation's liability.

5. **Executors and administrators** ⚿513(12)

Where bank, which was controlled by corporation, was appointed executor of an estate, and order was entered settling final account of bank as executor, in action against bank and corporation for fraud and conspiracy in not selling corporate stock of the estate and thus causing loss to the estate, plaintiff could not recover of bank for conversion of plaintiff's interest in estate, where neither demand for delivery to plaintiff was alleged nor any other facts showing that any assets of the estate were in the hands of the bank as executor which should have then been turned over to plaintiff.

◆

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Louise M. Perna against the Bank of America National Trust and Savings Association, as successor to the Bank of Italy National Trust & Savings Association, and another to recover damages caused by an alleged conspiracy between defendants. From judgments of dismissal, plaintiff appeals.

Affirmed.

Sanders & Jacques and Y. A. Jacques, all of San Diego, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, and Edmund Nelson, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from judgments of dismissal following the sustaining of separate demurrers to a fourth amended complaint in an action for damages. Two judgments were entered and two notices of appeal filed, which have been presented together. For convenience, the respondent bank and its predecessor will be referred to as the bank, and the respondent Transamerica Corporation will be referred to as the corporation.

The original complaint was filed in March, 1935. The amended complaint alleges that the corporation owned 99 per cent. of the stock of the bank; that the bank was appointed executor of a certain estate on June 10, 1929, and ever since has been and now is acting as such executor; that among the assets of the estate were certain shares of stock in the corporation and certain shares of stock in the California Packing Corporation; that on September 27, 1929, the court ordered the executor to sell the stock in the California Packing Corporation; that at that time the estate was indebted to the bank on certain notes; that on June 2, 1930, the bank filed its first account without informing plaintiff thereof; that the stock in the California Packing Corporation had not then been sold; that the officers and agents of the bank had orally agreed to give the plaintiff personal notice of the filing of this account, but failed to do so, by reason of which she was "prevented from appearing upon the hearing of said account"; that this account was approved and settled on June 20, 1930; that on July 22, 1932, the bank filed its final account as executor of this estate with a petition for distribution; that the bank did not personally notify the plaintiff of the filing of said account and, because thereof, she did not attend the hearing thereon and had no knowledge of the matters therein set forth; that on August 5, 1932, the court approved and settled this account and ordered one-sixth of the estate distributed to the plaintiff; and that the bank still retains possession of that portion of the estate.

It is further alleged, on information and belief that on September 27, 1929, the bank and the corporation, through their officers and agents, entered into a conspiracy to unlawfully use and exercise the powers possessed by the bank as the executor of said estate and in pursuance of said conspiracy the defendants did and performed the following fraudulent acts: The bank failed to sell the California Packing Corporation stock until April 22, 1932, and in the meantime its value very greatly decreased; the bank delayed the sale of the California Packing Corporation stock for the reason that A. P. Giannini, president of the corporation and chairman of the board of the bank, desired to delay the closing of the estate to enable the bank to enjoy the interest upon the indebtedness owed to the bank by the estate and to enable him "to peg and stabilize the value" of the stock of the corporation "so that it would not suffer a decline in value, which was then taking place upon the various stock markets in the United States with relation to nearly every kind and character of stocks";

the defendants informed the plaintiff that the shares of California Packing Corporation stock had been sold, that the estate was but little indebted, and that practically all claims against the estate had been filed; the president of the corporation directed the officers and agents of the bank to retain the voting control of all stock in the corporation owned by this estate for the purpose of preventing the dumping of said stock upon the market; that although the value of the stock of the corporation steadily declined between October, 1929, and May 15, 1930, the last day upon which claims could be filed in the estate, the executor failed and refused to ask permission from the court to sell a sufficient amount of said stock to pay outstanding claims against the estate; that at the direction of the president of the corporation and the chairman of the board of the bank the stock of the corporation belonging to this estate was retained for the purpose of being voted, and the same was voted, at an annual meeting of the stockholders held on February 15, 1932; that immediately prior to July 2, 1932, the officers and agents of the bank induced the plaintiff to execute an agreement transferring the assets of the estate to the bank, advising the plaintiff that the best interests of the estate would be served if this agreement was signed by her and that when the estate was finally ready for distribution she would be personally notified; that many times between June 2, 1930, and November, 1934, she inquired of the officers and agents of the defendants as to when the estate would be ready for distribution and was told the estate was in good condition and would be closed as soon as the same could lawfully be done.

The plaintiff further alleges that prior to November 15, 1934, she had had no experience in business affairs; that she had had many business transactions with the officers and agents of the defendants; that she relied implicitly upon their statements and advice; that her husband, an employee of the defendants, had been instructed by the defendants to refrain from telling her of the true condition of the estate and of the acts alleged to have been done by the defendants, and had been threatened with discharge if he told the plaintiff of these facts; that because of this threat her husband did not inform her of the true condition of the estate; and that she did not learn of the acts done pursuant to said conspiracy until November 15, 1934, at which time she was informed thereof by her husband "who had at all times herein mentioned, up to and including the 18th day of December, 1933, been one of the trusted officers and agents of the defendants".

[1-3] In so far as the bank is concerned, the order settling the final account is final and conclusive and cannot be thus collaterally attacked. Tobelman v. Hildebrandt, 72 Cal. 313, 14 P. 20; Security-First Nat. Bank v. Superior Court, 1 Cal. 2d 749, 37 P.2d 69; Adams v. Martin, 3 Cal.2d 246, 44 P.2d 572; Ringwalt v. Bank of America, etc., Ass'n, 3 Cal.2d 680, 45 P.2d 967; Carr v. Bank of America, etc., Ass'n, Cal.Sup., 79 P.2d 1096. In discussing somewhat similar facts, although alleged in a different form of action, the court, in the last cited case, said (page 1099): "There can be no doubt that * * * the order settling the executor's account is res judicata against any claim of liability against the bank in its capacity as executor for negligence or fraud, and such determination is binding upon all the parties interested in the estate." While the order in question could be set aside in a proper action, upon a sufficient showing of extrinsic fraud, not only are the allegations of this complaint insufficient for that purpose (Ringwalt v. Bank of America, etc., Ass'n, supra), but no such relief is here asked for the plaintiff stating in her briefs that she purposely brought an action at law instead of one in equity in order that she might have the right to a jury trial. Any issue of negligence or fraud on the part of the executor in failing to sell the stock was necessarily involved in the hearing on the final account, and should have been raised at that time. No claim is here made that all statutory notices were not given or that the proceedings leading to the order approving the final account were not in all respects regular.

We think the order approving the final account is also conclusive as regards the respondent corporation. In Carr v. Bank of America, etc., Ass'n, supra, it is said: "Although the respondent bank has filed no account as trustee, and the order settling the executor's account and for final distribution at first blush would not seem to be a bar against a claimed liability against the bank as trustee, nevertheless, there seems to be no escape from the conclusion that the court's negative determination of the issue of the bank's liability as executor upon the ground of negligence and fraud, of necessity, settles that issue when the question of the bank's negligence and fraud as executor is brought into question in the attempt to charge the bank as trustee."

While ordinarily each party to a conspiracy is equally liable for damages resulting from the acts of all of the conspirators an exception to the general rule is pointed out in 34 C.J. at pages 988 to 990, as follows: "An apparent exception to the rule of mutuality has been held to exist where the liability of defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts, when sued by the same plaintiff; in such cases the unilateral character of the estoppel is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct action."

In Duell, Inc., v. Metro-Goldwyn-Mayer Corporation, 128 Cal.App. 376, 17 P.2d 781, the court said (page 784):

"As a general proposition of law, we might concede that the principle of res judicata applies only between parties to the original judgment or to parties in privity with them. However, it seems settled law that lack of privity in the former action does not prevent an estoppel where the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other."

In Wilson v. Erickson, 152 Minn. 364, 188 N.W. 994, where the plaintiff alleged a conspiracy between the guardian of his estate and other persons to defraud him in connection with a sale made by the guardian, the court said (page 995): "Plaintiff urges that the defendants other than Erickson were not parties to the probate proceedings, and are not bound by the judgment of the probate court, and therefore cannot invoke that judgment as an estoppel. This is the general rule. But the matters determined by that judgment are res judicata as between plaintiff and Erickson; and as plaintiff predicates his cause of action on the alleged wrongdoing of Erickson, and the judgment conclusively determines that Erickson was free from wrongdoing, plaintiff has no cause of action against any of the defendants. Under such circumstances the judgment bars plaintiff from prosecuting another action against the other alleged tortfeasors."

[4] If either of these defendants performed any act pursuant to such a conspiracy as is alleged, the bank should have been charged with such act at the time its final account as executor was presented and settled. It having been judicially determined that the bank had properly performed its duties as executor the plaintiff cannot be permitted, while that judgment stands, to obtain a judgment against the corporation on the ground that it conspired with the bank in doing the things which have been confirmed and approved by the court.

The plaintiff suggests that, in any event, the order settling the final account is not conclusive as to the issue of whether the defendants converted the assets of said estate to their own use after a decree of distribution was entered. In this regard the complaint alleges that upon settling the final account the court directed the bank as executor "to distribute an undivided one-sixth of said estate to the plaintiff herein, but that defendant still retains possession of that portion of said estate belonging to plaintiff." It is further alleged that the plaintiff was told "that there were certain legal technicalities, which were unexplained to plaintiff here, that would have to be observed before the final distribution of said estate was made", that she was deceived by this and similar statements and that the defendants "in pursuance of the conspiracy hereinbefore alleged, have converted the said estate to the use of said defendants".

[5] Aside from any other consideration, although the bank was lawfully in possession of the assets of the estate as executor, no demand for delivery to the plaintiff is alleged and no facts are set forth showing that any assets of the estate were in the hands of the executor which should then be turned over to the plaintiff. The decree of distribution is not before us and it is not inconceivable that its terms, whatever they were, could not immediately be carried out. In so far as appears from this complaint it may not have been possible to deliver any property to the plaintiff before this action was filed, and the bank, as executor, may have been lawfully retaining the assets of the estate.

The demurrer of each defendant was properly sustained. Both judgments are affirmed.

I concur: MARKS, J.

FARNEY v. STOCKTON PORT DIST. et al.*

Civ. 6108.

District Court of Appeal, Third District, California.

Sept. 6, 1938.

1. Appeal and error 🔑781(4)

The District Court of Appeal would not determine issue on appeal from judgment dismissing mandamus proceeding to compel restoration of pilot's license for balance of term for which license was issued, where the term expired before pilot's brief on appeal was filed, thereby rendering the issue moot.

2. Appeal and error 🔑781(1)

An appellate court will not review or determine moot questions.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 81 P.2d 996.

Gumpert & Mazzera, of Stockton, for appellant.

Louttit, Marceau & Louttit, of Stockton, for respondents.

PER CURIAM.

On petition for rehearing it appears that the issue which was involved on the appeal in this proceeding became moot before the appellant's brief was filed therein, and that the granting of a peremptory writ of mandamus as prayed for would serve no useful or beneficial purpose.

[1, 2] The only purpose for which the writ of mandamus was sought to be procured in this case was to restore a pilot's commission to the petitioner for the balance of the term for which it was issued to him, for the alleged reason that the officers of the Stockton Port District had arbitrarily revoked his commission without cause and without notice. It is alleged his commission was issued May 20, 1937, "for the term of one year from the date hereof". The commission therefore automatically terminated on May 20, 1938. This proceeding was commenced before the last-mentioned date, but the appeal from the decision of the trial court was not perfected until a few days prior to the date of the expiration of the commission. That time expired before appellant's brief on appeal was filed in this case. The issue which is involved has therefore become moot and an appellate court will not review or determine questions which have become moot, since the decision will serve no useful or beneficial purpose. 38 C.J. 949, sec. 750; O'Neal v. Seabury, 24 Cal.App.2d 308, 311, 74 P.2d 1082.

Affecting the determination of a mandamus proceeding, it is said in 28 C.J., at page 949: "Ordinarily moot questions will not be considered; and where pending the review events have occurred rendering a decision of the legal questions involved unnecessary or useless, the court will not pass upon them."

The petition for a rehearing is therefore denied.

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28 Cal.App.2d 387

PEOPLE v. MELTON.

Cr. 3125.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1938.

False pretenses 🔑49(3)

Evidence that accused purporting to be agent for oil company obtained money from complaining witnesses to secure survey of certain oil land sustained conviction of grand theft.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Charles E. Melton was convicted of grand theft, and he appeals.

Affirmed.

P. E. Durkee, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was charged in an indictment with two counts of the crime of grand theft, was found guilty thereof by a jury. The appeal herein is from the judgment, and from the order denying defendant's motion for a new trial.

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*For subsequent opinion see 86 P.2d 832.

It appears from the evidence that on June 24, 1937, defendant represented himself to Mrs. Mary C. Hill, complaining witness, as a Mr. Hershfield, a representative of the "World Oil Company" of Ft. Worth, Texas. He stated to her that he understood she had 1,000 acres of oil land in Chavez county, New Mexico, and that he had been authorized by his company to make an offer on the land; that he would give her a $4,000 cash bonus and a one-eighth royalty on all the oil taken therefrom. Mrs. Hill owned one-half of the property, her sister, Mrs. Laura McGillivray, owned a quarter of the property and a Mr. Clark owned the other quarter. Defendant "took out of his pocket a book that looked like a check book" and offered to write a check for $1,000 at that time, which Mrs. Hill did not accept. She told defendant that she wished to talked to the other two parties before she would do anything. On the following day defendant returned to Mrs. Hill's home and repeated his offer to her and to Mrs. McGillivray. No payment of $1,000, however, was offered by defendant at this time. He informed them that it would be necessary to obtain a survey of the property before his company would execute the lease; that such survey would cost $500, but that his company would pay one-half of this sum if they were permitted to make the survey, provided the owners of the property would put up the other $250. Mrs. Hill, Mrs. McGillivray and defendant then drove to a bank; Mrs. McGillivray withdrew $250 in cash and handed the money to the defendant, who stated that the survey would be sent to them within ten days. This transaction represents count one of the indictment.

Within a few days thereafter Mrs. Hill received a telephone call from someone who made her an offer of $8,000 and a one-eighth royalty. Mrs. Hill testified that defendant called upon her on July 1st, and that she then told him "that we had had an offer of more money for the land and that we didn't feel that we could afford to let him have it for that figure, and he said $4,000 was all that his company would allow him to give. And he said, 'Well, what should we do in regard to the money my company has put up? My company has already put up $250 for the survey and if they don't get the land they will be sore at me for not giving you a deposit in the first place and making things more secure.' So he said, 'In that case I can't blame you an awful lot but I am very much disappointed because my commission would amount to about $400 on this sale.' He says, 'Of course, I am knocked out of that.' He says, 'But I will tell you what I will do. If you will give me the $250 to reimburse my company for the money they put up I will give you a receipt releasing you from all obligations with my company,' * *." On the following day defendant repeated the proposition to Mrs. Hill and Mrs. McGillivray, who accepted the offer. At this time defendant received the second sum of $250, which transaction represents count 2 of the indictment.

Shortly thereafter Mrs. Hill received a document through the United States mail postmarked "Sante Fe, New Mexico", which she described as looking like an "old envelope. The envelope was ragged as though it had saw hard usage." A document was contained in the envelope, wrapped in a piece of blue paper which had no writing on it. It was stipulated between counsel that the form of this document was printed by a stationery store in Los Angeles, and that it sold for five cents a copy. With regard to this document, referred to as exhibit No. 5, defendant testified as follows:

"Q. (By Mr. Durkee, Defendant's Attorney): Exhibit No. 5, a map, calling your attention to this map have you ever seen that before? A. I have.

"Q. Do you know who made that map? * * * A. I did.

"Q. For what purpose? A. Working copy for an engineer. * * *

"Q. You turned that map over to whom? A. William D. Barnett. * * * I turned the map over to Mr. Barnett as a working model of what I wanted him to produce for a certain fixed sum that I was paying him. * * *

"Q. (By Mr. Frampton, Deputy District Attorney): How much of this so-called plat, Exhibit 5, did you prepare? * * * A. Prepared all with the exception of this part which is attached to it.

"Q. You signed the name of J. B. Barber to it? A. Yes, sir.

"Q. Who is Mr. Barber? A. Lieut. Colonel of the United States Army.

"Q. What is his address? A. U. S. Army.

"Q. Where is that? A. In the U. S. of America. * * *

"Q. What is his occupation other that being a commissioned officer of the United States Government? A. I don't know.

"Q. Did you sign the attestation, 'C.E.' under his name? A. Yes, sir. * * *

"Q. What connection did Barber have with this transaction? A. Absolutely none. * * *

"Q. What was your intention when you made this document? A. As a working model for the engineer. * * *

"Q. You immediately turned it over to Mr. Barnett? A. Turned over a portion of it.

"Q. Was Mr. Barnett an engineer? A. He is a licensed real estate broker.

"Q. Is he an engineer? A. No, sir."

The evidence discloses that subsequent to the completion of the above transactions, defendant, on two different occasions, had introduced himself or had gone under the names of "Gordon" and "Alexander".

One George H. Campbell, federal receiver for the World Oil Company, located at Fort Worth, Texas, testified in substance that he has had full supervision of that company under the orders of the court since July, 1930; that he was in full charge of the operation of the company, employing all the help; that he did not know the defendant and had never see him; that the company at no time had any interest in any property in Chavez county, New Mexico; that his company never received any money purporting to be for a survey of the land in question; and that the company never paid out the sum of $250 for the purpose of surveying said land.

With regard to defendant's offer to write a check for $1,000, heretofore mentioned, defendant testified as follows:

"Q. (By Mr. Frampton): You had a bank account with about $5000 in it, didn't you? A. No.

"Q. How did you expect to pay $1000 down and $4000 to Mrs. Hill? A. In cash.

"Q. Did you have that in the bank? A. No sir.

"Q. Didn't you pull out a check book and show it to Mrs. Hill? A. No sir.

"Q. You carried that around on your person? A. Not $5,000.

"Q. Where? * * * A. In a safety deposit box.

"Q. In what bank? A. Not in any box.

"Q. Did you have it out in a woodpile in your yard? A. In a hotel."

Defendant further testified, in response to an inquiry as to what was done by him with the money received from the complaining witness, as follows:

"Q. What did you do with the first $250 that was given to you on June 25, 1937? A. Together with an additional $150 I paid to William D. Barnett.

"Q. For what purpose did you give it to Mr. Barnett? A. For the bringing down of the title, the survey certificate, a geological report on the lease.

"Q. Has Mr. Barnett ever given that money back to you? A. No, sir."

The defense consisted of the testimony of the defendant and six character witnesses. Notwithstanding the evident value and importance that would have attached to any evidence tending to corroborate the defendant's story, none was forthcoming at the trial. Even the purported individual, referred to by defendant as "William D. Barnett", did not appear as a witness. As to the character evidence produced in behalf of the defendant, the record appears to justify the argument of the district attorney to the jury with regard thereto, which was as follows: "Ladies and gentlemen of the jury, there isn't very much I can do about testimony of that kind. You are going to have to weigh testimony of that kind. All I can say is that witnesses of that character and this defendant belong to each other by the right of mutual discovery and reciprocal attachment and I wouldn't for a minute disturb such a beautiful relationship between witnesses of that kind and this defendant. They are welcome to each other."

Appellant advances the usual contentions, in substance, that the evidence is insufficient to support the judgment; that the trial court erred in the admission and rejection of evidence; that the district attorney was guilty of prejudicial misconduct; and that the court erred in refusing to give certain instructions requested by the defendant.

Without going into further detail, it is sufficient to state that a review of the record reveals all of said contentions to be without merit, and no error appears of that prejudicial character that would justify a reversal.

For the foregoing reasons the judgment and the order denying a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

SKIDMORE et al. v. ALAMEDA COUNTY.*

Civ. 10382.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1938.

Rehearing Denied Oct. 1, 1938.

Hearing Granted by Supreme Court Oct. 31, 1938.

1. Accord and satisfaction 🔑10(1)
Compromise and settlement 🔑6(2)
Counties 🔑166

Plaintiffs' acceptance of payment made by auditor pursuant to warrant which county board of supervisors directed auditor to issue to plaintiffs for final payment due plaintiffs under contract with county for an investigation and report on tax delinquent property, which contract provided that 25 per cent. of amount due plaintiffs under contract was to be withheld until plaintiffs should furnish an affidavit of full performance, did not constitute a final payment and termination of all obligations under contract or an accord and satisfaction, where there was no dispute as to amount due plaintiffs, and the term "final payment" in warrant referred only to final payment of compensation already accrued and withheld.

[Ed. Note.—For other definitions of "Final Payment," see Words & Phrases.]

2. Counties 🔑200

Under statute permitting county board of supervisors to consider only claims filed within one year after the accrual of the last item of the claim, plaintiffs contracting with county for an investigation and report on tax delinquent property for which plaintiffs were to be paid 50 per cent. of all money received by county for redemption or sale of such property could recover from county only 50 per cent. of amount received by county for redemption or sale of property within the period of one year prior to filing of plaintiffs' claim with county board of supervisors, where the amount to be received by plaintiffs from each sale or redemption became due separately and not on completion of all the sales or redemptions. Pol. Code, §§ 4075, 4078.

3. Counties 🔑194

Plaintiffs contracting with county for an investigation and report on tax delinquent property for which plaintiffs were to be paid, to the extent of $12,000, 50 per cent. of all money received by county for redemption or sale of such property, could not recover, to the extent of $12,000, 50 per cent. of what county would have received on property which county refused to sell, where contract did not require county to make sales.

4. Counties 🔑200
Limitation of actions 🔑46(7)

The alleged claim of plaintiffs contracting with county for an investigation and report on tax delinquent property for which plaintiffs were to be paid 50 per cent. of all money received by county for redemption or sale of such property, for 50 per cent. of what county would have received on property which it refused to sell, was barred by limitations where claim was not filed with county board of supervisors within one year after county's refusal to sell property, and action on claim was not commenced within four years of such refusal to sell. Pol.Code, § 4075; Code Civ.Proc. § 337.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by C. E. Skidmore and another against Alameda County to recover a balance alleged to be due under the terms of a contract entered into by the plaintiffs with the defendant. From a judgment for the defendant, the plaintiffs appeal.

Reversed, with instructions.

Hester W. Webb and William H. Mackay, both of San Francisco, for appellants.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondent.

BRAY, Justice pro tem.

Appellants appeal from a judgment in respondent's favor in an action brought to recover a balance alleged to be due under the terms of a contract entered into by them with defendant.

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*For subsequent opinion see 90 P.2d 577.

By the terms of said contract, which was entered into on March 30, 1922, plaintiffs were to investigate and report on all real property in the County of Alameda, on which the taxes were first delinquent in the fiscal year 1916–17 or prior thereto, which had not been sold by the state for tax delinquency, which had not been redeemed by the owners thereof, and against which there were uncancelled taxes disclosed by the records. Appellants were to be paid an amount equal to 50 per cent of all money received by said county for redemption or sales of property covered by the authorization, but in no event were appellants to be paid in excess of $12,000. Twenty-five per cent of the amount due appellants was to be withheld until appellants furnished an affidavit of full performance by them under the contract. The affidavit so certifying was filed October 26, 1927. Up to this time certain payments had been made to appellants, and after the affidavit was filed, and on November 3, 1927, a resolution was passed by the board of supervisors accepting appellants' services "as full and complete performance of the things required to be done and performed by them under such contract" and directing the auditor to issue a warrant in plaintiffs' favor "for the final payment due said persons under and by virtue of the terms of said contract". On November 8, 1927, a warrant was issued appellants for $860.97 (25 per cent of the amount theretofore paid appellants). Thereafter during the next four years six further payments were made totaling $291.77, the last being made September 4, 1931. On May 11, 1932, appellants filed their claim for $8,264.77, the difference between the amount already paid by the county under the contract, and the maximum provided therein. The claim was rejected and this action was brought.

The complaint is in four counts. The first is an action for fifty per cent of the moneys received by the county from sales and redemptions. The second is based upon the refusal of the county to sell certain parcels of property, the theory being that the contract contemplated the county would sell, and that it breached its contract by its failure and refusal to sell; that had such sales been made, plaintiffs' share would have been the maximum specified in the contract, and plaintiffs' demand the same, less what they already have received. The third and fourth causes of action were expressly waived at the oral argument and will not be considered here.

[1] As to the first cause of action, the main controversy lies over the effect of the board of supervisors' resolution and the acceptance of the payment made by the auditor pursuant thereto. Respondent contends this constituted a final payment and a termination of all obligations under the contract, and that cashing the warrant constituted an accord and satisfaction. Appellants answer this contention by claiming, first, that the resolution had no such effect, and secondly, that the theory of final payment is untenable in view of the six payments later made.

It is clear that appellants' theory of the effect of the resolution and payment must be upheld. It was not intended as a termination of the relations between the parties. The contract provided that the appellants were to render certain services. These, of course, would be soon completed, but it was known that the moneys to be received by the county of Alameda, as a result of appellants' services, from redemptions or sales would not come in for some time. In fact, it must have been contemplated that these redemptions and sales might cover, as they actually did, a period of years. Appellants would not have any money coming until the county first received it, and hence the purpose of the resolution was to find that, under the terms of the contract, appellants had fully performed their services and were entitled to the twenty-five per cent theretofore withheld by the county, and thereafter would be entitled to receive from sales and redemptions their full fees without any portion being withheld. Its purpose was to clear the way for the withheld moneys and to allow full compensation thereafter without any withholding. That this was the intention and the effect is shown by the fact that thereafter, as redemptions or sales were made, the county made six additional payments to appellants. While they were only small amounts, nevertheless they indicated the understanding of the parties and were properly paid under the contract. There was no accord and satisfaction as there was no dispute. Rued v. Cooper, 119 Cal. 463, 467, 51 P. 704; Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 44 P.2d 670. Moreover, the term "final payment" merely referred to the final payment of compensation already accrued, twenty-five per cent of which had been withheld. There was nothing to indicate to either party that this payment was to be a final adjudication of the relations between the parties.

Appellants' claim, upon which they base their first cause of action, was filed with the board of supervisors on May 11, 1932. It was rejected by the board. Respondent contends that the action of the board is not subject to review by the courts. However, section 4078 of the Political Code expressly provides that suit may be brought upon such rejected claim.

[2] The next question, as regards the first cause of action, is the effect of section 4075 of the Political Code, which provides that the board of supervisors must not hear or consider any claim which is not filed within one year after the last item of the account or claim accrued. The bulk of the redemptions and sales for which appellants are asking compensation took place more than one year before appellants filed their claim. To evade the effect of section 4075 of the Political Code, appellants contend they are suing on a contract which provided for a running or open account between the parties and that they are entitled to include items older than one year preceding the filing of appellants' claim so long as no gap of a year separated the items of their claim, and inasmuch as the last item was within the year.

Here appellants' services were fully performed and completed in 1927. Nothing remained for appellants to do to earn their money. They only had to wait for the money to come into the county from sales or redemptions. The accrual of the right to receive money from the county in no way depended upon any action of either themselves or the county. Each time there was a sale or a redemption, the appellants were entitled to their money and could have immediately brought suit therefor, after first having filed a claim with the county. There was nothing which required or permitted them to wait until all the sales and redemptions that might occur over the years had been made. The amount to be received by appellants from each sale or redemption became due separately. Lee v. De Forest, 22 Cal.App.2d 351, 71 P.2d 285. As said in appellants' brief "the right to compensation arose, not on completion of services, but upon receipt by the county of money from redemptions and sales". Each sale or redemption constituted an item by itself and from which the appellants were immediately entitled to their share. They could have and should have demanded it then. It appears in evidence that the total redemptions made within the period of one year prior to the filing of the claim with the board of supervisors amounted to $690.19. Appellants' share of this was 50% or $345.10. For this sum alone appellants are entitled to a judgment.

[3] As to the second cause of action, the judgment below should be affirmed. The entire contract between the parties is contained in the resolution of the board of supervisors adopted in 1922. There is nothing in the resolution which obligates the county to sell the property concerning the delinquent taxes upon which appellants have reported. Appellants contend that the county is obligated to sell all properties as to which they reported until such time as appellants have received from such sales the maximum compensation agreed upon. But the resolution in no wise requires the county to make sales, and it is very doubtful if the board of supervisors would have the power to agree to such a requirement had they attempted to do so. 15 Cor.Jur. 465; Egan v. City and County of San Francisco, 165 Cal. 576, 133 P. 294, Ann. Cas.1915A, 754. Of course, the county never received anything from these properties, so, under the wording of the resolution, nothing ever became due appellants. The most the contract provides is that the appellants should make recommendations as to the disposition of these properties, but at no time did the board obligate itself to follow such recommendations.

[4] Moreover, if any obligation to sell was created by the resolution, the breach of such obligation occurred when the county refused to sell upon demand in the spring of 1929. Any action for such breach would be barred by both section 4075 of the Political Code and the four-year statute of limitations, Code Civ.Proc. § 337.

The judgment is reversed and the lower court is instructed to enter judgment in favor of appellants and against respondent for the sum of $345.10, appellants to recover costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

28 Cal.App.2d 382

PASSOW v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10894.

District Court of Appeal, First District,
Division 2, California.
Sept. 7, 1938.

Mandamus 🔑**31**

Mandamus would lie to compel superior court to assume jurisdiction of a motion for an injunction restraining a defendant from disposing of his property for the purpose of defeating execution of a judgment against him where appeal in action in which judgment was rendered had been decided and petition for transfer to Supreme Court had been denied and remittitur to the superior court had gone down from the District Court of Appeal.

◆

Original mandamus proceeding by Henry E. Passow against the Superior Court of the State of California in and for the City and County of San Francisco and the Honorable C. J. Goodell, Judge thereof, to require the respondent court to assume jurisdiction of a motion for an injunction restraining one John Bell from disposing of his property for the purpose of defeating execution of a judgment against him in an action entitled Passow against Bell.

Peremptory writ of mandamus issued.

Robert E. Hatch, of San Francisco, for petitioner.

Jerome L. Schiller and Samuel G. Holcenberg, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an original proceeding for a writ of mandamus to require the respondent court to assume jurisdiction of a motion for an injunction restraining one John Bell from disposing of his property for the purpose of defeating execution of a judgment against him in an action entitled Passow v. Bell. On the hearing on the return to the alternative writ issued herein it was conceded that the sole ground upon which a hearing of the motion was denied was that the superior court was without jurisdiction because the original case was pending on appeal. At the time this ruling was made, the order in the case of Passow v. Bell had been reversed by this court, 81 P.2d 224, and a petition for a transfer to the Supreme Court was pending. Thereafter such petition was denied, and the remittitur to the superior court went down from this court on August 29, 1938.

There is no further obstacle to the assumption of jurisdiction over the motion for an injunction, and the respondent court may now proceed to hear the motion on its merits.

Let a peremptory writ of mandamus issue as prayed.

I concur: SPENCE, J.

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28 Cal.App.2d 397

PEOPLE v. LOHR.

Cr. 3130.

District Court of Appeal, Second District,
Division 2, California.
Sept. 8, 1938.

Hearing Denied by Supreme Court
Oct. 7, 1938.

1. Criminal law 🔑**1202(1)**

In order to adjudge a defendant an habitual criminal, the test is not whether he shall have been twice convicted of any felonies, but whether he shall have been twice convicted of felonies enumerated in the Penal Code. Pen.Code, § 644.

2. Criminal law 🔑**1202(7)**

Where charge against defendant, who was sought to be adjudged an habitual criminal, was that he had been convicted of violating the National Motor Vehicle Theft Act, the District Court of Appeal would assume that he had been convicted of the violation of that section punishing whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing it to have been stolen, where information did not charge and record did not establish the section on which defendant had been convicted. Pen.Code, § 644; National Motor Vehicle Theft Act, 18 U.S.C.A. § 408.

3. Criminal law 🔑1202(1)

Court erred in adjudging defendant, who pleaded guilty to charge of forgery, an "habitual criminal" within meaning of the Penal Code because of the fact that he had been previously convicted twice of the violation of that section of the National Motor Vehicle Theft Act punishing whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing it to have been stolen, since prior convictions were not for an offense enumerated in the Penal Code. Pen.Code, § 644; National Motor Vehicle Theft Act, 18 U.S.C.A. § 408; St.1923, p. 564, § 146.

[Ed. Note.—For other definitions of "Habitual Criminal," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Franklin H. Lohr pleaded guilty to a charge of forgery, was adjudged an habitual criminal, and he appeals.

Judgment reversed, with directions.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WOOD, Justice.

The defendant entered a plea of guilty to the charge of forgery. The information contained two separate charges of former convictions of felonies in the following language: "That before the commission of the offense hereinabove set forth in this information, said defendant, Franklin H. Lorh (under the name of Frank Henry Lohr), was, in the District Court of the United States, in and for the Southern District, Central Division, of the State of California, convicted of the crime of Dyer Act, a felony, and the judgment of said Court against said defendant, in said connection, was, on or about the 12th day of March, 1932, pronounced and rendered, and said defendant served a term of imprisonment therefor in the Federal Prison. That before the commission of the offense hereinabove set forth in this information, said defendant, Franklin H. Lohr (under the name of Frank H. Lohr), was, in the District Court of the United States, in and for the State of Texas, convicted of the crime of Dyer Act, a felony, and the judgment of said Court against said defendant, in said connection, was, on or about the 6th day of August, 1933, pronounced and rendered, and said defendant served a term of imprisonment therefor in the Federal Prison."

The defendant admitted the convictions on the charges of prior convictions of the felonies mentioned in the information. The trial court thereupon adjudged defendant to be an habitual criminal and directed that he be punished by imprisonment in the state prison at Folsom for the term prescribed by law.

The defendant now contends that the convictions which he admitted were not convictions of such felonies as must be established to justify the trial court in adjudging him an habitual criminal in accordance with section 644 of the Penal Code, which provides in part as follows: "Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a State prison, forgery, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years."

[1, 2] In order to adjudge a defendant an habitual criminal the test is not whether he shall have been twice convicted of any felonies, but whether he shall have been twice convicted of felonies enumerated in section 644 of the Penal Code. The Dyer Act referred to in the information, more accurately called the National Motor Vehicle Theft Act, 18 U.S.C.A. § 408, contains the following: "Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not

more than five years, or both." Other provisions are contained in the act, a violation of which, it might be argued, would constitute the crime of grand larceny. The charge in the information does not designate the section of the Dyer Act upon which defendant was convicted and the record furnishes us no assistance in this regard. We must therefore assume that defendant was convicted of the violation of that portion of the Dyer Act which has just been quoted.

[3] In order to justify the court's action in adjudging the defendant to be an habitual criminal it must be held that the violation of the section of the Dyer Act above quoted constituted the crime of grand theft or the crime of feloniously receiving stolen goods. We cannot reconcile the definition of either of these felonies with the language contained in the said section of the Dyer Act. The offense mentioned in the section of the Dyer Act above referred to consists in the transportation in interstate commerce of a motor vehicle with knowledge that the vehicle was stolen. Such conduct is substantially the same as the offense denounced in section 146 of the California Vehicle Act, St.1923, p. 564. This section is now section 503 of the Vehicle Code, St.1935, p. 174, and is as follows: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of, such vehicle, whether with or without intent to steal the same, is guilty of a felony * * *." This offense is not one of those enumerated in section 644 of the Penal Code, the prior convictions of which authorize the court to adjudge a defendant an habitual criminal. It was necessary for the prosecution to charge and prove that the prior convictions were among those set forth in section 644 in order to adjudge the defendant an habitual criminal. This it did not do. People v. Morrison, Cal.App., 80 P.2d 94; People v. Carrow, 207 Cal. 366, 278 P. 857; People v. King, 64 Cal. 338, 30 P. 1028.

The respondent relies upon People v. Fitzwater, 5 Cal.App.2d 187, 42 P.2d 1044. It will be noted that in the Fitzwater Case the only issue before the court involved the question whether the defendant had been previously convicted of any felony. Section 644 of the Penal Code was in no way involved or referred to. The Fitzwater decision supports the contention of appellant, for the court in that case said that it was "satisfied that the National Motor Vehicle Theft Act and section 146 of the California Vehicle Act denounce the same general conduct or acts, and that each defines such conduct and acts as a felony" [page 1046].

The judgment is reversed and the superior court directed to pronounce a new judgment not inconsistent with the views herein expressed.

We concur: CRAIL, P. J.; McCOMB, J.

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28 Cal.App.2d 392

PEOPLE v. BERNER.

Cr. 3133.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1938.

Hearing Denied by Supreme Court
Oct. 7, 1938.

1. Automobiles ⟹355(1)

Evidence sustained defendant's conviction under statute making it a felony to drive an automobile when addicted to or under the influence of narcotic drugs, notwithstanding that defendant was not at the moment of his arrest under the influence of such drugs. St.1935, p. 176, § 506.

2. Automobiles ⟹316

The section of the Vehicle Code making it a felony for a motorist to drive when addicted to or under the influence of narcotic drugs is within Legislature's province and is not unconstitutional on ground that it is an unlawful exercise of the police power. St.1935, p. 176, § 506.

3. Automobiles ⟹316
Constitutional law ⟹250

The section of the Vehicle Code making it a felony for a motorist to drive when addicted to or under the influence of narcotic drugs is not unconstitutional on ground that it deprives a defendant of the equal protection of the law. St.1935, p. 176, § 506.

4. Automobiles ⚷356

Whether degree of offense of driving a motor vehicle on the highway while addicted to or under the influence of narcotic drugs should have been reduced from a felony to a misdemeanor because of the fact that drug was allegedly necessary because of defendant's physical condition and had been furnished by his physician, was addressed to judgment and discretion of trial court. St. 1935, p. 176, § 506.

5. Automobiles ⚷355(1)

In prosecution for driving a motor vehicle on the highway while addicted to or under the influence of narcotic drugs, wherein defendant introduced evidence that he took drugs on advice of physician and was not under the influence of the drugs at the time of his arrest, evidence supported trial court's action in refusing to reduce the degree of the offense from a felony to a misdemeanor. St.1935, p. 176, § 506.

6. Criminal law ⚷1184

A mere difference of opinion whether the degree of an offense should be reduced will not, as a matter of law, justify modification of the judgment, where evidence supports trial court's conclusion.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Joe Berner was convicted of violating the section of the Vehicle Code making it a felony for any one to drive while addicted to or under the influence of narcotic drugs, and he appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

Clifford Thoms and Robert P. Dockeray, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was charged in an information with the violation of section 506 of the Vehicle Code, St.1935, p. 176, a felony, was adjudged guilty thereof by the court and sentenced to imprisonment in the state prison. The appeal herein is from the judgment, and from the order denying defendant's motion for a new trial.

Section 506 of the Vehicle Code reads as follows:

"*Driving When Addicted to or Under Influence of Narcotic Drugs.* It is unlawful for any person who is addicted to the use, or under the influence, of narcotic drugs to drive a vehicle upon any highway. Any person convicted under this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment in the State prison for not less than one year nor more than five years or in the county jail for not less than ninety days nor more than one year or by a fine of not less than two hundred dollars nor more than five thousand dollars or by both such fine and imprisonment."

The evidence reveals that on March 17, 1938, defendant, while driving an automobile on a public highway in the city of Los Angeles, was arrested by a police officer who knew him. Some 9½ grains of morphine and a hypodermic device were found in defendant's possession.

The city jail physician, who is also examining physician for the city and state narcotic department, testified, in substance, that he examined defendant at the central jail in Los Angeles on March 17th, and found that defendant was under the influence of and addicted to the use of a habit-forming drug, but that defendant's appearance showed he had his faculties, and he was able to respond normally to all the questions; that it was his impression that if defendant were conducting a business or occupation he would be able to handle it; that the examination further revealed that defendant was afflicted with very severe bronchial asthma. He also stated that defendant appeared to be capable of driving an automobile, and further testified that defendant told him that "* * * for the past four years (a doctor) has been prescribing for him the amount of 42 grains of morphine sulphate per week, giving him 6 grains of morphine per day, * * * that he used adrenalin to effect relief, which would give him very temporary relief and would make him considerably nervous, but since the use of the opiate drug that he gained control of his asthmatic attacks fairly well and is able to be employed and continue in a gainful occupation".

Defendant's physician testified that in the event said defendant was deprived of the opiate for forty-eight hours his condition would be very serious.

Appellant urges as grounds for reversal that the evidence is insufficient to support the judgment in that it does not show the defendant to have been either addicted to the use of, or under the influence of, narcotic drugs within the meaning of section 506 of the Vehicle Code. It is argued in that connection that inasmuch as neither the phrase "addicted to the use", nor the phrase "under the influence", is defined, that such section is intended to apply only when such addiction or influence renders the individual thus afflicted incapable of operating a motor vehicle. It is pointed out, by analogy, that the phrase "under the influence of intoxicating liquor" has been defined by the courts in connection with the interpretation of the Vehicle Code (People v. Dingle, 56 Cal.App. 445, 205 P. 705), and that the same test should apply to the provision of the Vehicle Code herein under consideration. It is urged that if such test were applied, the defendant could not be held to have violated the above section.

[1] The argument is plausible but not logical. That defendant was addicted to the use of narcotic drugs within the meaning of section 506 of the Vehicle Code there can be no question. Whether he was at the moment of his arrest under the "influence" of such drug is therefore unimportant. There is slight, if any, resemblance between the use of narcotic drugs and the use of intoxicating liquors, and the likely or possible effect thereof upon the individual. It was within the province of the legislature to permit the operation of a motor vehicle by one who uses alcoholic beverages, but at the same time to declare it to be an offense to operate a motor vehicle when under the "influence" of such beverage. It was likewise within the province of the legislature to declare it to be an offense "for any person who is addicted to the use * * * of narcotic drugs to drive a vehicle upon any highway".

[2-3] Appellant's further contention that section 506 of the Vehicle Code is unconstitutional for the reason that it is an unlawful exercise of police power, and deprives appellant of the equal protection of the law, is without merit.

[4-6] It is also urged that the degree of the offense should be reduced from that of a felony to a misdemeanor. Such question was addressed to the judgment and discretion of the trial court in the first instance, and the conclusion reached by the trial court is supported by the evidence. A mere difference of opinion, if any existed, will not as a matter of law justify the modification of a judgment under such circumstances.

For the foregoing reasons the judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

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28 Cal.App.2d 395

PEOPLE v. LONDON.

Cr. 3138.

District Court of Appeal, Second District,

Division 2, California.

Sept. 8, 1938.

Criminal law 🔑1001

Clear and satisfactory evidence of violation of terms of probation warranted revocation of order granting probation as against contention that violation of probation must be proven beyond all reasonable doubt. Pen.Code, §§ 288, 288a.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Jack C. London was convicted of violation of section 288 and section 288a of the Penal Code, and from an order after judgment revoking a previous order suspending the execution of sentence and placing him on probation, he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty.. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from an order after judgment revoking a previous order suspending the execution of sentence of the defendant and placing him on probation after conviction of a violation of section 288 and section 288a of the Penal Code.

In summing up the case the court stated: "It is probably true that, if we were trying the issues involved in this violation on a charge of a new crime, there might be some reasonable doubt as to whether the evidence was sufficient to warrant a conviction."

It is the contention of the appellant that, "If there was a reasonable doubt as to whether the evidence was sufficient to warrant a conviction, then there certainly was a reasonable doubt to warrant the court in giving the defendant that benefit before ordering him into a violation."

At the hearing for the revocation of the order granting his probation it was not necessary that he be proved guilty beyond all reasonable doubt. We have read the evidence. It shows clearly and satisfactorily that the defendant violated the terms of his probation. People v. Lippner, 219 Cal. 395, 400, 26 P.2d 457. The court did not abuse its discretion.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 401

HEROUX v. ATCHISON, T. & S. F. RY. CO. et al.

Civ. 11815.

District Court of Appeal, Second District, Division 2, California.

Sept. 8, 1938.

Hearing Denied by Supreme Court Nov. 7, 1938.

1. Railroads 🔑327(2), 333(1)

If the physical facts shown by undisputed evidence raise the inevitable inference that a motorist approaching a railroad crossing did not look or listen or that, having looked or listened, endeavored to cross immediately in front of a rapidly approaching train which is plainly open to view, motorist is as a matter of law guilty of contributory negligence, notwithstanding that motorist may be in condition of mental abstraction and indifferent to peril of his situation.

2. Railroads 🔑327(2), 333(1)

Where motorist had unobstructed view of train as it approached intersection but did not look or listen or, having looked, failed to heed the rapidly approaching train and endeavored to cross in front of it, motorist was contributorily negligent and was precluded from recovering for injuries.

3. Negligence 🔑83

The doctrine of last clear chance is inapplicable unless it is shown that defendant was aware of plaintiff's dangerous situation and realized or should have realized plaintiff's inability to escape therefrom and defendant then had a clear chance to avoid injuring plaintiff by the exercise of ordinary care and failed to do so.

4. Railroads 🔑338

Where fireman on defendant's locomotive, observing motorist's automobile approaching crossing, called fact to engineer's attention and engineer instantly blew whistle and applied emergency brakes of train and did all that he could to avoid a collision, motorist could not recover for injuries sustained in collision at railroad crossing under last clear chance doctrine, since railroad's employees had no chance to avoid injuring motorist subsequent to learning of her position of danger.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Marie Heroux against the Atchison, Topeka & Santa Fé Railway Company, a corporation, and another for injuries sustained in a collision between an automobile and a locomotive. From a judgment for the plaintiff, defendants appeal.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

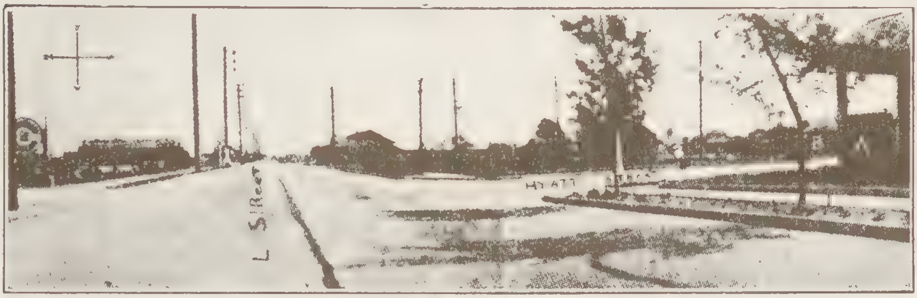
Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellants.

Russell H. Pray and Mason & Windham, all of Long Beach (Henry F. Walker, of Los Angeles, and Roy J. Brown, of Long Beach, of counsel), for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries suffered in a collision between an automobile and locomotive.

Photograph of the Scene Where the Accident Hereinafter Described Occurred.



Viewing the evidence most favorable to plaintiff (respondent) the material facts are:

January 3, 1937, about 3 a. m., defendant corporation was operating a steam train with defendant Alverson as engineer. This train, which consisted of a locomotive and tender, two box cars and a caboose, was moving about 25 miles per hour in a northerly direction on the track just south of the point where the right of way crosses L street in the Wilmington district of the city of Los Angeles. L street at this point runs east and west.

The house just west of Hyatt street and south of L street, which is marked A in the above picture, is 205 feet west of the center of the railroad tracks of the defendant Atchison, Topeka & Santa Fe Railway Company, which run north and south along a line indicated by the figures 1 and 2.

It is 181½ feet from the south curb line of L street to the house marked B in the above picture. All of the fences and other structures between the south curb line of L street and the house marked B are located east of the railroad tracks. There is a standard cross-arm railroad sign located at the point marked 1, which is 13 feet east of the center line of the railroad tracks. This cross-arm sign is approximately 12 feet high and the cross-arms are approximately 8 feet long consisting of boards 1 inch by 6 inches in size with the letters in the sign "railroad crossing" about 6 inches in size. The locomotive being operated by defendants was equipped with:

(a) An automatic bell which had been turned on at the Wilmington pier and continued to operate automatically thereafter until subsequent to the accident herein described.

(b) A headlight consisting of a 250-watt bulb with a funnel-shaped reflector which threw a beam of light 800 feet in advance of the locomotive. The rays of the beam from the headlight extended approximately 50 feet on each side of the track.

(c) A steam whistle which was sounded when the train was 200 feet south of the crossing by the giving of two long and two short blasts.

Upon the caboose there was a yellow sidelight visible to the west of the train.

When the pilot of the locomotive was approximately 100 feet south of the crossing the fireman, looking from the left window of the engine, observed an automobile, which was being operated by plaintiff, approximately 300 feet west of the crossing and traveling in an easterly direction on L street between 20 and 25 miles per hour. He forthwith told the engineer that an automobile was approaching. The engineer then blew the whistle. Immediately thereafter the fireman yelled, "Hold her" (meaning apply the emergency brakes), which was instantly done by the engineer.

It was a clear night and plaintiff, who had all of the windows in her car closed except the right-hand wind wing, which was open about an inch, was looking straight ahead through the windshield at all times prior to the accident while she was traveling east on L street. She did not notice the train until she was about 12 feet west of the crossing, at which time she heard the whistle blow and turned sharply to the left. The engine struck the right, front wheel of her car and carried the automobile about 20 feet north of the north side of L street.

Plaintiff had passed over this crossing on two previous occasions, once about ten days before the accident and on another occasion about three weeks before, at which times she knew of the location of the railroad track. As a result of the accident plaintiff received serious, personal injuries.

These are the questions necessary for us to determine:

First: Was plaintiff contributorily negligent as a matter of law, in view of the facts stated above?

Second: Was the doctrine of last clear chance applicable under the foregoing statement of facts?

[1] The first question must be answered in the affirmative. It is the settled law of this jurisdiction that, if the physical facts shown by undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen or that, having looked or listened, he endeavored to cross immediately in front of a rapidly approaching train which was plainly open to view, he is as a matter of law guilty of contributory negligence. Guyer v. Pacific Electric Railway Co., 24 Cal.App.2d 499, 502, 75 P.2d 550.

In Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259, our Supreme Court thus states the rule at page 754, 210 P. at page 262: "And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent."

[2] Applying the foregoing rule to the facts in the instant case, it is evident from the undisputed physical facts that plaintiff had an unobstructed view of defendant's train as it approached the intersection and that either she did not look or listen or, having looked, failed to heed the rapidly approaching train and endeavored to cross immediately in front of it. In either event she was contributorily negligent as a matter of law.

It is hard to conceive of a clearer case of contributory negligence than that which the facts here disclose.

[3] The second question must also be answered in the negative. The law is settled in California that the doctrine of last clear chance is inapplicable to a case unless there is evidence from which it may be found that (1) defendant was aware of plaintiff's dangerous situation and realized or should have realized plaintiff's inability to escape therefrom, and (2) defendant then had a clear chance to avoid injuring plaintiff by the exercise of ordinary care and failed to do so. Guyer v. Pacific Electric Railway Co., 24 Cal.App.2d 499, 503, 75 P.2d 550.

[4] The uncontradicted testimony shows that the fireman on defendant railroad company's locomotive, immediately upon observing plaintiff's automobile, called the fact to the engineer's attention, who instantly blew the whistle and immediately thereafter applied the emergency brakes of the train. It is clear that he thus did all in his power to avoid the unfortunate accident. It is, therefore, evident that the elements of the doctrine of last clear chance set forth in paragraph (2) above are absent from this case. Defendants neither had a clear chance to avoid injuring plaintiff subsequent to learning her position of danger nor did they fail to avoid the accident by not using ordinary care.

The conclusions which we have reached render it unnecessary for us to consider the other points discussed by counsel.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

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28 Cal.App.2d 406

PEOPLE v. RODONI.

Cr. No. 1639.

District Court of Appeal, Third District, California.

Sept. 12, 1938.

Criminal law 🔑1130(4)

Where defendant filed transcript on appeal on May 6, but filed no brief, and cause was regularly placed on the calendar for oral argument on September 12, but no appearance was made for defendant, conviction was affirmed. Pen.Code, §§ 107, 1253.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Leo Rodoni was convicted of violation of statute providing for punishment for escape of a prisoner, and he appeals.

Affirmed.

Leo Rodoni, in pro. per.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of the crime of violation of section 107 of the Penal Code of the state of California, a felony.

The transcript on appeal was filed in this court May 6, 1938. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on September 12, 1938. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

28 Cal.App.2d 383

HAYDEL v. MORTON.

Civ. 10041.

District Court of Appeal, First District, Division 1, California.

Sept. 8, 1938.

Hearing Denied by Supreme Court Nov. 7, 1938.

1. Appeal and error 🔑1218

The recalling of a remittitur is an extraordinary remedy that is only exercised in cases of fraud or imposition practiced upon the court or upon the opposite party or where a judgment is improvidently granted upon a false suggestion, or under a mistake as to the facts of the case.

2. Appeal and error 🔑1218

A judgment "improvidently granted" upon false suggestion or under mistake as to the facts of the case so as to warrant recall of a remittitur is one which is thoughtlessly granted, or without due consideration.

3. Malicious prosecution 🔑15, 26

To maintain an action for malicious prosecution, a plaintiff must show that the defendant acted without probable cause and that defendant was actuated by malice.

4. Malicious prosecution 🔑15

In action for malicious prosecution, showing that defendant acted maliciously is not of itself sufficient to warrant recovery in absence of showing of want of probable cause.

5. Malicious prosecution 🔑71(2)

What constitutes probable cause for alleged malicious prosecution is a question of law for the court.

6. Appeal and error 🔑1218

A motion to recall a remittitur on ground that it was improperly granted in that certain facts were suppressed on appeal would be refused where it appeared that no appeal was taken to the Supreme Court from appellate court's determination and that decision was not improvidently granted but was based upon failure of the plaintiff to show want of probable cause in action for malicious prosecution.

CASHIN, J., dissenting

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Lionel Haydel against Andrew Wade Morton for malicious prosecution, wherein judgment for the plaintiff was reversed, 19 Cal.App.2d 697, 66 P.2d 204, and thereafter a remittitur was issued. On motion to recall the remittitur.

Motion denied.

Sullivan, Roche & Johnson, of San Francisco, for appellant.

Thomas C. Ryan and F. H. Dam, both of San Francisco, for respondent.

MAXEY, Justice pro tem.

The plaintiff herein secured a judgment against the defendant, predicated upon a charge of malicious prosecution. The case was tried before a jury and interrogatories were propounded and findings thereon duly made by the jury. Judgment was rendered in accordance with the verdict. The defendant appealed, and on March 24, 1937, this court reversed the judgment; the respondent petitioned for a hearing by the Supreme Court after judgment in the District Court of Appeal. This petition was denied by the Supreme Court on May 20, 1937. Thereafter a remittitur was issued out of this court and the respondent herein, on February 25, 1938, filed a motion to recall the remittitur.

The basis of this motion is that said judgment was improvidently granted by this court upon a false suggestion by appellant; under a mistake as to the facts of the case, and through the inadvertence of the court. That the decision results in a miscarriage of justice due to the error of this court.

[1] A motion to recall a remittitur is an extraordinary remedy that is only exercised in cases of fraud or imposition practiced upon the court or upon the opposite party or where a judgment is improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case. Rowland v. Kreyenhagen, 24 Cal. 52; Trumpler v. Trumpler, 123 Cal. 248-252, 55 P. 1008; Municipal Bond Co. v. City of Riverside, 138 Cal.App. 267-279-285, 32 P.2d 661; Isenberg v. Sherman, 214 Cal. 722-725, 7 P.2d 1006.

[2] Improvidently granted is defined as being thoughtlessly granted, or without due consideration.

Respondent's motion is predicated upon certain statements alleged to have been made in appellant's briefs on file herein, and upon the alleged suppression by the appellant of the fact that the findings upon the special interrogatories made by the trial jury were not called to the attention of the court by appellant in his opening brief, and that the decision of this court was mistakenly made by reason of the alleged suppression of these facts by appellant. These points are set forth in detail in respondent's memorandum of authorities and in the affidavit filed in support of this motion. The affidavit fully sets forth the factual situation relative to the alleged misleading statements and suppression of the special findings.

[3] The action is one in malicious prosecution. In order to sustain such an action it is well settled that the burden is upon the plaintiff to establish two indispensable elements: First, that the defendant acted without probable cause; second, that defendant was actuated by malice. Haydel v. Morton, 8 Cal.App.2d 730-732, 48 P.2d 709, and cases cited.

[4, 5] It is not sufficient in such a prosecution to merely show malice upon the part of the defendant. It must further appear that the prosecution was not only maliciously had, but that it was had without probable cause. The question of what facts or circumstances amount to probable cause has been held to be a pure question of law for the court. Haydel v. Morton, supra, and cases cited. In the instant case, therefore, it is inconsequential as to the findings of the jury upon the propounded interrogatories, should the facts and circumstances of the particular case be insufficient as a matter of law to show a want of probable cause in the defendant. The decision in the instant case is predicated upon the legal conclusion that the facts of the case, being without conflict, do not, as a matter of law, support the verdict based upon the want of probable cause on the part of the defendant. Any special findings made by the jury upon that question, whether in findings predicated upon propounded interrogatories, or contained in a general verdict, would have no effect upon the legal conclusions to be drawn from such nonconflicting facts.

[6] It is therefore our conclusion that the decision reached in this case was not improvidently granted for the following reasons: Respondent had ample opportunity in his reply brief to refute any statements contained in appellant's opening brief and to expose the suppression of facts alleged to have been made by appellant in this court; upon decision by this court an opportunity was afforded respondent to petition this court for a rehearing, and at that time to call to the court's attention the very matters which are now set forth in the motion to recall the remittitur, such a petition for a rehearing was never filed in this court. Respondent had the opportunity of raising the questions here involved in his petition before the Supreme Court for a hearing after determination in this court; and, lastly, the decision of this case as made by this court, and reported in 19 Cal.App.2d 697, 66 P.2d 204, clearly indicates that the decision was not "improvidently granted" but was based upon the failure of the respondent to show a want of probable cause in the original trial of the action that would justify the legal conclusion that the prosecution had been without probable cause as a matter of law.

The record does not indicate, nor has any instance been called to our attention which would warrant the conclusion that any fraud or imposition had been practiced upon this court, nor that the decision was thoughtlessly made without due consideration to all of the facts and circumstances involved therein, but quite to the contrary, the decision shows that the record was fully and carefully examined without reference to the prior case between these same parties, and that the conclusion of this court was predicated upon its independent research and careful study of the matters involved in this appeal.

The motion will, therefore, be denied.

I concur: KNIGHT, Acting P. J.

I dissent: CASHIN, J.

In re RATTRAY'S ESTATE.*

MURPHY v. RENNIE et al.

S. C. 66.

District Court of Appeal, Second District,

Division 1, California.

Sept. 8, 1938.

Hearing Granted by Supreme Court
Nov. 7, 1938.

1. Descent and distribution 🔑6

The descent of property is governed by the law in force at the time of the death of the person whose property is to be distributed.

2. Husband and wife 🔑264

Evidence that neither spouse had any property at time of marriage, that neither inherited any property during lifetime, that wife was at no time engaged in gainful employment, that when husband ceased employment he was earning approximately $200 per month, and that both were frugal during their 22 years of married life, supported court's finding that $18,000 left by wife whose husband had predeceased her was community property as regards rights of sisters and brothers of both the husband and wife to the property. Probate Code, §§ 228, 229.

3. Husband and wife 🔑266

Community funds which were deposited in bank in wife's name and were not accounted for nor inventoried in the predeceased husband's estate were gifts to wife by husband of his community interest as regards rights of brothers and sisters of husband and wife to the funds. Probate Code, §§ 228, 229.

4. Statutes 🔑225

The provisions of the Probate Code regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue, must be considered together in view of the fact that the two sections were originally contained in one section. Probate Code, §§ 2, 228, 229.

5. Husband and wife 🔑274(1)

The Probate Code provision that, where decedent leaves no issue, one-half of community property goes in equal shares to decedent's heirs and one-half to heirs of decedent's predeceased spouse, applies to property received out of the community property by gift, descent, devise or bequest. Probate Code, §§ 2, 228, 229.

6. Husband and wife 🔑266

Where husband during lifetime made a gift to wife of his interest in community property, wife, who survived husband, was absolute owner in her own right of all the property during her lifetime and could give it away or will it away.

7. Husband and wife 🔑274(1)

Where both spouses die intestate without issue, the origin of property which is left and not the closeness of relationship to the last deceased spouse is the test of succession to such property under Probate Code. Probate Code, §§ 228, 229.

8. Husband and wife 🔑274(1)

Where property left by the last deceased spouse has its origin, either in whole or in part, in the joint efforts of the spouses, the Probate Code contemplates that upon the death of the survivor of the community intestate, the property shall go in equal shares to the objects of the bounty of both spouses. Probate Code, §§ 228, 229.

9. Husband and wife 🔑274(1)

Where husband made gift to wife of his interest in community property, husband predeceased wife and both died intestate and without issue, court properly distributed half of the originally community property to husband's heirs and other half to wife's heirs. Probate Code, §§ 228, 229.

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*For subsequent opinion see 91 P.2d 1042.

10. Husband and wife ⚩274(1)

Where husband, who predeceased wife, made gift of his interest in community property to wife, and husband and wife both died without issue and intestate, in order for heirs of husband to recover one-half of such property left by wife, husband's heirs had only to prove that the money was community property at the time of the gift and not at the time of husband's death. Probate Code, §§ 228, 229.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceeding in the matter of the estate of Elizabeth Rattray, also known as Lizzie M. Rattray, deceased, by Mary Ann Rennie and others, wherein the Honorable Matthew Murphy, Consul of the Irish Free State, appearing for John Shea and others, filed objections to the partial distribution of the property in the deceased's estate. From a decree of partial distribution, contestant appeals.

Affirmed.

Lloyd R. Massey and Ralph Edgington, both of Los Angeles, for appellants.

Louis Thomsen, of Los Angeles, for respondents Mary Ann Rennie and David Rattray.

Duque & McKinley, of Los Angeles, for respondent William Rattray, as administrator.

WHITE, Justice.

This is an appeal from a decree of partial distribution, distributing to the respondents, Mary Ann Rennie and David Rattray, sister and brother of the predeceased husband of decedent herein, who died intestate without issue. The appellants are a brother, sister, and several children of a predeceased sister and two predeceased brothers, of said decedent, in whose behalf Hon. Matthew Murphy, consul of the Irish Free State, appears by his attorneys.

Appellants, appearing in the court below, filed objections to the partial distribution of property in the estate of Elizabeth Rattray, also known as Lizzie M. Rattray, hereinafter referred to as decedent, to the relatives of her predeceased husband, upon the ground that the portion of the estate affected by the petition for partial distribution, consisting of the sum of $18,307.03, was the separate property of the decedent, and that appellants, as her sole heirs, should receive the whole thereof.

With reference to the money here involved, there was evidence before the probate court that at the time of the death of her husband in 1930, decedent had on deposit with a bank in her own name, as shown by her bank books, the sum of $16,618.90. It was also established that decedent during her married life, extending from 1908 to 1930, held title in her own name to several parcels of real estate. The aforesaid cash standing in the name of decedent at the time of her husband's death in 1930 was not inventoried in nor accounted for as part of his estate. The court found in effect that all of the estate of decedent, including the aforesaid bank account and cash in addition thereto consisting of the increment thereof, totaling in all $18,307.03, was community property of decedent and her previously deceased spouse, James W. Rattray, and came to her "by gift, devise and bequest"; by reason of which the court decreed that respondents, as sister and brother of decedent's predeceased husband, are heirs of decedent under the provisions of section 228 of the Probate Code, and entitled thereunder to share in the estate of decedent. Overruling appellants' objections, the court ordered that partial distribution of the estate of decedent be made as prayed for by respondents.

[1] It is undisputed that the descent of property is governed by the law in force at the time of the death of the person whose property is to be distributed. Estate of Putnam, 219 Cal. 608, 28 P.2d 27. The provisions of section 228 of the Probate Code, as enacted in 1931, therefore govern and control the distribution of the property in the estate of Elizabeth Rattray, who died intestate July 25, 1936. The pertinent section of the Probate Code reads as follows: "If the decedent leaves no issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and to their descendants by right of representation, and

the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of such deceased spouse and to their descendants by right of representation."

The first contention advanced by appellants is that the evidence is insufficient to support the finding that all of the estate of decedent was community property of said decedent and her previously deceased husband, James W. Rattray, and came to decedent from her husband by gift, devise and bequest. Also in this connection it is urged that there is an insufficiency of evidence to support the finding that respondents, as heirs at law of the predeceased husband of the decedent herein, constituted them heirs of decedent under the provisions of section 228 of the Probate Code and that by reason thereof they are entitled to succeed to the estate of decedent.

[2] In considering these claims of appellants, it is necessary to epitomize the testimony presented to the probate court. This was furnished in the main by William Rattray, a brother of the predeceased husband, who testified he first met decedent two years after her marriage to his brother; that he resided with decedent and her husband for "some little time" and thereafter saw them at intervals over a period of several years. This witness testified that he discussed with decedent and her husband their financial affairs; that his brother had no property at the time of his marriage to decedent, and inherited none during his lifetime; also that at the time of her marriage to his brother, decedent had no property, and so far as the witness knew, she never inherited any property during her lifetime. It was testified that the predeceased husband of decedent shortly after his marriage commenced to work for the Los Angeles Water Company and continued in the employ of said company and its successors up to a short time prior to his demise in 1930. The evidence indicates that decedent and her husband were frugal in their habits and mode of living, and that at the time the husband left the service of the water company his occupation was that of foreman and his salary approximated $200 per month. The record further indicates that during the entire married life of decedent and her husband the former's exclusive occupation was that of housewife in their home, and that after the death of her husband decedent engaged in no gainful employment. Upon this state of the record, we have no hesitancy in saying that the trial court was justified upon the foregoing facts in concluding that all of the property was acquired by the joint efforts and frugality of decedent and her husband during coverture. The wife had no separate property; her husband worked continuously; they were frugal and saving over a period of 22 years of married life; and the fruits of their efforts totaled an amount entirely commensurate with the savings and investments based upon the earnings and income of the husband.

We come now to a consideration of the question whether under the provisions of section 228 of the Probate Code, as construed by the decisions of the appellate courts of this state, one-half of the sum of money here involved goes to the heirs of the predeceased husband of decedent. To answer this question in the affirmative, we must conclude that the money in question came to decedent by "gift" from her husband during his lifetime out of the community funds. And if we conclude that decedent received the money as a gift from her husband out of their community funds, before we can hold that his heirs are entitled to inherit from the estate of his surviving wife, we must read into section 228 of the Probate Code the provision that any portion of community property received by one spouse from the other by gift and remaining the property of such spouse after the death of the donor spouse and at the time of the death of the donee spouse, in the event the latter dies intestate, is divided equally between the heirs of both the parties to the community.

[3] Deciding as we have that the trial court was justified in concluding that the money here in question was community property, we hold that in view of the fact that it was taken from community funds and deposited in the bank in the name of the wife and was not accounted for nor inventoried in the husband's estate, the sums so deposited in the wife's name were gifts made to her by the husband of his community interest therein. Having determined that the money here in question came to the decedent by gift from the community funds, we are confronted with the specific question—are the words "came to the decedent from such spouse by gift, descent, devise or bequest", which appear in section

229 of the Probate Code regulating the disposition of the separate property of a deceased spouse who died intestate, read into section 228 of the Probate Code, in which latter section those words do not now and never did appear? In the determination of this question, the decision in Estate of Simonton, 183 Cal. 53, 190 P. 442, is helpful. That case involved the construction of what are now sections 228 and 229 of the Probate Code at a time when (in the year 1920) those sections were section 1386, subdivision 8, of the Civil Code. At that time the word "gift" did not appear anywhere in said subdivision 8 of section 1386, said word having been added to section 229 of the Probate Code when the Probate Code was enacted in 1931. Subdivision 8 of section 1386 of the Civil Code, at the time of the Simonton decision and for many years prior thereto, and up to 1931, read:

"If the deceased is a widow, * * * and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and * * * her deceased spouse, while such spouse was living * * one half of such common property goes * * * in equal shares to the brothers and sisters of such deceased spouse. * * *

"If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes * * *" (all to the heirs of the predeceased spouse).

From the foregoing it will be noted that the manner in which the property had to come from the predeceased spouse to the last decedent was not stated in the first paragraph of subdivision 8 of section 1386 (the paragraph dealing with common or community property), but that in the second paragraph (dealing with separate property) the manner in which the property had to come to the last decedent from the predeceased spouse was specified, namely, that it had to come "by descent, devise or bequest", that is, will or succession. While the Civil Code section so read the Estate of Simonton, supra, was decided by the Supreme Court. The property involved in that decision was community property, largely. The facts in that case were very similar to the facts in the case at bar, but we must keep in mind that the law (section 1386, subdivision 8, Civil Code) was not the same then as it now appears in part in section 229 of the Probate Code. In 1931 the word "gift" was added to section 229 of the Probate Code (which was formerly the second paragraph of subdivision 8 of section 1386, Civil Code). Section 228 of the Probate Code, with which we are mainly here concerned, remains the same as the first paragraph of the old subdivision 8 of section 1386, and that section of the Probate Code deals with community property.

In the Simonton Case, supra, one of the questions presented was whether property which had at one time been community property, and had been "given" by the predeceased husband to his wife during his lifetime, came within the purview of what was then subdivision 8 of section 1386, Civil Code; that is, whether any part of such property would go to the heirs of the previously deceased spouse. The Supreme Court held in the negative under the law as it then read, saying (page 57, 190 P. page 444): "Literally, this would include any property which had once been community property, no matter if it were not such at the time of the husband's death, as, for example, where the husband had in his lifetime given it to his wife for her separate property. But such a meaning is clearly not what was intended, and it has already been held that it is not the true meaning. Estate of McCauley, 138 Cal. 546, 71 P. 458."

In the same case, the Supreme Court further said: "The only rational construction which can be given the provision is that it applies only to community property received by will or inheritance or retained by virtue of its character as community property. * * * If the wife be the survivor, it applies to such of the community property as she receives either by will or as her share of the estate. * * *"

On page 58, 190 P. on page 444, of the opinion in the Simonton Case, supra, the following appears: "The correctness of this construction" (placed by the court upon the first paragraph of subdivision 8 of the Civil Code) "is made doubly evident by the language of the second paragraph of the Code subdivision, that which deals with property which was the separate property of the predeceased spouse. There the language is that such property as 'came to the decedent (the surviving spouse) by descent, devise or bequest' from the spouse first dying shall go to the latter's relatives. This language is specific as to how the property must come to the decedent in order that the provision apply. The equivalent provision in the case of community property would be one limited to property received or retained by the survivor of the community either by will or by inheritance or by virtue of its character as community property. * * *"

[4] In other words, the Supreme Court in the Simonton Case held that the provisions of the second paragraph of subdivision 8 of section 1386 of the Civil Code, specifying the manner in which the property had to come to the decedent from the predeceased spouse, must be read into and form a part of the first paragraph of said subdivision. That being true, we hold that notwithstanding the fact that at the time section 1386, subdivision 8, was "lifted" from the Civil Code and reenacted into the Probate Code it was divided into two separate sections, the two named sections must be considered together, in conformity with the provisions of section 2 of the Probate Code, reading as follows: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

[5] Remembering that when section 229 was enacted into the Probate Code the legislature added the word "gift" to the words "descent, devise or bequest" as originally contained in the second paragraph of subdivision 8 of section 1386 of the Civil Code, we conclude from the reasoning in the Simonton Case, supra, that the only logical construction which can be given to the provisions of section 228 of the Probate Code is that it applies to property received out of community property by gift, descent, devise, or bequest. We are fortified in this construction by the language of section 229 of the Probate Code, which deals with property that was the separate property of the predeceased spouse. There the language is that such property as "came to the decedent from such spouse by gift, descent, devise or bequest" from the spouse first dying shall go to the latter's relatives. This language is specific as to how the property must come to the decedent in order that the provisions of section 229 shall apply. An equivalent provision affecting what was community property during the lifetime of both spouses would require equal distribution to the heirs of both spouses of any property received or retained by the surviving spouse of the community property which came to such survivor by gift, will, or by inheritance. Peculiarly applicable to the situation before us as to the intent of the legislature in reenacting section 228 of the Probate Code, is the language used by the Supreme Court in Estate of Simonton, supra, at page 58, 190 P. at page 444: "There is a fair presumption that upon this point the provisions with regard to community and separate property were intended to be equivalent, for no reason for a difference exists."

[6-9] Coming to her from her husband during his lifetime as a gift out of the community property, Elizabeth Rattray, the surviving spouse, was during her lifetime the absolute owner in her own right of all the property with which we are here concerned. She could give it away or will it away. But when she died intestate and without issue, the right of the relatives of her predeceased spouse to inherit that part of the estate which had come to her from him by gift out of community funds came into existence. Estate of Harris, 9 Cal.2d 649, 72 P.2d 873. The Probate Code in cases like the one now before us makes the origin of the property and not the closeness of the relationship to the decedent the test of succession in the particular situation covered by it. Where the property, either in whole or in part, has its origin in the joint efforts of the members of the community, the statute contemplates that upon the death of the survivor of the community intestate, the property shall go in equal shares to the objects of the bounty of both. Such fair and equitable distribution undoubtedly was the intention of the legislature when it adopted the provisions of section 228 of the Probate Code. The money here in question, having been received by the surviving spouse through gift from her predeceased husband out of their community property, was rightly distributed by the probate court under the provisions of section 228 of the Probate Code when the surviving spouse died intestate.

Appellant next contends that the findings of the trial court are in irreconcilable conflict, in that the court found that all of the estate of decedent was community property of decedent and her predeceased spouse, which came to her by gift from James W. Rattray, and further found that said property came to her by devise and bequest from the estate of her predeceased husband. We find no merit in this contention, for the reason that whether it came to her by gift, devise or bequest, distribution should be made in accordance with the provisions of section 228 of the Probate Code.

[10] Lastly, appellants contend that the finding of the court in the Estate of James W. Rattray, deceased, was a conclusive determination that the said James W. Rattray had no community interest at the time of his death in the money standing in the name of Elizabeth Rattray. The predeceased husband during his lifetime having made a gift of such money to his wife, it was only necessary for respondents to prove that the money going into the bank accounts was community property at the time of the gifts, and not at the time of his death. It is by reason of the origin of these moneys and the increment thereof that they remain subject to the provisions of section 228 of the Probate Code.

For the reasons stated, the decree of distribution is affirmed.

We concur: YORK, P. J.; DORAN, J.

28 Cal.App.2d 379

DEIST v. FIRST NAT. BANK OF ORANGE et al.

Civ. 2302.

District Court of Appeal, Fourth District, California.

Sept. 6, 1938.

1. Appeal and error 🔑370

A transcript cannot be filed until the filing fee has been paid.

2. Appeal and error 🔑627(2)

Where the record was not filed for one year and seven days after the legal time for filing had expired, appeal was required to be dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 1.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Ida A. Deist against the First National Bank of Orange, wherein the bank filed a cross-complaint against A. I. Frey, trustee, and others, and A. I. Frey, trustee, filed a cross-complaint against the bank. From an adverse judgment, the trustee appeals.

Appeal dismissed.

A. I. Frey, in pro. per.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for respondent.

MARKS, Justice.

This is a motion to dismiss the appeal because the record on appeal was not filed within the time required by law.

The complaint of Ida A. Deist, the answer and cross-complaint of The First National Bank of Orange, and the judgment in favor of the latter are not in the record. The only pleadings brought up are the cross-complaint of A. I. Frey, trustee, and the answer of The First National Bank of Orange to it.

It appears from the record that on January 21, 1936, The First National Bank of Orange recovered judgment against Ida A. Deist quieting its title to real property in Orange county; that on January 31, 1936, A. I. Frey, trustee, appeared by cross-complaint, seeking to establish an interest in the property involved in the original action; that an answer was filed to this cross-complaint; that the cause made by these pleadings was regularly set for trial for January 11, 1937; that on that day The First National Bank of Orange appeared ready for trial; that A. I. Frey, trustee, was not ready for trial and requested a continuance; that this continuance was granted and the cause reset for trial for April 1, 1937, on condition that A. I. Frey, trustee, pay to The First National Bank of Orange costs in the sum of $6.70; that such costs were not paid and A. I. Frey, trustee, refused to pay them; that on April 1, 1937, the parties were again in court and A. I. Frey, trustee, refused to pay any portion of such costs except the sum of $2.10; that, it then appearing to the trial judge that the condition upon which the continuance had been granted had and would not be complied with, the cross-complaint of A. I. Frey, trustee, was dismissed.

Judgment of dismissal was entered on April 6, 1937. Notice of entry of this judgment was given on April 13, 1937. Notice of appeal to this court was given on April 19, 1937. A clerk's and reporter's transcript, approved and certified on July 17, 1937, were received by the clerk of this court on July 19, 1937, without being accompanied by a filing fee. When the notice of motion to dismiss the appeal was filed the cause was transferred to the Supreme Court because of jurisdiction. It was retransferred here and the motion to dismiss came on for hearing on September 2, 1938. A. I. Frey, trustee, paid the filing fee on that date.

[1] Rule 1 of the Rules for the Supreme Court and District Courts of Appeal require the filing of a typewritten transcript within forty days after it is "approved and certified as required by law". A transcript cannot be filed until the filing fee has been paid.

A similar situation was before the court in the case of Silva v. Co-operative Dairymen's League, 5 Cal.App.2d 294, 42 P.2d 370, where, in speaking of section one of rule five, Rules for the Supreme Court and District Courts of Appeal, it was said (page 371): "It provides as follows: 'If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, upon notice given, either on motion of the respondent or of the court in which the appeal is pending. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such *notice is given,* that fact shall be sufficient answer to the motion.' (Italics ours.) That rule has the force of positive law so far as the rights of the parties are concerned. Brooks v. Union Trust, etc., Co., 146 Cal. 134, 79 P. 843; Helbush v. Helbush, 209 Cal. 758, 763, 290 P. 18. The rights of the defendant to have the appeal dismissed for the failure of the plaintiff to file his transcript within the time limited by the rules must be determined by the facts as they exist at the time the notice of motion is given and is not destroyed by the subsequent filing of a purported transcript. Shain v. People's Lumber Co., 98 Cal. 120, 32 P. 878; McCabe v. Healey, 139 Cal. 30, 72 P. 359; Barnhart v. Conley, 17 Cal.App. 230, 119 P. 200; Raisch Improvement Co. v. Arata, 193 Cal. 573, 226 P. 399."

[2] As the record in this case was not filed for one year and seven days after the legal time for filing it had expired it follows that the motion to dismiss must be granted.

Appeal dismissed.

We concur: BARNARD, P. J.; LEONARD, Justice pro tem.

12 Cal.2d 166

POMEROY, State Relief Administrator, et al. v. RILEY, State Controller, et al.

S. F. 16113.

Supreme Court of California.

Sept. 21, 1938.

Statutes ⚷33

Where original bill contained an appropriation of $48,000,000 for unemployment relief but Legislature added provisions designating that certain amounts be expended for particular purposes, the Governor's veto of the added provisions did not reduce the original appropriation by amount so specifically allocated, but left the appropriation effective for the original amount after attempt to override the Governor's veto failed.

◆

In Bank.

Mandamus proceeding by Harold E. Pomeroy, as State Relief Administrator, and State Relief Commission of the State of California, petitioner, against Harry B. Riley, as Controller of the State of California, and another, to compel the named defendant to set up a certain sum for relief on the books of his office, and to compel the other defendant as Director of the Department of Finance, to approve the budget for unemployment relief for the 1937-1939 biennium.

Writ granted.

Louis Heilbron, of San Francisco, for petitioner.

Jess Hession, of Sacramento, for respondent Stockburger.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent Harry B. Riley, Controller.

PER CURIAM.

The petitioner, as State Relief Administrator, and State Relief Commission of the State of California, seeks the issuance of a writ of mandamus directing and commanding Harry B. Riley, as the Controller of this state, to set up on the books of his office for the 1937-1939 biennium the sum of $48,000,000 for the relief from hardship and destitution due to and caused by unemployment, which amount includes not to exceed $500,520 for the administration expenses of the State Controller in connection therewith.

Petitioner seeks a similar writ directing and commanding the respondent, Arlin E. Stockburger, as Director of the Department of Finance, to approve the budget for unemployment relief for said 1937-1939 biennium, which budget has been framed upon the basis of this alleged appropriation of $48,000,000 for said biennial period.

Respondent Stockburger, as Director of Finance, admits all the allegations of the petition and signifies his willingness to approve this proposed fiscal year budget, but is prevented from so doing by reason of the failure and refusal of respondent Riley, as Controller, to set up on his books more than $40,733,450 for unemployment relief for the designated biennium, which amount is $7,266,550 less than that alleged by petitioner to have been appropriated for said purposes.

The controversy as to this disputed item arises out of the following proceedings taken during the last session of the legislature: The original appropriation bill, following the budget, provided for an appropriation of $48,000,000 for the relief from hardship and destitution due to unemployment. As the bill was finally passed by this legislature it contained provisions for expenditures out of such appropriation of certain amounts for additions and repair to various state institutions, colleges, schools and other state agencies totaling the sum of $7,266,550. The governor vetoed that added portion of the bill, which designated these amounts for said designated purposes, and expressly indicated that the amount for general unemployment relief was not thereby reduced but should remain at $48,000,000. The bill was returned to the legislature and an attempt was made without success to override the governor's veto.

The respondent Riley contends that the amount of the original appropriation, as contained in the appropriation bill, was by the legislature, in designating a portion thereof to particular purposes and the veto of the governor as to said designation reduced by the amount so designated to such purposes. This same question was raised and decided adversely to the contention of respondent Riley in the two recent cases of Reardon v. Riley, 10 Cal.2d 531, 76 P.2d 101, and Railroad Commission v. Riley, Cal.Sup., 82 P.2d 394. On the authority of those cases we are of the opinion that the peremptory writ should issue as prayed for, and it is so ordered.

28 Cal.App.2d 455

PEOPLE v. LEVENS.

Cr. 3129.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1938.

Hearing Denied by Supreme Court Oct. 17, 1938.

1. Automobiles ⟹355(6)

To sustain a conviction under statute making it a felony to drive a motor vehicle while under the influence of intoxicating liquor so as to cause bodily injury to another, it must appear in the evidence adduced, not only that defendant was driving an automobile while under the influence of intoxicating liquor and that while in such condition he committed some act forbidden by law, or that he neglected to perform some duty imposed by law, but that such act, or such neglect, proximately caused bodily injury to some person. St.1935, p. 174, § 501.

2. Automobiles ⟹355(6)

The particular case must determine whether acts shown to have been committed by defendant constitute a violation of statute making it a felony to drive a motor vehicle while under the influence of intoxicating liquor so as to cause bodily injury to another. St.1935, p. 174, § 501.

3. Automobiles ⟹332

The mere act of driving a motor vehicle on a public highway while intoxicated is an unlawful act, but whether it is a felony or a misdemeanor depends on the facts and circumstances in the case. St.1935, p. 174, §§ 501, 502.

4. Automobiles ⟹355(6)

Evidence did not sustain conviction for driving a motor vehicle while under the influence of intoxicating liquor and causing bodily injury to another. St.1935, p. 174, § 501.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Edward Thomas Levens was convicted of driving a motor vehicle while under the influence of intoxicating liquor and causing bodily injury to another, and he appeals.

Judgment reversed and cause remanded for new trial.

Hearing denied by Supreme Court; **CURTIS, J., dissenting.**

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, Presiding Justice.

Appellant was found guilty by the court of the crime of violation of section 501 of the Vehicle Code, St.1935, p. 174, in that he "did willfully, unlawfully and feloniously drive a certain vehicle, to-wit, an automobile, while under the influence of intoxicating liquor, and in an unlawful manner, causing bodily injury to one Marie A. Beck, a human being." His motion for a new trial having been denied, appellant was sentenced to state's prison for the term prescribed by law. Such sentence was suspended by the court, appellant was placed on probation for a period of two years, and as one of the conditions of such probation his operator's license was suspended for a period of five years.

This appeal is from the judgment and from the order by which appellant's motion for a new trial was denied, it being here urged that the evidence is insufficient to justify the verdict as to a violation of section 501 of the Vehicle Code, and that the court erred in ordering appellant's driving license suspended for five years.

With respect to his first point, it is earnestly contended that the elements necessary for a conviction under section 501, supra, are not only that the defendant be under the influence of intoxicating liquor, but that while in such condition and in addition thereto, he must commit some act forbidden by law or neglect to perform some duty imposed by law, which act or neglect proximately results in bodily injury to some person. Appellant also maintains that the evidence is insufficient to prove that he drove his automobile in an unlawful manner.

The provisions of section 501 of the Vehicle Code are as follows: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the State prison. * * *"

It is revealed by the record that appellant while driving westerly on Florence avenue at about 2:30 o'clock in the morning of January 20, 1938, collided with an unlighted automobile which was parked at an angle of forty-five degrees in front of sheriff's substation No. 1 at 1559 East Florence avenue, said automobile belonging to a friend of one of the deputy sheriffs. It further appears that appellant had some beer with his dinner at 5 o'clock of the evening before the accident occurred and had a glass of muscatel wine early that evening; that he called for a friend of his, Miss Neese, around 7:30 o'clock and drove to the beach; from there they returned to the Figueroa Theatre at Figueroa and Santa Barbara avenue arriving there at approximately 9 o'clock; that after the show appellant drove his companion to her home, leaving that place at about 1:30 o'clock; that he stopped at Findley's restaurant where he had a sandwich and a cup of coffee, and as he left said restaurant he met some neighbors and one of them, Miss Beck, asked appellant if she might ride home with him instead of riding with her three friends in their coupe. Appellant and his companion had traveled only a few blocks when the collision occurred, as the result of which Miss Beck sustained injuries which confined her to a hospital for a period of one month and appellant received a cut on the nose.

Miss Neese testified that appellant's driving from Los Angeles to Venice and back was "Perfect. He made all boulevard stops and everything like he usually did." In answer to the question, "Now, at that time what was his condition as to being intoxicated, that is whether he was drunk or sober?" she replied, "Oh, he had had nothing to drink while he was with me, so he would be perfectly all right."

Miss Beck testified that she was in Findley's restaurant with the people with whom she lived and that, because they had another passenger and were driving a coupe, she rode home with appellant, whom she knew as a neighbor; that appellant talked clearly and walked all right when she met him outside the restaurant; that he did not seem drunk to her or she would not have ridden with him; that he drove carefully at a speed of from 20 to 25 miles per hour; that she was facing him and talking to him when the accident occurred and did not see the parked car.

Appellant testified that he was dazed after the accident, and that his head, knees and hip were hurting him; that he had beer to drink with his dinner the night before the accident and drank a glass of muscatel wine at 7:30 o'clock of that evening; that he had nothing to drink except coffee at the restaurant just previous to the accident. He further testified that he was not accustomed to driving on streets where machines were parked at an angle; that he drove too close to the right-hand curb and before he could get back toward the center of Florence avenue, he struck the parked car.

Four deputy sheriffs, who were on duty at the substation, testified that appellant was intoxicated, basing their conclusions as to such condition upon his thick and incoherent speech, his alcoholic breath, the dilated pupils of his eyes and the fact that he was emotionally upset. One of these deputy sheriffs and a man by the name of Saxe, who was connected with the substation, testified that appellant staggered into the substation immediately after the collision and when asked if he were drunk, replied, "I am drunker than hell." Appellant was not given a sobriety test, and he testified that he did not remember for sure whether he told the officers that he was drunk; did not think he did so, because he had no occasion to make such a statement.

[1-3] In order to sustain a conviction under section 501 of the Vehicle Code, it must appear in the evidence adduced at the trial not only that the defendant therein was driving an automobile while under the influence of intoxicating liquor, and that while in such condition he committed some act forbidden by law, or that he neglected to perform some duty imposed by law, but in addition that such act or such neglect, proximately caused bodily injury to some person. It is elementary that the particular case must determine whether the acts shown to have been committed constitute a violation of the statute upon which the prosecution is based. "The mere act of driving a vehicle upon a public highway while intoxicated is an unlawful act. Section 502, Vehicle Code (St. 1935, p. 174). Whether it is a felony or misdemeanor depends on the facts and circumstances in the case. Section 501, Vehicle Code (St.1935, p. 174)." People v. Freeman, 16 Cal.App.2d 101, at page 103, 60 P.2d 333, at page 334.

[4] In the instant case the evidence adduced at the trial is entirely lacking in the legal requirement that appellant, in addi-

tion to being under the influence of intoxicating liquor, either committed any act forbidden by law or neglected to perform any duty imposed by law and that such act or neglect proximately caused injury to Miss Beck. See People v. Trantham, 24 Cal.App.2d 177, 178, 179, 74 P.2d 851.

Because of the views herein expressed, it is deemed unnecessary to pass upon appellant's second point.

The judgment of conviction is reversed and the cause remanded for a new trial.

We concur: DORAN, J.; WHITE, J.

Ex parte PETRAEUS.

Cr. 3144.

District Court of Appeal, Second District, Division 2, California.

Sept. 13, 1938.

Hearing Granted by Supreme Court Oct. 13, 1938.

1. Criminal law 🔑42

Where accused was charged in an information with statutory crime of gaming, and another defendant was charged in another information with violating same statute at same time and place, and accused, upon being called as witness for defendant in other defendant's trial, testified concerning matters of which he was charged, accused was entitled to statutory immunity from being prosecuted for offense relative to which he had testified. Pen.Code, §§ 334, 337a, subsec. 2.

2. Criminal law 🔑42

Under statute providing that "no person" shall be disqualified from testifying concerning gaming on ground that such testimony may incriminate him, but granting immunity from prosecution for offense concerning which he testifies, any person is granted immunity for any gaming offense concerning which he testifies, regardless of whether he was called by the people or by a defendant. Pen.Code, § 334.

[Ed. Note.—For other definitions of "No Person," see Words & Phrases.]

3. Constitutional law 🔑70(1)

Courts must not act as judicial legislators and rewrite a statute so as to make it conform with presumed intention of Legislature, but must interpret statutes as they are written. Pen.Code, § 334.

4. Statutes 🔑190

A statute free from ambiguity and uncertainty needs no interpretation. Pen.Code, § 334.

5. Criminal law 🔑42

By charging in one information all defendants concerned in an offense of gaming, district attorney may protect the People from a defendant's becoming entitled to statutory immunity from prosecution for gaming by defendant's being called as witness for other defendants to testify concerning the offense. Pen.Code, § 334.

Proceeding in the matter of the application of Westy Petraeus, Jr., for a writ of habeas corpus.

Application granted.

W. I. Gilbert and James B. Fredericks, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This comes before us on writ of habeas corpus, the petitioner claiming that he is imprisoned and illegally deprived of his liberty for the following reasons. The facts are admitted.

Westy Petraeus, Jr., was charged in an information filed by the district attorney with the crime of violation of section 337a, subsection 2, of the Penal Code. Margaret Petraeus was charged in another and different information with violating the same section at the same time and place. The case of Margaret Petraeus came on for trial and after the People rested she called petitioner to testify and he did thereupon testify concerning matters of which he was charged in the information against him. Thereafter petitioner was placed on trial and convicted of the violation of said section against the objection of petitioner that the court was without jurisdiction to try him as petitioner had gained immunity to such prosecution by virtue of section

334 of the Penal Code. The prosecution resulted in the conviction of petitioner and he is now held by the sheriff under order of the court.

The sole question before us is this: Does the immunity of section 334 of the Penal Code apply to a witness who testifies concerning the defense of a defendant so charged? Said section reads as follows: "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

[1, 2] The first two words of this section give an answer to the proposition here presented, and it follows that any person, whether the person was called by the People or by the defendant, is a qualified witness under this section and is granted immunity under this section for any offense concerning which he testified. In re Williams, 127 Cal.App. 424, 16 P.2d 172. In this case we find the appellate court referring to "any witness" called in the gaming cases as being a person to whom immunity under section 334 of the Penal Code extends. See, also, In re Critchlow, Cal.Sup., 81 P.2d 966.

[3] The attorney-general contends that the statute should be taken as if it read, "No person called by the District Attorney." But against this we have the long line of cases on statutory construction which hold that the courts must not act as judicial legislators, but must interpret the statutes as they are written.

[4, 5] The courts are without power to rewrite a statute so as to make it conform with the presumed intention of the legislature. In re Weisberg, 215 Cal. 624, 12 P.2d 446; Estate of Barnett, 97 Cal. App. 138, 275 P. 453. A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. Merkley v. Williams, 3 Cal. App. 268, 84 P. 1015; German Savings & Loan Society v. Aldrich, 5 Cal.App. 215, 89 P. 1063. The district attorney may protect the People by charging all defendants concerned in any one offense in one information.

The sheriff is directed to release the defendant.

We concur: WOOD, J.; McCOMB, J.

In re SLACK'S ESTATE.*

SPARKS et al. v. RENWICK et al.

Civ. 10866.

District Court of Appeal, First District Division 2, California.

Sept. 16, 1938.

Hearing Granted by Supreme Court Nov. 7, 1938.

1. Husband and wife 🔑266

Money in a joint tenancy bank account created from the community earnings of the spouses, which came to wife as sole survivor, remained her separate property and was distributable to wife's heirs alone. Probate Code, § 228.

2. Husband and wife 🔑262(1)

Where husband and wife each acquired undivided half interest in realty by deed, and held such interest as tenants in common until death of husband, the wife's interest was her separate property, in absence of evidence controverting the statutory presumption, as regards rights of wife's heirs thereto. Civ.Code, § 164.

3. Husband and wife 🔑249

Where undivided one-half interest in realty was conveyed each to husband and wife by deed, the half conveyed to the husband became the community property of the marriage.

4. Husband and wife 🔑266

Where undivided one-half interest in realty was conveyed each to husband and wife by deed, and when husband was in fear of approaching death, husband told wife that, if anything happened to husband, wife should record deed executed eight years prior thereto by husband conveying his half interest to wife, such instruction did not constitute a conditional delivery and did not affect the absolute conveyance of the interest covered by the instrument as respects rights of wife's heirs to the realty so conveyed. Civ.Code, § 1056.

5. Husband and wife 🔑266

Where undivided one-half interest in realty was conveyed each to husband and wife by deed, husband executed absolute conveyance of his interest to wife and husband predeceased wife, the interest in the realty so conveyed to wife was distributable to the heirs of the wife alone.

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Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

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*For subsequent opinion see 91 P.2d 1052.

Proceeding in the matter of the estate of Cora C. Slack, also known as Coreen C. Slack, deceased, by Josephine A. Sparks and others against Jennie B. Renwick and others to determine heirship. The probate court decreed that all the property involved was community property, and Josephine A. Sparks and others appeal.

Reversed.

Charles C. Boynton, of San Francisco, for appellants.

W. A. Brandenburger, of Sacramento, for respondents.

NOURSE, Presiding Justice.

In a proceeding to determine heirship arising out of section 228 of the Probate Code a contest was made between the heirs of the decedent wife and the heirs of the predeceased husband. All the property involved was acquired during coverture and is found to have been community property. The sole issue in this proceeding is the character of the property at the time of the death of the respective decedents. The probate court found that it was all community property and from the order and decree the heirs of the decedent wife have appealed.

[1] A portion of the estate was money in a joint tenancy bank account created from the community earnings of the two spouses. This fund came to the decedent wife as sole survivor and remained her separate property distributable to her heirs alone. In re Kessler, 217 Cal. 32, 34, 17 P. 2d 117; Estate of Harris, 9 Cal.2d 649, 72 P.2d 873. It is of no moment that the administratrix has used some of that fund in the payment of debts and expenses of administration. The issue is whether the property was separate or community at the time of the decease. Since none of this fund came from the separate property of the husband, the question of a gift inter vivos does not arise.

[2] An undivided one-half interest in the real property came to the decedent wife by deed in 1917. This interest she held as tenant in common until the death of her husband in November, 1931. (Sec. 164, Civ.Code.) The presumption arising under that section, that such interest was the separate property of the decedent wife from the date of the transfer, has not been controverted by any evidence. The conclusion follows that such interest must be held to be the separate property of this decedent. Dunn v. Mullan, 211 Cal. 583, 588, 296 P. 604, 77 A.L.R. 1015.

[3] As stated in the case last cited, the other half of this property, which was conveyed to the husband in the same deed, became the community property of the marriage. Such interest the husband conveyed to his wife by deed executed in 1923 and delivered a few days before his death in 1931. The evidence of delivery is complete and uncontroverted. The presumption arising from possession has not been rebutted. Respondents stress the testimony that the parties, at some time, made joint deeds each conveying to the other the respective interest held. The testimony does not disclose when these joint deeds were made and none from the wife was produced. But, even so, the effect of the deed in evidence is not destroyed by the fact that the wife also might have made a deed at the same time. It is possible that when this deed was delivered, the other was destroyed by mutual consent and that the intention of the parties was not different from that expressed in the instrument.

[4] It is argued that the delivery was conditional because the grantor told his wife to record it if anything should happen to him. This statement was made at a time when the grantor was in fear of approaching death. It does not constitute a conditional delivery—merely an injunction for the wife's protection. If it was intended as a qualified, or conditional delivery, it was ineffectual. (Sec. 1056, Civ. Code.) Being oral and inconsistent with the written instrument, it does not affect the absolute conveyance of the interest found in the instrument. 9 Cal.Jur. p. 166; Stewart v. Silva, 192 Cal. 405, 410, 221 P. 191.

[5] The fact of delivery not having been controverted, the deed effectively passed all title of the husband to the wife as her separate property. This interest in the realty, like all the other property of the estate, is distributable to the heirs of the decedent wife alone, and there is no case for the application of either sections 228 or 229 of the Probate Code.

The decree is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

EVERTS v. NEWHOUSE INCORPORATED, Limited.

Civ. 11542.

District Court of Appeal, Second District, Division 1, California.

Sept. 15, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. Mortgages ⚷375

An action to recover a deficiency judgment after foreclosure of trust deed was "founded" upon the instrument secured by the trust deed within contemplation of Mortgage Moratorium Act extending period within which an action could be brought on an obligation founded on written instrument secured by a trust deed. St.1935, p. 1214, § 19; Code Civ.Proc. § 337, subd. 1; § 580a.

[Ed. Note.—For other definitions of "Founded," see Words & Phrases.]

2. Mortgages ⚷375

Where note secured by trust deed was executed in 1934, and the incumbered realty was sold under terms of the trust deed in November, 1935, an action to recover deficiency, commenced on June 6, 1936, was not barred by statute limiting time for commencement of such actions to three months after the sale under the trust deed, in view of Mortgage Moratorium Act which extended the time within which an action might be commenced upon an obligation founded upon a written instrument secured by trust deed. St.1935, p. 1214, § 19; Code Civ.Proc. § 337, subd. 1; § 580a.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by H. W. Everts against Newhouse Incorporated, Limited, to recover a deficiency existing after realty was sold under terms of trust deed. From an adverse judgment, the plaintiff appeals, bringing the matter before the District Court of Appeal upon the judgment roll alone.

Judgment reversed and cause remanded, with directions to enter judgment for the plaintiff.

Hearing denied by Supreme Court; CURTIS and EDMONDS, JJ., dissenting.

Louis Ferrari, of San Francisco, and Edmund Nelson, Hugo A. Steinmeyer, and Howard Waterman, all of Los Angeles, for appellant.

C. Roy Smith, and Stacy H. Aspey, of Long Beach, for respondent.

WHITE, Justice.

Plaintiff acquired ownership of a $4,741 note and trust deed which had been executed by defendant on February 21, 1934. On July 9, 1935, a notice of default under the trust deed was recorded, and on November 8, 1935, the real property was sold under the terms of the trust deed, leaving a deficiency of $2,252.65.

On June 6, 1936, an action was commenced in the superior court of Los Angeles county to recover the deficiency. Defendant answered, setting up as an affirmative defense that the amended complaint did not state facts sufficient to constitute a cause of action against it for the reason that the action, being one for a deficiency judgment, was not commenced within three months after the date of the sale of the real property under the terms of the trust deed. After trial, wherein the facts were not disputed, the trial court concluded that the action was barred by subdivision 1 of section 337 and section 580a of the Code of Civil Procedure, and accordingly rendered judgment for defendant. From the judgment plaintiff prosecutes this appeal, bringing the matter before us only upon the judgment roll.

The sole question presented to us is whether this action to recover a deficiency judgment is barred by subdivision 1 of section 337 and section 580a of the Code of Civil Procedure, which limit the time for commencement of such actions to three months after the sale under the deed of trust; or whether, as contended by appellant, the limitations contained in the aforesaid sections were extended by the provisions of section 19 of the Moratorium Act of 1935. Stats.1935, ch. 348, p. 1214; Deering's 1935 Supp., Act 5104a, p. 1341.

The section of the Moratorium Act here involved provides as follows:

"Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any endorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter I, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter VII, Statutes of

1935, or any other provision of law, during the period commencing with the effective date of this act and ending on February 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1937."

We find no merit in respondent's claim that section 19 of the Moratorium Act applies only to actions predicated upon written instruments secured by mortgage, deed of trust or contract of purchase before any sale has been had under such mortgage, deed of trust or contract of purchase and is inapplicable after the security is exhausted by such sale, at which time, respondent argues, the action to recover a deficiency judgment is upon an unsecured instrument.

[1, 2] The positive and direct language of the moratorium statute involved provides that the extension has to do with actions "founded upon a written instrument secured by mortgage, deed of trust or contract of purchase", etc. An action to recover a deficiency judgment is manifestly "founded" upon the instrument secured by the mortgage, deed of trust, contract of purchase or other contract whereby the security is given. It is the instrument secured by the deed of trust which gives rise to the action for a deficiency judgment; and as pointed out in an able and well-considered opinion by Mr. Justice Haines, sitting pro tempore in the Fourth District Court of Appeal, in the case of Bakersfield Home Bldg. Co. v. J. K. McAlpine Land & Dev. Co., Ltd., 79 P.2d 410, hearing denied by the Supreme Court, July 18, 1938, since such an action as the one with which we are here concerned is on the instrument secured (though not on the instrument that affords the security), such action is unquestionably included among those to which the moratorium privilege is expressly extended. See, also, Harris v. Fitting, 9 Cal.2d 117, 69 P.2d 833. Therefore we hold that the time for commencing the present action was, before it had expired, extended by the moratorium legislation here discussed to July 1, 1937, and consequently that the action was brought in time.

For the foregoing reasons, the judgment is reversed and the cause remanded, with directions to the court below to enter judgment for plaintiff.

We concur: YORK, P. J.; DORAN, J.

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28 Cal.App.2d 430

OTIS ELEVATOR CO. v. BERRY.

Civ. 10736.

District Court of Appeal, First District,
Division 2, California.

Sept. 16, 1938.

1. Evidence ⟹459(2)

Where a person signs his own name to a written contract, without qualification and without disclosing that he acted solely as agent, extrinsic evidence is inadmissible to prove that he acted solely as agent and was not a party to the contract.

2. Evidence ⟹459(2)

An agent who has signed his own name unqualifiedly may introduce extrinsic evidence to show that he is not a party to the contract only if the contract itself contains some phrase or provision which shows that he was acting in a representative capacity.

3. Evidence ⟹450(6)

In action on a written contract for repair of hotel elevator which defendant had signed without indicating the identity of his principal or that defendant was acting as agent, extrinsic evidence was not admissible to prove that defendant had signed the contract as secretary for hotel company, notwithstanding alleged ambiguity created by the fact that agreement was addressed to the hotel company.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the Otis Elevator Company against B. S. Berry on a written contract for repairs. Judgment for defendant, and plaintiff appeals.

Reversed.

Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellant.

Charles A. Christin and Rowland R. King, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff has appealed from a judgment in favor of defendant.

The action was brought upon a written contract relating to certain repairs to be made upon an elevator located in the Hotel Lorenz at Redding, California. It is not disputed that the plaintiff has fully performed the contract and that the sum of $2,084 is now due to plaintiff under the terms of said contract. The only question presented to this court is whether the defendant B. S. Berry is personally liable on said contract.

Shortly prior to September 17, 1926, negotiations between the parties culminated in a written invitation or proposal to contract. This document set forth in detail the full terms of the contract. It was addressed to "Hotel Berry Systems, 110 Sutter Street, San Francisco, California". It was signed by the plaintiff and expressly provided that it was not valid unless approved by the service manager of plaintiff. Defendant signed the proposal in the following terms: "Signed and accepted in duplicate, Sept. 17, 1926. B. S. Berry". Shortly thereafter the contract was approved by the service manager of plaintiff. The trial court found: That the Hotel Berry Systems was also known to plaintiff as the Berry Hotels System, and said proposal was intended for said Berry Hotels System which controlled and operated Hotel Lorenz; that defendant B. S. Berry was secretary of said Berry Hotels System; "That at said time (Sept. 17, 1926) B. S. Berry was acting as agent for said Berry Hotels System and authorized, on behalf of said corporation, to execute contracts and to enter into any and all transactions with plaintiff for and on behalf of said corporation, and said signature of B. S. Berry was affixed to said proposal as agent for said corporation and with the knowledge of plaintiff that said B. S. Berry was so acting as agent for said corporation." In accordance with the findings, judgment was entered for defendant.

There is ample evidence to sustain the finding of the trial court that plaintiff knew, at the time the contract was entered into, that the Hotel Lorenz was being operated by the Berry Hotels System, and that B. S. Berry was its agent and acting as such when he signed the contract. The question we are confronted with is whether this evidence was admissible to prove that the parties never intended that the defendant B. S. Berry should be personally bound by the contract.

[1-3] The rule is that where a person signs his own name to a written contract, without qualification and without disclosing that he acts solely as agent, extrinsic evidence is inadmissible to prove that he acted solely as agent and was not a party to the contract. Broy v. Calaveras Central Gold Min. Co., 18 Cal.App.2d 371, 64 P.2d 456. Defendant contends that the face of the agreement discloses an ambiguity justifying the admission of extrinsic evidence to prove that the agreement was in fact the contract of the Berry Hotels System. He relies upon the fact that the face of the agreement shows that it was addressed to Berry Hotels System and that it was signed by B. S. Berry, a person other than the one to whom it was addressed. An agent, who has signed his own name unqualifiedly, may introduce extrinsic evidence to show that he is not a party to the contract, only where the contract itself contains some phrase or provision which shows that he was acting in a representative capacity. A.L.I., Restatement of the Law, Agency, sec. 323 subds. 2 and 3, and cases cited in the California Annotations thereto. Applying this rule to the instant case, it is apparent that no such ambiguity existed. The mere fact that the proposal was addressed to the defendant's principal is not enough, for the contract might also have been intended to bind the agent as well. Aside from the address, there is no reference in the contract to defendant's principal and there is no clause in the contract which, either expressly or by implication, indicates that defendant acted in a representative capacity. Defendant signed his name without indicating the identity of his principal, or even the fact that he was acting as agent. Under these circumstances, he cannot now assert that he is not a party to the contract.

It follows, therefore, that the extrinsic evidence was improperly admitted and that the judgment is without evidentiary support.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

28 Cal.App.2d 410

PEOPLE v. ONE 1936 PONTIAC SIX FOUR-DOOR SEDAN (SAVAGE HALDEMAN CO., Claimant).

Civ. 11886.

District Court of Appeal, Second District, Division 2, California.

Sept. 15, 1938.

1. Forfeitures ⚷5

A conditional seller opposing forfeiture of automobile for violation of Narcotic Act has burden of proving that contract was bona fide and was entered into after a reasonable investigation of the moral responsibility, character and reputation of the buyer and without any knowledge that the automobile would be used in violation of the act. Gen.Laws Supp.1935, Act 5323, § 15(e).

2. Forfeitures ⚷5

A conditional seller's interest* in automobile was subject to forfeiture under Narcotic Act in absence of proof that seller was without any knowledge that the automobile was being or was to be used in violation of such act. Gen.Laws Supp.1935, Act 5323, § 15(e).

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding by the People of the State of California for the forfeiture under the Narcotic Act of One 1936 Pontiac Six Four-Door Sedan, Engine No. 6—201840-CM. The Savage Haldeman Company filed a verified third party claim. From the judgment, the People of the State of California appeal.

Reversed.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

Albert J. Signer, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment allowing a third party claim in the sum of $318.80, but otherwise forfeiting the car under the provisions of the state Narcotic Act, Gen.Laws 1931 and Supps.1933, 1935, Act 5323.

In a complaint filed on behalf of the People by the attorney-general the appellant sought to have forfeited to it under the provisions of section 15 of the state Narcotic Act, Gen.Laws Supp.1935, Act 5323, the vehicle mentioned in these proceedings for the reason that the vehicle was being used in violation of said act. The registered owner made no appearance. The respondent filed a verified third party claim which stated that the respondent sold said vehicle to the owner under a conditional sales contract, stated the amount due, and alleged, among other things, that prior to the sale of said automobile respondent made a reasonable investigation of the moral responsibility, character and reputation of the purchaser and was without any knowledge that said automobile was to be used in violation of the state Narcotic Act.

It is the contention of the appellant that there is no evidence to sustain the allegation that respondent was without any knowledge that said automobile was to be used in violation of the act.

[1] Subdivision (e) of section 15 of the act provides that "the claimant of any right, title or interest in said automobile or other vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that such right, title or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without any knowledge that the automobile or other vehicle was being, or was to be, used for the purpose charged". It is well settled that the burden of proving such fact is upon the claimant. In the case of People v. One LaSalle, etc., 23 Cal.App.2d 237, 72 P.2d 766, this court said: "This court there held that subdivision (f) placed upon the claimant the burden of proving the three elements conjunctively enumerated in subdivision (e), and that, in absence of such proof, the trial court should find against the claimant on the element not proven, and enter judgment of forfeiture accordingly."

[2] An examination of the record herein fails to reveal any testimony whatever that respondent was without any knowledge that the automobile was being or was to be used for the purpose charged. For the reason the judgment must be reversed. Appellant makes other contentions, but it is not necessary to discuss them for they will not appear upon a new trial.

Judgment reversed.

We concur: WOOD, J.; McCOMB, J.

PEOPLE v. RABALETE.

Cr. 3109.

District Court of Appeal, Second District,
Division 1, California.

Sept. 20, 1938.

Hearing Denied by Supreme Court
Oct. 20, 1938.

1. Criminal law 🔑412(1)

In prosecution for knowingly occupying and keeping a place with books, papers, devices and paraphernalia for the purpose of recording or registering bets on horse races, officer's testimony that defendant in whose book store were found betting markers and other paraphernalia used in bookmaking establishments said "242 to show" to man with whom defendant was talking was improperly admitted, where the statement was only one phrase of a conversation which was not heard by officer, and no connection was shown between defendant and the markers and paraphernalia. Pen.Code, § 337a, subd. 2.

2. Criminal law 🔑412(1)

To justify the admission into evidence of a part of scrap of conversation, enough of the conversation must be testified to as gives the hearer thereof an intelligent understanding of what was actually said, and a mere suspicion, however strong, as to what the entire conversation would have shown is insufficient.

3. Gaming 🔑98(5)

A defendant in whose place of business are found betting markers and other paraphernalia used in bookmaking establishments cannot be convicted for knowingly occupying and keeping a place with books, papers, devices, and paraphernalia for the purpose of recording or registering bets on horse races unless some causal connection is shown between the paraphernalia found on the establishment and the defendant. Pen.Code, § 337a, subd. 2.

4. Gaming 🔑98(5)

Evidence that form charts and markers upon which bets were recorded and other racing paraphernalia were found in defendant's book store was insufficient to warrant conviction for knowingly occupying and keeping a place with books, papers, devices, and paraphernalia for the purpose of recording or registering bets on horse races and for receiving, holding or forwarding a bet to be staked or bet on the result of a horse race, where none of the markers was in defendant's handwriting and no connection was shown between defendant and the markers and paraphernalia. Pen.Code, § 337a, subds. 2, 3.

5. Criminal law 🔑561(1)

In criminal prosecution, the prosecution is required to prove every material element of the offense beyond a reasonable doubt.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

George Rabalete was convicted for knowingly occupying and keeping a place with books, papers, devices, and paraphernalia for the purpose of recording or registering bets on horse races and the receiving, holding or forwarding of bets or wagers on horse races, and he appeals.

Reversed.

Henry G. Bodkin and Louis G. Guernsey, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an amended information containing two counts appellant was charged with violations of subdivisions 2 and 3 of section 337a of the Penal Code, which section denounces as a crime the maintenance or occupancy of a place for the purpose of recording or registering bets on horse races; or the receiving, holding or forwarding of bets or wagers upon such contests. Trial had before the court sitting without a jury resulted in the conviction of appellant on both counts. This is an appeal from the judgments and from the order denying appellant's motion for a new trial.

The factual background of the prosecution's case was supplied in the main by the testimony of police officer M. Stuart Jones, who in substance testified that he had been employed in the vice division of the Los Angeles city police department since February of 1937, and that for some three months he had devoted himself exclusively to investigating bookmaking establishments and was familiar with the routine procedure and machinery of these establishments. On the third of January, 1938, the officer went to the Douglas building, 255 South Spring street, in the city of Los Angeles, about 1 o'clock in the afternoon. At this address the defendant maintains a large bookstore on the ground floor of the building, with approximately one hundred feet of open frontage upon the street. There the officer saw the defendant and several others behind the counter making notations on paper and taking money from different people. While the officer was talking to a man behind the counter he heard the defendant, five or six feet from him, in conversation with another unidentified man, utter the following words: "242 to show." At the same time the defendant was handed some paper money which to the witness looked like a dollar bill. After this statement was made the defendant, according to the witness, made a notation on a slip of paper, turned directly about, walked about six feet to a shelf, took down a book and placed the slip of paper therein. The book to which reference was made was volume II of "World's Popular Encyclopedia", and was identified by the witness at the trial as being the book in which the slip was placed by the defendant, after which the book was received in evidence. Certain slips of paper were found in this book which were also received in evidence. The police officer testified that in connection with his official duties as an investigator of bookmaking establishments, he had theretofore seen slips of paper similar to the ones taken from the book, and that they were commonly called "betting markers" and were used for the purpose of recording bets on race horses. The witness also stated that the letters A, B and C, which appeared on these "markers," were used to indicate respectively bets placed on the winner of the race; the horse to come in second in the race; and the horse to come in third. On the counter in the store, about eight feet from where the books were, there was found a back sheet of a racing form which bore the date, January 3, 1938. This form purported to contain the names of entries of horses, races, the post times of races, and other information relating to them. At the trial the officer compared the number 242 appearing on the "marker" numbered exhibit 1 with the racing form received as People's exhibit 8, and found that this number appeared opposite the name of a horse, "Ladino", which was to race at the New Orleans Fair Grounds on January 3. The witness also testified that the markings on exhibit 1 indicated that one dollar had been bet on this horse to come in third. In this connection it should here be remembered, however, that the evidence clearly showed that none of the markings upon these exhibits or betting slips were in the handwriting of the defendant, although the officer testified he saw the defendant writing something upon one of the slips or markers and place the same in the book. It was also testified by the officer that he personally attempted to place a bet on a horse with the defendant, but the latter refused to accept the bet, the officer's testimony in this connection being as follows: "He said that he (the defendant) didn't know me and I would have to get somebody to know me, that knew me, that he couldn't take my bet."

Following this last-mentioned episode, the officer went out upon the sidewalk and around the corner of the building, where he received a signal from a fellow officer; whereupon both policemen reentered the store at which time, the testimony indicates, somebody said, "Cops"! and everyone made a hasty retreat, with the exception of the defendant, who was the owner of the store. Upon the person of the defendant was found the sum of $192, and when the arrest was made a search of the premises revealed numerous sheets, called "National Scratch Sheets"; also a full pad of slips similar to those received in evidence. The "National Scratch Sheets" were so-called "tip sheets" which are sold at newsstands and contain the entries, names and numbers of horses and recommendations of favorites in various horse races.

Appellant first challenges the validity of the conviction under count 1 of the amended information on the ground that the trial court fell into error in admitting into evidence a fragmentary part of a conversation had between appellant and an unidentified man, and which words, it is contended by appellant, constitute the only evidence from which his guilt could be inferred. As heretofore stated, the conversation occurred when the officer first entered the store, when, according to the officer, he observed appellant "take his pencil and mark on paper and repeat, '242 to show'. That is all the conversation I got." The officer then testified with reference to the conduct of the defendant in placing the slip upon which he had written in a book as hereinbefore set forth. Defendant's objection to the introduction into evidence of the three words uttered by him was overruled and his motion to strike the same was denied.

The importance of this ruling becomes at once apparent, because it was conceded at the trial that when the book into which the officer testified the defendant placed the slip upon which he had written was seized and examined, none of the racing paraphernalia in the form of betting markers or slips abstracted from the book bore any of defendant's handwriting. Therefore, to connect defendant with the taking of a bet, his guilt must be predicated upon the assumption that the words uttered by him, "242 to show", indicated the taking by him of a bet upon a horse race which it was proved at the trial was being that day run at New Orleans, and in which race a horse named Ladino, bearing number 242, was running. While it is true that some slips, forms and other paraphernalia common to establishments maintained for the reception of bets on horse races were found at the book store, the evidentiary value, if any, of such paraphernalia was in our opinion correctly appraised by the court in the following language addressed to the district attorney:

"* * * But you have not connected the defendant with them. The mere fact that he has a large book store with a large number of books in it and you find several books segregated in one place and you find something in one of those books, unless you can find defendant had something to do with it or he at least knew it was there, I don't see how you tie him up with it. I might go to my chambers and find volume 146, California Reports, and find in it the result of the last race somewhere, and I would hate to be tied up with that if I didn't put it there.

"Mr. Richardson (Deputy District Attorney): Don't you think the circumstance he was, according to the testimony of the officer, actually accepting a bet on a certain horse race connects these exhibits up?

"The Court: No, I don't think that is sufficient.

"Mr. Richardson: Because it is a necessary part of the business to have information when a race starts and the odds paid on it.

"The Court: I may be able to deduce that, but you have got to prove those things. I can't speculate. I can assume, if I start out on the assumption that the person has a bookmaking establishment or is accepting bets commercially, that he has some means of finding out when the races have been run and how the horses placed; but the fact that there are some figures in a store showing how a certain race came out—why, maybe one of the other clerks was playing these races on his own and he might have put these in. * * *."

[1-3] There being no connection shown between the defendant and the betting markers and other paraphernalia, the trial court erred in admitting into evidence the scrap of a conversation, namely, the words "242 to show", because these words admittedly did not constitute the entire conversation, but consisted only of one phrase used by defendant in the course of a conversation not with the officer, but with a third person whose utterances were unheard by the officer. Clearly the question of whether this phrase was evidence of an incriminating nature or an innocent statement depends upon what was said to the defendant by the other party, and that the witness did not hear. One might strongly suspect, in view of all the facts and circumstances here present, that the unidentified stranger said, "I would like to place a bet on 242 to show," and handed the defendant some money, whereupon defendant replied in the aforesaid language, namely, "242 to show"; but mere suspicion, however strong, as to what the entire conversation would have shown if it had been heard by the officer, is not sufficient to warrant the admission of a fragmentary part thereof. To justify the admission into evidence of a part of scrap of a conversation, enough of the conversation must be testified to as gives the hearer thereof an intelligent understanding of what was actually said. Here it is certain that the witness heard nothing of what the unidentified stranger said to the defendant, and how important the portion not heard may have been in determining innocent or culpable conduct on the part of appellant we cannot know. So far as we can tell it might, if heard even in part, have relieved the appellant of any incriminating consequences. This is especially true when it was conceded by both the People and the defendant at the trial that none of the betting markers found in the books contained even a single number, letter or word in the handwriting of appellant, and yet the officer testified that practically simultaneously with the

utterance by defendant of the phrase, "242 to show", he wrote something on the "marker" which he placed in one of the books. If such a "marker" had been found in either of the books, bearing some of appellant's handwriting, it might have supplied the necessary foundation for the admission into evidence of the aforementioned phrase, because of the testimony of the officer with reference to what the handwriting upon the "markers" meant in betting or racing parlance. While it is true that it is the occupancy of a room with paraphernalia for the purpose of recording bets, not the actual making of bets, which constitutes the offense denounced by subdivision 2 of section 337a of the Penal Code, as charged in count 1, nevertheless some causal connection must be shown between the paraphernalia found upon the premises and the defendant, before a conviction can be sustained. If in the instant case it were shown that after appellant had stated, "242 to show", he wrote something on a piece of paper used in connection with the business of bookmaking and put it in a book where other racing "markers" were found, then a connection would be established between the defendant and the racing paraphernalia which would justify an inference that he knowingly occupied and kept a place with books, papers, devices, paraphernalia, etc., for the purpose of recording or registering bets. But in the instant case none of the markers taken from the books contained anything in defendant's handwriting or indicated in any way that he ever had the same in his possession or knew of their existence. In fact, the trial judge expressed himself as willing to make a finding of fact for the record that none of the handwriting on the betting "markers" was that of the defendant. Further, the presence of the "markers", racing form charts and other documents found in the store is not incompatible with defendant's innocence, when we remember that the bookstore operated by defendant had an open frontage of one hundred feet upon the ground floor, and that defendant had five clerks working for him, all of whom had access to all parts of the store and its fixtures. There is no evidence here that the bookstore in question was not operated as a bona fide mercantile establishment.

[4, 5] Eliminating the fragmentary part of the conversation as the court should have done, the evidence falls short of that substantiality required to warrant a conviction as to count 1, and the judgment rendered thereon must be reversed.

The gravamen of count 2 is the receiving, holding, or forwarding a bet to be staked or bet on the result of a horse race or purported horse race. The only direct evidence we find in the record upon which a conviction under count 2 can be predicated is the following testimony by officer Jones:

"Q. (By Mr. Richardson, Deputy District Attorney) What did you hear this other man say to the defendant? A. He said '242—$1.00, 242, to show'. * * *

"The Court: Who said it? * * * A. The defendant, Rabalete, stated, 'No. 242 to show.'

"Mr. MacKay (defendant's counsel): There wasn't anything about a dollar there? A. That is right.

"Mr. MacKay: I knew you made that mistake. I was going to check that after we got this motion ruled on.

"The Court: Let us clarify this situation. What did you mean by this dollar business you said in your direct examination? A. I evidently got this mixed up with—there may have been several book places since then, and I have it here in my notebook.

"Q. Let us get it right. A. The defendant said, '242 to show.' That's what he said. * * *."

It is apparent from the foregoing testimony that there was no evidence whatsoever to show that any money was taken or received by appellant for the purpose of making a bet, nor was there any evidence to show that the defendant made any record or notation of any bet, or received or forwarded a bet to be staked upon any actual or purported horse race. Much of what we have said in disposing of count 1 is pertinent to the conviction obtained upon count 2. The trial judge having found as a fact that none of the "markers" upon which bets were recorded was in appellant's handwriting, and the phrase "242 to show" uttered by appellant being but a scrap or fragmentary part of a conversation and therefore inadmissible, we find nothing in the record tending to prove the material allegations of count 2 unless we resort to suspicion founded upon the presence in the bookstore operated by appellant of certain form charts and racing paraphernalia with which no direct connection with defendant was established. It is a fundamental rule of criminal procedure that in the trial of an action wherein the defendant is charged with the commission of a crime the prosecution is required to prove every material element of the offense beyond a reasonable doubt. In this respect there is a marked difference between the degree of proof which is thus required and that which is imposed upon a plaintiff in a civil action. (Sec. 2061, subd. 5, Code Civ.Proc.) In the latter all that is required is that the affirmative allegations requisite to the cause of action stated by the plaintiff's complaint shall be established by a mere preponderance of the evidence. The material elements of the offense charged in count 2 are that the appellant received, held or forwarded the sum of one dollar to be staked or bet on the result of a horse race or purported horse race; and the evidence offered in support thereof falls far short of that quantum of proof required to establish the guilt of appellant to a moral certainty and beyond a reasonable doubt.

In view of the foregoing, other points raised do not require consideration.

For the reasons stated, the judgments and the order by which defendant's motion for a new trial was denied are, and each of them is, reversed.

We concur: YORK, P. J.; DORAN, J.

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28 Cal.App.2d 439

AMERICAN DISTILLING CO. v. HOLLYWOOD STORAGE CO. et al.

Civ. 10745.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1938.

Rehearing Denied Oct. 15, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. **Warehousemen** 🔑32½

A warehouseman's lien on goods warehoused by the legal possessor for storage charges and advances made may be impliedly waived by acts or conduct inconsistent therewith. Gen.Laws 1931, Act 9059, § 27.

2. **Warehousemen** 🔑32½

Where owner shipped liquor to warehouseman, owner was named as both consignor and consignee, warehouseman paid freight, liquor was not sold and was returned to owner, warehouseman was entitled to lien for storage and freight charges notwithstanding separate agreement between warehouseman and prospective purchaser whereby purchaser would pay such charges upon delivery of liquor to purchaser if and when a sale was made to purchaser. Gen. Laws 1931, Act 9059, § 27.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodcell, Judge.

Action by the American Distilling Company against the Hollywood Storage Company and another to recover sums paid under protest and claimed by defendants to be due for freight advanced and storage charges upon a shipment of liquor. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Norman A. Eisner, of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued the defendants for the recovery of sums paid under protest claimed by the defendants to be due for freight advanced and storage charges upon a shipment of liquor. The cause was tried without a jury and, at the close of plaintiff's case, judgment of nonsuit was rendered in favor of defendants.

The undisputed facts are that the plaintiff shipped the liquor to defendants' place of business upon an order of the Western Distilleries, that the defendants advanced the freight charges and placed the consignment in the warehouse, that the Western Distilleries failed to make the purchase, and the liquor was returned to the plaintiff after it had paid under protest the charges made by defendants. The plaintiff was both consignor and consignee and at all times retained complete title to the goods. Numerous shipments of like character had been made in the past, and the defendants had some sort of a working agreement with the Western Distilleries, whereby they advanced these charges and were repaid by the Western Distilleries when the goods were delivered to the latter.

Stripped of all the generalities, the single question of law involved herein is this: When an owner of goods ships to a warehouseman, naming himself as both consignor and consignee, and the warehouseman pays the freight, does the latter forfeit his lien for storage and freight charges advanced because of a separate agreement with the prospective purchaser to pay all these charges upon delivery of the goods to him if and when a sale is made.

The learned trial judge determined this question in the negative, and we are in full accord with his ruling. The determining factor is the one of title. Appellant did not make a sale to the intended purchaser. It shipped the goods to itself as consignee under a prospective sale which was to be made at the respondents' warehouse upon payment by the Western Distilleries and delivery to that purchaser. No title passed at any time to either the warehouseman or to the intended purchaser. And no circumstance intervened which would relieve the consignee from the operation of the usual warehouseman's lien. Whatever arrangements the respondents may have had with the intended purchaser, either by way of former practice, or by agreement as to this particular shipment, was a matter between them alone. And it is of no importance that the consignor may have had knowledge of this former practice in view of the conceded facts that it did not rely upon it in making the shipment, but was careful to retain title in itself until an actual sale and delivery was consummated. It further protected itself in this regard by the express instructions to respondents to release no shipments "regardless of whom the shipment may be consigned to * * * without instructions from this office or our San Francisco office".

[1, 2] The applicable statute is section 27 of the Warehouse Receipts Act, as amended in 1931, Deering's General Laws, Act No. 9059, which gives a lien on goods warehoused "by the legal possessor" for all storage charges and advances made. Such a lien may be impliedly waived by acts or conduct inconsistent therewith (37 Cor.Jur. 334), but we can find nothing inconsistent with the claim of lien in the conduct of respondents in endeavoring to collect these charges from the intended purchaser before asserting a lien against the owner and consignee.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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28 Cal.App.2d 468

SMITH v. McCLARY et al.

Civ. 11896.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1938.

Hearing Denied by Supreme Court Nov. 17, 1938.

1. Negligence 🔑121(2)

The inference of negligence created by the doctrine of res ipsa loquitur arises only in the absence of explanation of the cause of the accident.

2. Negligence 🔑121(2)

The doctrine of res ipsa loquitur does not apply where a plaintiff sets out specifically the negligent acts complained of instead of relying upon a general allegation of negligence.

3. Food 🔑25

In action for injuries sustained when a foreign substance in a malted milk purchased by plaintiff from defendants lodged in plaintiff's throat, where plaintiff alleged specifically that defendants negligently permitted the malted milk to contain a foreign substance, doctrine of res ipsa loquitur did not apply.

4. Evidence 🔑195

In action for injuries sustained when a foreign substance in a malted milk purchased by plaintiff from defendants lodged in plaintiff's throat, court did not err in admitting in evidence a lid from a 100-pound malt can which was proven to be identical with the lid of the can from which the malt was taken in mixing plaintiff's malted milk.

5. Evidence 🔑195

In action for injuries sustained when a foreign substance in a malted milk purchased by plaintiff from defendants, lodged in

plaintiff's throat, where defendants offered in evidence a lid to a 100-pound malt can which was identical with the lid of the can from which the malt was taken in mixing plaintiff's malted milk, it was not necessary for defendants to produce the can which the lid fitted to entitle them to introduce the lid.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Eber H. Smith against William L. McClary and another, doing business under the fictitious name and style of the Coast Ice Cream Company, to recover for injuries sustained when plaintiff choked upon a foreign substance contained in a malted milk purchased from defendants. Judgment for defendants, and plaintiff appeals.

Affirmed.

Alfred J. Smallberg and Oliver M. Hickey, both of Los Angeles, for appellant.

Charles G. Hedgcock, of Huntington Park, and Reginald I. Bauder, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the defendants in an action for damages for alleged personal injuries. The contention of the plaintiff is that the trial court erred in refusing to give to the jury instructions on the doctrine of res ipsa loquitur.

Plaintiff entered the place of business of the defendants and ordered a chocolate malted milk. The malted milk was thereupon mixed by the employees of the defendants in the regular manner. While in the act of consuming the malted milk plaintiff felt something in his throat. He choked and coughed up a substance that resembled a piece of cork three-quarters of an inch long by one-eighth of an inch wide. He coughed up no blood at the time, but he claims that he noticed a change in his voice and he could not speak above a whisper for months, and he asked damages for the injury.

In alleging negligence the plaintiff did not plead negligence generally, but he alleged specifically as follows: "That the said defendants, by and through their said servants and agents, and not regarding their duty in that behalf, carelessly and negligently caused and permitted the said Chocolate Malted Milk to then and there contain a foreign, solid substance, resembling a piece of cork about three-quarters of an inch long and one quarter inch wide, and that while plaintiff was thus drinking said Chocolate Malted Milk, and because of the said negligence and carelessness on the part of the defendants, the said solid substance stuck in plaintiff's throat thereby causing plaintiff to then and there have a violent choking spasm, * * *"

This is not a case where plaintiff has undertaken to recover upon a breach of an alleged warranty, either express or implied The pleadings fail to embrace such an issue and the "food cases" recently decided by our courts on a breach of warranty, either express or implied, do not apply.

[1-3] The res ipsa loquitur doctrine is based in part upon the theory that the defendant in the particular case involved has the best opportunity of ascertaining the cause of the accident, and that the plaintiff, having no such knowledge, is compelled to rely upon proof of the happening of the accident in order to establish negligence. (19 Cal.Jur. 713.) The inference of negligence created by the doctrine arises only in the absence of explanation of the cause of the accident. Gordon v. Goldberg, 3 Cal. App.2d 659, 40 P.2d 276. If, instead of relying upon a general allegation of negligence, a plaintiff sets out specifically the negligent acts complained of, the doctrine does not apply. There is a long line of cases which hold that the doctrine is inapplicable where the negligence is pleaded specifically and not generally. (8 Cal.Jur. Ten-Year Supp. 383.) We are of the view, therefore, that there was no occasion for the trial court to give to the jury instructions on the doctrine of res ipsa loquitur.

[4, 5] Finally, the plaintiff contends that the court erred in admitting into evidence a lid to a 100-pound malt can which was not the lid to the particular can from which the malt was taken with regard to the particular malted milk in question, when no foundation was laid on the part of defendants as to the whereabouts of the original or particular can from which the malt was taken. Obviously the defendants had no occasion to save the original lid until they knew there was a claim for damages. Then they offered the lid in question after proof that it was identical. It was admitted in evidence just as a photograph would be,

and it was not important one way or the other in the trial. Neither was it necessary in order to introduce the lid to require the production of the large 100-pound can which the lid fitted. We see no error here.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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28 Cal.App.2d 465

PEOPLE v. MORCUMB.

Cr. 3134.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1938.

1. Criminal law 🔑1153(2)
Witnesses 🔑40(2)

Whether a child under 10 is capable of receiving just impressions of the facts respecting which the child is to be examined and of relating them truthfully, so as to be a competent witness under statute, is a question resting in the trial judge's sound discretion, the exercise of which will not be disturbed on appeal in the absence of a showing of abuse. Code Civ.Proc. § 1880, subd. 2.

2. Criminal law 🔑1134(2)

In determining whether the trial judge has abused his discretion in permitting a child under 10 years of age to testify, the District Court of Appeal will review the entire record made by the child and not confine the review of the question of the child's competency to the voir dire examination. Code Civ.Proc. § 1880, subd. 2.

3. Infants 🔑20

In prosecution for committing lewd and lascivious acts upon and with the body of a child under age 14, the fact that the child involved has made complaint of the outrage to another is admissible evidence. Pen. Code, § 288.

4. Criminal law 🔑369(2)

In prosecution for committing lewd and lascivious acts upon and with the bodies of girls under age 14, testimony of mothers of the girls that the girls complained to the mothers regarding defendant's conduct on the day following commission of the alleged lewd and lascivious acts was admissible. Pen.Code, § 288.

5. Criminal law 🔑785(7)

In prosecution for committing lewd and lascivious acts upon and with the body of a girl under age 14, the failure to give instructions required by statute to be given when the opinion of an expert witness is received in evidence was not error, where the physician and surgeon testifying as to the result of his examination of one of the girls merely testified as to the physical facts which his examination disclosed and did not give his opinion upon any subject. Pen. Code, §§ 288, 1127b.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

William Morcumb was convicted for committing lewd and lascivious acts upon or with the bodies of children under the age of fourteen years, and he appeals.

Affirmed in part and reversed in part.

John Gratton and Horace Appel, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice.

From judgments of guilty on four counts of violating section 288 of the Penal Code after trial before a jury defendant appeals.

Defendant relies for reversal of the judgments on the following propositions:

First: The evidence is insufficient to sustain the judgments.

Second: Three of the complaining witnesses, children less than ten years of age, were incapable of receiving just impressions of the facts relative to which they testified and, therefore, it was prejudicial error for the trial court to receive their testimony in evidence.

Third: The trial court committed prejudicial error in permitting the mothers of the prosecuting witnesses to testify that the day following the commission of the alleged, illegal acts by defendant their daughters complained to them regarding defendant's conduct.

Fourth: The trial court committed prejudicial error in not reading to the jury an *instruction on the subject of expert testimony as required by section 1127b of the Penal Code.*

The first proposition is untenable as to counts I, III, and IV of the indictment. An examination of the record discloses that there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments of guilty as to these counts were necessarily predicated. We, therefore, refrain from further discussion of the evidence.

As to the second count of the indictment a different situation obtains. The record is devoid of any evidence upon which to sustain a conviction of violating section 288 of the Penal Code as charged in this count.

[1] The second proposition is likewise untenable. The law is settled in California that whether or not a child under the age of ten years is capable of (a) receiving just impressions of the facts respecting which the child is to be examined and (b) relating them truthfully (sec. 1880, subd. 2, Code Civ. Proc.) is a question, the determination of which rests in the sound discretion of the trial judge, and in the absence of a showing of abuse of this discretion by the trial judge his decision will not be disturbed on appeal. People v. Valenti, 103 Cal. App. 249, 251, 284 P. 485; People v. Freeman, 24 Cal.App.2d 619, 621, 75 P.2d 640.

[2] It is also settled that this court in determining whether the trial judge has abused his discretion in permitting a child under ten years of age to testify, will review the entire record made by the witness and not confine the review of the question of the child's competency to the voir dire examination. People v. Freeman, 24 Cal. App.2d 619, 621, 75 P.2d 640.

Applying the foregoing rules to the instant case, it appears from the entire testimony of the complaining witnesses that they were capable of receiving just impressions of the facts relative to which they testified and also of relating them truthfully. No useful purpose would be subserved by setting forth in this opinion the sordid details of the complaining witnesses' testimony, which we therefore omit.

[3, 4] The third proposition is without merit. The law is settled that in a prosecution for violating section 288 of the Penal Code the fact that the child involved has made complaint of the outrage to another is admissible evidence. People v. Ferrari, 80 Cal.App. 182, 184, 251 P. 692.

[5] Defendant's final contention is invalid. A physician and surgeon was called as a witness, who testified as to the result of his examination of one of the complaining witnesses. His opinion was not asked upon any subject. He merely testified as to the physical facts which his examination disclosed. Therefore, neither section 1127b of the Penal Code nor People v. Williamson, 134 Cal.App. 775, 26 P.2d 681, were applicable to the instant case.

For the foregoing reasons the judgments as to counts I, III, and IV are affirmed and the judgment as to count II is reversed.

We concur: CRAIL, P. J.; WOOD, J.

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28 Cal.App.2d 471

PEOPLE v. KUHL.

Cr. 1644.

District Court of Appeal, Third District, California.

Sept. 19, 1938.

1. Larceny 🔑65

Evidence that accused with others killed calf and carried it away from ranch of owner sustained conviction of grand theft.

2. Criminal law 🔑511(4)

Testimony of two witnesses that they saw accused and accomplices bring in calf on night in question and thereafter skin and dress the animal was sufficiently corroborative of testimony of the accomplices to warrant conviction of grand theft.

3. Larceny 🔑79

In prosecution for grand theft, refusal to give instruction that crime of petty theft was included in the charge of grand theft, and that if jury did not believe accused guilty of crime of grand theft they might find him guilty of petty theft if they found the value of the property taken to be less than $200, was not error.

Appeal from Superior Court, Sutter County.

Bob Kuhl was convicted of grand theft, and he appeals.

Affirmed.

Richard H. Fuidge, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant herein was indicted for the crime of grand theft, it being alleged that he killed and carried away a Jersey heifer calf, the personal property of W. C. Holmes. To this indictment the defendant entered a plea of not guilty. Upon the trial he was convicted of the offense charged, and from this judgment of conviction this appeal is prosecuted.

Appellant contends that there was no evidence that the animal referred to belonged to or was taken from the ranch of Holmes, and that he was convicted on the uncorroborated testimony of admitted accomplices and that the court erred in failing to instruct as to petty theft.

[1] At the time this offense is alleged to have been committed appellant was living with Ivan Kendall, Bud Gividen and Arthur Gates on a ranch known as the Filby place. On the evening in question appellant, with Gividen and Kendall, left the Filby ranch and after traveling about the countryside searching for hogs, they finally came to what is known as O'Banion Corners near the property of W. C. Holmes, the complaining witness. These men, including appellant, left the car, which had been driven down a country road, went through a couple of fences and proceeded toward a barn. Finding no hogs they were returning to the car when appellant who had a .22 caliber rifle, remarked that "one of these are good enough". Directly thereafter a shot was heard by Gividen who, in response to a call from appellant, went to where he was and assisted him in picking up a Jersey heifer calf. The calf was taken to the Filby place, where the skin and head were thrown into an irrigating ditch, from where it was later removed by the sheriff and identified by Holmes as being from a calf of the size and color of one that he had lost from his herd. Holmes testified that he had lost a calf about the time that these men were on their hunting expedition, and also testified that along his property line was a double fence which enclosed the pasture wherein the calf was, which also formed a lane which ran from the pasture to the corral and the barn. This testimony bore out that given by Gividen that when he and appellant entered the field where the shot was fired and from which the calf was removed they had to cross two fences to get into the field and that the two fences were ten or twelve feet apart. These facts, together with the testimony of Holmes and the sheriff, constitute sufficient evidence for the jury to determine that the calf was taken from the Holmes property.

[2] The testimony of Gates and one William Jones was to the effect that they saw appellant and his accomplices bring in the calf on the night in question and thereafter skin and dress the animal. This testimony was sufficient to justify the jury in deciding the calf belonged to Holmes and was stolen by appellant, and corroborated the testimony of the accomplices.

In People v. Faust, 137 Cal.App. 549, 31 P.2d 213, defendant was there charged with the shooting and theft of a calf in which the same points on appeal were then raised as are here presented. The Faust Case held the judgment of conviction was proper.

[3] Objection is also made that the court refused to give an instruction that the crime of petty theft was included in the charge of grand theft, and that if the jury did not believe the defendant guilty of the crime of grand theft they might still find him guilty of petty theft if they found the value of the property to be less than $200. Under the evidence the refusal of the court to give this instruction was not error.

The record amply supports the finding of the jury and the judgment herein is affirmed.

I concur: THOMPSON, J.

ECHLIN v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.*

Civ. 10888.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1938.

Rehearing Denied Oct. 19, 1938.

Hearing Granted by Supreme Court Nov. 17, 1938.

1. Constitutional law 🔑43(2)

In personal injury action where plaintiff filed an application under statute providing for change of attorneys and for determination of compensation to be paid discharged attorney, plaintiff could not question the constitutionality of sections relating to compensation. Code Civ.Proc. § 284.

2. Constitutional law 🔑43(2)

When party claims right granted by statute providing for change of attorneys, he may not reject the statutory terms upon which that right is granted. Code Civ.Proc. § 284.

3. Constitutional law 🔑43(2)

When party elects to accept benefits of a statute, he may not escape its burdens by asserting that the statute is unconstitutional. Code Civ.Proc. § 284.

◆

Proceedings by Madeline Echlin against the Superior Court of the State of California in and for San Mateo County and the Honorable Aylett R. Cotton, Judge thereof, for a peremptory writ of mandate to compel the respondent court to grant petitioner's application for a change of attorney.

Writ denied.

Robert E. Hatch, of San Francisco, for petitioner.

J. E. McCurdy, of San Mateo, for respondents.

SPENCE, Justice.

Petitioner seeks a peremptory writ of mandate to compel the respondent court to grant her application for a change of attorney.

Petitioner sustained personal injuries and engaged Mr. J. E. McCurdy as her attorney to prosecute her claim. They entered into an agreement whereby the attorney's compensation was to be contingent upon the recovery of money by way of settlement or judgment. Mr. McCurdy filed an action in the respondent court on behalf of petitioner and was prosecuting petitioner's claim as agreed. Petitioner filed an application in said action to change her attorney to Mr. Robert E. Hatch. It was stated that the application would be based upon "the ground that plaintiff desires to have Robert E. Hatch to act as her attorney in lieu of the said J. E. McCurdy" and that said motion would be made "upon the authority of Section 284 of the Code of Civil Procedure". Mr. McCurdy filed in the respondent court an affidavit setting forth the nature of his agreement with petitioner and the nature of the services which he had rendered thereunder. He requested that the respondent court determine the compensation to be paid to him by petitioner as provided in said section 284. Petitioner then filed in said court her written objections to the determination of said compensation, claiming that the provisions of said section relating to the determination thereof were unconstitutional. Petitioner's application was continued on the calendar from time to time but no hearing was had upon said application or upon the request of Mr. McCurdy owing to the failure of Mr. Hatch to appear at said times. Petitioner seeks by this proceeding to compel the respondent court to grant her application without acting upon Mr. McCurdy's request for the determination of his compensation.

[1-3] Petitioner contends that the portions of said section relating to the determination of the attorney's compensation are unconstitutional and that the writ of mandate should therefore issue as prayed. She cites and relies upon Cassel v. Gregori, Cal. Super., 70 P.2d 721. The cited case is not in point as the motion was there made by the attorney and not by the client. Petitioner made the motion here and the case of Foster v. Superior Court, Cal.App., 79 P.2d 144, is controlling. It therefore becomes unnecessary to discuss the constitutional question. The only distinction pointed out by petitioner is that in the Foster Case the petitioners expressly requested the trial court to determine the compensation as well as to make the substitution. We do not believe this distinction to be material. The right of a party to obtain an order of court for a change of attorney is statutory and the statute in question provides the terms upon which such change may be had. When a party claims the right granted by such a statute, he may not reject the terms upon which that right is granted. In other words,

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*For subsequent opinion see 90 P.2d 63.

when a party elects to accept the benefits of a statute, he may not escape its burdens by asserting that the statute is unconstitutional. Foster v. Superior Court, supra. The existence of this rule is indicated in Cassel v. Gregori, supra, cited by petitioner, where the court said [page 724], "When the client makes the motion, he does so with knowledge (actual or imputed) of the terms of the statute. * * *" (See, also, cases cited in note in 11 So.Cal.Law Rev. 291.)

The alternative writ is discharged and the peremptory writ is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

28 Cal.App.2d 442

PEOPLE v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 10884.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1938.

Rehearing Denied Oct. 15, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. Criminal law 🔑997

The use of a writ of error coram nobis is limited to those situations in which the right to appeal and the right to move for a new trial as provided by statute do not afford a remedy.

2. Criminal law 🔑997

A petition for a writ of error coram nobis, filed by defendant in a police court which had previously sentenced defendant on a plea of guilty, for purpose of having the judgment set aside and obtaining leave to change his plea from guilty to not guilty, was to be treated as a motion to vacate the judgment.

3. Criminal law 🔑258(4)

A police court has jurisdiction to entertain a petition for a writ of error coram nobis by which it is sought to set aside a judgment theretofore entered by the court on a plea of guilty to a complaint charging the defendant with the commission of a misdemeanor.

4. Criminal law 🔑260(1)

An order of a police court denying a petition for a writ of error coram nobis by which it was sought to set aside a judgment theretofore entered by the court on a plea of guilty was an "appealable order" which a superior court had jurisdiction to "reverse, affirm or modify" as provided by statute. Pen.Code, §§ 1466, 1469, as amended by St.1935, p. 2146.

Mandamus proceeding by the People of the State of California, by U. S. Webb, Attorney General, petitioner, against the Superior Court of the State of California, in and for San Mateo County, and the Honorable Aylett R. Cotton, as Judge thereof, respondents, to compel the respondent court to enter an order denying an appeal from an order of the police court of the city of Burlingame.

Alternative writ theretofore issued discharged, and peremptory writ denied.

U. S. Webb, Atty. Gen., and Lionel Brown, Deputy Atty. Gen., for the People.

Bernard P. Sharon, of San Mateo, for respondents.

SPENCE, Justice.

Petitioner seeks a peremptory writ of mandate to compel the respondent court "to make, enter, give and file an order and judgment dismissing and denying" a certain appeal from an order of the police court of the city of Burlingame.

A complaint was originally filed in said police court charging Paul F. Eid with the commission of a misdemeanor. He entered a plea of guilty and was thereafter sentenced to be imprisoned in the county jail for a term of ninety days and to pay a fine of $100. While so imprisoned, said Paul F. Eid filed a document in said police court entitled "Petition for Writ of Error Coram Nobis". He sought thereby to have the judgment set aside and to obtain leave to change his plea from guilty to not guilty for the purpose of having a trial upon the merits. His petition was denied and he appealed from the order of denial. The appeal was heard by the respondent court and the order was reversed. Petitioner then filed this proceeding seeking a writ of mandate as above indicated.

We are of the opinion that the writ should be denied. As we understand the main contention of petitioner, it is that the police court had no jurisdiction to entertain said petition of the defendant in the criminal action and that the respondent court therefore "was without jurisdiction to do other than enter an order dismissing the appeal" from the order denying the petition. In our opinion, this contention cannot be sustained.

The place of the so-called writ of error coram nobis in the jurisprudence of this state has been clarified by several recent decisions. Said writ was originally a common-law remedy which was used under certain exceptional circumstances. The nature of the writ and its survival in modified form in this state is exhaustively discussed in People v. Reid, 195 Ca. 249, 232 P. 457, 36 A.L.R. 1435. The court there quoted from 5 Encyclopedia of Pleading and Practice, page 27, at page 255, 232 P. at page 459 of the opinion, where it is said, "The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as * * * a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned". It may be stated here that petitioner does not question the sufficiency of the allegations contained in the petition filed in the police court to bring the cause within the rule stated.

[1, 2] The use of said writ is limited in this state to those situations where the right to appeal and the right to move for a new trial as provided by statute do not afford a remedy (People v. Reid, supra; People v. Superior Court, 4 Cal.2d 136, 47 P.2d 724); and it has been held that "in the practice in this state a petition for a writ of error, coram nobis, is nothing more nor less than a motion to vacate a judgment". People v. Vernon, 9 Cal.App.2d 138, 143, 49 P.2d 326, 328. See, also, People v. Perez, 9 Cal.App. 265, 98 P. 870. The court further said in the case of People v. Vernon, supra, at page 141, 49 P.2d at page 327, "It therefore results that, although the relief sought be of the nature of that included within and formerly afforded by a writ of error, coram nobis, because of its comparatively ancient origin and its correspondingly relatively recent disuse, the mystery and the magic which now apparently attach to such an appellation as applied to the proposed remedy are completely dispelled and obliterated by designating such remedy by the more simple and appropriate name of a motion to vacate the judgment. The practical result of such practice in effect and substance demonstrates that the relief that may be administered by the one form of procedure is identical with that in the other." We therefore believe that the defendant's petition as filed in the police court should be treated as a motion to vacate the judgment previously entered.

[3] Our search has not brought to our attention any case directly holding that a police court may entertain such a motion under the precise circumstances before us, but we are of the opinion that a police court has jurisdiction for that purpose. The authorities do not indicate that such jurisdiction is vested only in courts of record. In People v. Campos, 3 Cal. 2d 15, 43 P.2d 274, the court said at page 17, 43 P.2d at page 274, "It is settled in this state that where on account of duress, fraud or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is reasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before plea of any kind was entered". See, also, People v. Schwarz, 201 Cal. 309, 257 P. 71; In re Sargen, 135 Cal.App. 402, 27 P.2d 407. And in Williams v. California Milk Producers Association, 136 Cal.App. 172, 28 P.2d 59, it was held that a police court has the inherent power to vacate a judgment previously rendered by it under certain exceptional circumstances. On page 175, 28 P.2d on page 60 the court there said, "Under such circumstances the statutory remedies have no application, and a procedure based upon the common law has developed to meet the lack of a statutory remedy. This procedure has taken the form of a motion properly supported. People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Perez, 9 Cal.App. 265, 98 P. 870."

[4] We conclude that the defendant's petition filed in the police court was in substance and effect a motion to vacate the

judgment previously entered by said court; that said court had jurisdiction to entertain said motion; that the order denying said motion was an appealable order (Pen. Code, sec. 1466, as amended by St.1935, p. 2146); and that the respondent court had jurisdiction to "reverse, affirm or modify the * * * order appealed from". Pen. Code, sec. 1469, as amended by St.1935, p. 2146. In view of these conclusions, it becomes unnecessary for us to determine whether mandamus would have been an appropriate remedy in the event that the trial court had exceeded its jurisdiction.

The alternative writ is discharged and the peremptory writ is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

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28 Cal.App.2d 490

CAMPBELL v. CITY OF LOS ANGELES.

Civ. 11837.

District Court of Appeal, Second District, Division 2, California.

Sept. 20, 1938.

Hearing Denied by Supreme Court Nov. 17, 1938.

1. Death 🔑58(1)

In an action for wrongful death, wherein evidence discloses the acts and conduct of the deceased immediately prior to and at the time of the accident, the presumption that the deceased used ordinary care for his own safety is inapplicable.

2. Appeal and error 🔑1064(1)

In an action for wrongful death, the giving of an instruction that presumption exists that decedent used ordinary care for his own safety, is prejudicial error, if the instruction is inapplicable and contributory negligence of the decedent would bar recovery for his death.

3. Appeal and error 🔑1064(1)

In action for wrongful death of plaintiff's son allegedly resulting from negligence of city, wherein the plaintiff's witnesses related in detail and without conflict the acts of the son prior to and at the time of the accident, an instruction that there was presumption that the son used ordinary care for his own safety was improper and required reversal, in view of fact that, if the son was guilty of contributory negligence, the plaintiff could not recover.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Frank W. Campbell against the City of Los Angeles for damages for the wrongful death of the plaintiff's son allegedly caused by the negligence of the defendant. From an adverse judgment, the defendant appeals.

Reversed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., Leonard Husar, Deputy City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for appellant.

Thompson & Thompson, Clifford H. Thompson, and Winfield B. Thompson, all of Burbank, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for the wrongful death of plaintiff's son defendant appeals.

The essential facts are:

August 27, 1936, plaintiff and his wife took their three minor sons to a section of Griffith park located near the northerly bank of the Los Angeles river in the city of Los Angeles. Their son Howard (the deceased) with his two brothers went to play in an excavation which had been made by the United States government in connection with certain work being done for the Los Angeles County Flood Control District. While the three boys were scratching their initials on the embankment adjacent to the excavation, the earth gave way, injuring Howard, with the result that he died shortly thereafter.

This is the sole question necessary for determination:

Did the trial judge commit prejudicial error in instructing the jury as follows:

"There is a presumption that Howard Campbell used ordinary care for his own safety."

[1] This question must be answered in the affirmative. The law is established in California that where the evidence introduced by plaintiff discloses the acts and

conduct of the injured party immediately prior to and at the time in question, the presumption of law set forth in the instruction quoted above is inapplicable. Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P. 2d 65; Lindley v. Southern Pacific Co., 18 Cal.App.2d 550, 556, 64 P.2d 490; Varner v. Skov, 20 Cal.App.2d 232, 240, 67 P.2d 123; Engstrom v. Auburn Automobile Sales Corp., Cal.Sup., 77 P.2d 1059.

In Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709, our Supreme Court in holding it was error to give an instruction similar to the one here involved thus states the rule at page 119, 47 P.2d at page 714:

"It is difficult to see how there was any place for a presumption as to the plaintiff's conduct. What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject. That instruction had no place in this case and should not have been given."

[2] The giving of the instruction set forth above in a case where it is inapplicable is prejudicial error, if contributory negligence of plaintiff's decedent would bar a recovery. Paulsen v. McDuffie, supra.

[3] Applying the rule of law above stated to the instant case, it is evident that the instruction should not have been given, for the reason that plaintiff offered testimony of witnesses who related in detail and without conflict the acts of the deceased prior to and at the time of the accident. Also there was evidence from which the jury might have found decedent guilty of contributory negligence. It is self-evident that, if deceased was guilty of contributory negligence, plaintiff could not recover in the present case.

For the foregoing reasons the judgment is reversed.

I concur: CRAIL, P. J.

WOOD, Justice (concurring).

I concur in the judgment of reversal but I cannot agree that the reversal should be based upon the giving of the instruction referred to in the majority opinion. The instruction is open to the criticism that the rule on the subject should have been more completely stated and the jury told that there is a presumption that Howard Campbell used ordinary care for his own safety unless the presumption be overcome by evidence. In view of all the instructions given I am of the opinion that the judgment should not be reversed for the sole reason that the instruction is subject to this criticism.

I cannot agree with the statement in the majority opinion concerning the circumstances under which the presumption may not be invoked. In Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, it was held that an instruction on the subject of the presumption under consideration may be given unless the plaintiff's witnesses establish facts which are "wholly irreconcilable with the presumption sought to be invoked" [page 534]. In the late case of Engstrom v. Auburn Auto. Sales Corp., Cal.Sup., 77 P.2d 1059, the Smellie Case is referred to with approval and the rule again set forth in the following language [page 1063]: "Generally speaking, however, it may be said that a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence." In the case before us plaintiff did not present any evidence which was irreconcilable with the presumption covered by the instruction in question.

In my opinion the judgment should be reversed for the reason that plaintiff did not present evidence showing facts upon which the liability of the city can be predicated. The accident did not occur while the decedent was using the recreational facilities of the park which had been provided for the public. The question of the dangerous character of a defective condition depends largely on the intended lawful use of the premises. Howard v. City of Fresno, 22 Cal.App.2d 41, 70 P.2d 502. The liability of the city under the Public Liability Act is limited to damages suffered in the ordinary, usual and customary use of defective streets, grounds or property. Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993. The city had no notice that children were in the habit of playing about the embankment. Regardless of any other question involved, it cannot be held that the city had knowledge or notice that the premises in question were in a dangerous condition.

28 Cal.App.2d 412

CHRISTINA v. BAKER et al.

Civ. 11880.

District Court of Appeal, Second District, Division 2, California.

Sept. 15, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. Judgment ⚷855(2)

Where plaintiff, who recovered judgment on joint note, sought to bind another joint maker thereby, and summons was not issued as to such joint maker until more than one year after commencement of original action, service of the summons was valid as against contention that statute providing that joint debtor may be summoned after judgment, but that summons must be served in same manner and within the same time as original summons, required issuance of summons within one year of commencement of action. Code Civ.Proc. § 406, as amended by St.1933, p. 1844; §§ 414, 581a; §§ 989, 990, as amended by St.1935, p. 1965; § 991.

2. Judgment ⚷855(2)

The Legislature in enacting statutes providing that parties not summoned in an action on a joint contract may be summoned after judgment, and requiring that summons on such parties must be served in the same manner and returnable within the same time as the original summons, did not intend to require such summons to be issued within one year from the time of the commencement of the action. Code Civ.Proc. § 406, as amended by St.1933, p. 1844; §§ 414, 581a; §§ 989, 990, as amended by St.1935, p. 1965; § 991.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action on a promissory note by N. Christina against S. G. Baker and others. From orders quashing summons and service thereof on defendant Bruce L. MacLean, and denying plaintiff's motion to set aside the order quashing the summons, plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson and Howard Waterman, both of Los Angeles, for appellant.

Henry N. Cowan, of Los Angeles, and Shipper & Benard, of San Francisco, for respondent.

WOOD, Justice.

Plaintiff commenced this action on June 17, 1935, to recover a judgment against the four defendants who were makers of a promissory note in which they jointly and severally promised to pay the sum of $2,750. A fifth defendant, Stedman G. Smith, was sued as guarantor of the note. On the same date the clerk issued a summons directed to all of the defendants. Bruce L. MacLean, respondent herein, was not served with the summons. The action went to trial on May 14, 1937, against defendants Smith and Helen L. MacLean and judgment was entered against these two in the sum of $2,288.17. Thereupon an affidavit was filed on behalf of plaintiff in accordance with the provisions of sections 989, 990, as amended by St.1935, p. 1965, and 991 of the Code of Civil Procedure. On May 18, 1937, the clerk issued a summons directed to Bruce L. MacLean and Lela S. Baker directing them to show cause why they should not be bound by the judgment recovered by plaintiff against defendants Smith and Helen L. MacLean on May 14, 1937. This summons was served on Bruce L. MacLean on March 11, 1938, and a return was made thereon on April 14, 1938. By special appearance a motion was made on March 28, 1938, to quash the summons and the service on Bruce L. MacLean. On April 7, 1938, the court granted the motion of Bruce L. MacLean to quash the summons and service thereof and on April 13, 1938, the court denied a motion by plaintiff to set aside the order quashing the summons. Plaintiff appeals from the orders made on April 7, 1938, and April 13, 1938.

In section 406 of the Code of Civil Procedure, as amended by St.1933, p. 1844, it is provided that at any time within one year after a complaint is filed a plaintiff may have a summons issued. In section 414 of the Code of Civil Procedure it is provided that when the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. In section 581a of the Code of Civil Procedure it is provided that the court must dismiss an action "unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action."

In title XIV, chapter 1, Code of Civil Procedure, under the heading, Proceedings Against Joint Debtors, appear several sections, 989, 990 and 991, by which provision is made for summoning joint debtors to show cause why they should not be bound by judgments theretofore entered. Section 990 is as follows: "The summons specified in section 989 shall be issued by the clerk, or by the justice if there be no clerk, upon presentation of the affidavit specified in section 991, and must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time, as the original summons. It is not necessary to file a new complaint."

It will be noted that a summons was issued and directed to respondent within one year from the time of the commencement of the action and that after the entry of the judgment against other defendants a summons was issued in accordance with the provisions of sections 989 and 990 of the code, the last-mentioned summons having been issued and returned within three years from the time of the commencement of the action. It is the contention of respondent that the summons provided for in the sections concerning proceedings against joint debtors must be issued within one year from the date of the commencement of the action. In support of this contention respondent cites Carson v. Lampton, 23 Cal.App.2d 535, 73 P.2d 629. The facts of that case are distinguishable from the facts of the case under consideration. In the Carson Case the summons issued under section 990 was issued more than three years after the commencement of the action and the court applied the language of section 990, wherein it is provided that the summons must be "returnable" within the same time as the original summons. Manifestly, a summons issued more than three years after the commencement of the action could not be returned within the period of three years from the commencement of the action. The court, however, included in its opinion certain language which was not necessary to the determination of the issue then under consideration, stating that sections 989 and 990 "contemplate that the summons referred to must be issued and returned within the same time that the original summons might have been issued and returned after the filing of the original complaint" [page 631]. We are of the opinion that the word *issued* was inadvertently and erroneously inserted in the sentence just quoted.

The code section which authorizes the issuance of the summons now under consideration contains no limitation upon the time in which it may be issued except that it may not be issued until after judgment is entered against a joint debtor. It must be served in the same manner and returned within the same time as the original summons. If the legislature had intended that a summons in joint debtor proceedings must be issued within one year from the time of the commencement of the action it doubtless would have inserted in the section appropriate language to designate such period. An examination of section 990 reveals that the legislature provided for the manner of the service and return of the summons but provided no period within which the summons might be issued. The courts may not now add to the section a provision which the legislature has omitted.

In failing to limit the time for issuance of the summons in joint debtor proceedings to one year from the time of the commencement of the action the legislature doubtless took into consideration the well-known fact that court calendars are frequently congested and that in many cases, especially in contested actions, parties are unable to secure judgments against any of the joint debtors within one year from the time of the filing of the complaint. It is apparent that if respondent's contention should be upheld litigants in many cases would be deprived of the beneficial provisions of the code sections under discussion and the purpose of the sections, to simplify and shorten the work of the courts, would in a large measure be nullified.

[1, 2] The reasons for requiring the original summons to be issued within one year from the time of the commencement of the action are not present in a situation in which summons is to be issued after the entry of a judgment against one or more of several joint debtors. A delay in applying to the clerk for the issuance of an original summons indicates

an intention on the part of a plaintiff to postpone taking steps to terminate the litigation or perhaps to abandon it. On the other hand a litigant may proceed with utmost diligence and yet be unable to secure a judgment against any of the defendants within the period of one year from the commencement of the action. The clerk must issue the summons upon the mere request of the plaintiff, a request that can be easily made at any time within the period of one year, but the litigant cannot be assured of being able to go through the preliminary steps and bring the action to judgment within the same period. From the nature of the proceedings to bind additional joint debtors, from the objects to be attained by the code sections in question and from the language contained in section 990, it must be concluded that the legislature did not intend to require that the summons referred to in section 990 be issued within one year from the time of the commencement of the action.

The orders are reversed.

I concur: CRAIL, P. J.

McCOMB, Justice (dissenting).

I dissent.

Section 990 of the Code of Civil Procedure, which is here in question, provides that the summons "must be served in the same manner, and returnable within the same time, as the original summons". Section 581a of the Code of Civil Procedure provides that the court must dismiss the action "unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action."

In the instant case the action was commenced June 17, 1935, and the summons was not issued until May 18, 1937. It is therefore evident that the summons here in question was not issued until one year and eleven months had elapsed after the commencement of the action; and, thus pursuant to the mandate of section 581a of the Code of Civil Procedure the court properly granted the motions to quash service of summons and denied the subsequent motions to set aside these orders.

This court, in Carson v. Lampton, 23 Cal.App.2d 535, 73 P.2d 629, has previously decided the question herein involved contrary to the majority opinion in the present case, and in my view correctly. Mr. Justice Doran at page 538, 73 P.2d at page 630, there says:

"Appellant contends, in substance, that the provision in section 990, namely, that the summons 'shall be issued * * * and returnable within the same time, as the original summons,' should be construed as an unequivocal requirement that the summons in question must be issued and returned within the same time as the original summons might have been issued and returned, after the filing of the original complaint.

Respondent contends, however, that said section 'does not limit the time within which the summons specified in section 989 shall be issued by the clerk'; that by the use of the word 'returnable' in section 990, it is merely 'intended that a joint debtor summons must require the defendant to appear within ten days if served within the county where the action is brought, or within thirty days if served elsewhere.'

"Respondent's position is untenable. As hitherto declared, 'It is the policy of the law to put an end to litigation, and to aid the vigilant, and not those who sleep upon their rights.' [Citing case.] Moreover, it is a well-recognized rule of construction that where a statute is susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected and the latter adopted. [Citing cases.] It can scarcely be contended with reason that as to one section of the Code, regarding the subject herein referred to, all limitation with respect to time is intended to be disregarded, when, with reference to all others, the element of time receives express, if not emphatic, consideration. Necessarily, sections 989 and 990 are to be construed with related sections and as well with the provisions of the Code on limitations, and so construed, in the light of the foregoing, are not without limitation as to time, but, to the contrary, contemplate that the summons referred to must be issued and returned within the same time that the original summons might have been issued and returned after the filing of the original complaint."

For the foregoing reasons in my opinion the orders appealed from should be affirmed.

28 Cal.App.2d 425

McLAUGHLIN v. NORTHERN LIFE INS. CO.

Civ. 10684.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1938.

As Modified on Denial of Rehearing Oct. 15, 1938.

1. Appeal and error ⚷1002

Where evidence is conflicting, findings of jury may not be disturbed on appeal.

2. Insurance ⚷242, 246

Evidence was sufficient to support jury's finding that after insured's unexplained disappearance, insured's wife neither surrendered life policies, of which insurer acquired possession, to insurer, nor consented to cancellation.

3. Insurance ⚷181

Where insured had been unexplainedly absent for over seven years, and jury found that death occurred on date of disappearance, no premiums were required to be paid on insured's life policies subsequent to date of disappearance.

4. Insurance ⚷246

Where insured had been unexplainedly absent for over seven years and jury found that death occurred on date of disappearance, acceptance by insured's wife of insurer's return of premiums paid on life policies after date of disappearance did not bar wife's recovery on policies, as respects contention of mutual rescission.

5. Insurance ⚷615

An action on life policies which was instituted almost 10 years after insured's unexplained disappearance was not barred by laches.

6. Insurance ⚷615

In action on life policies, plaintiff could attack insurer's evidence of a purported surrender of policies when such evidence was offered, as against contention that plaintiff should first have brought action to rescind the alleged surrender before suing on policies.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Margaret Helen McLaughlin against the Northern Life Insurance Company to recover on two life policies issued by defendant on the life of plaintiff's husband. Judgment for plaintiff, and defendant appeals.

Affirmed.

Knight, Boland & Riordan, of San Francisco, for appellant.

Gus L. Baraty and E. A. Larrecou, all of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff brought suit against the defendant to recover on two different life insurance policies. She framed her complaint in two counts. In each count she pleaded that Frank McLaughlin, her deceased husband, disappeared on the 13th day of October, 1926, and that she was informed and believed that he died on said date. The action was commenced on February 10, 1936. The defendant appeared and answered. It denied nearly all of the allegations set forth in the plaintiff's complaint and set forth several affirmative defenses including a claim that the plaintiff surrendered both of said policies and that said policies were cancelled long prior to the commencement of said action. It also alleged that each cause of action was barred by the statute of limitations. The trial court made findings of fact in favor of the plaintiff on each and all of the issues and from the judgment entered the defendant has appealed.

The first point made by the defendant is that the evidence did not show that plaintiff's husband died while the policies were in force. In presenting that point the defendant contends that while the evidence introduced by the plaintiff showed Frank McLaughlin disappeared October 13, 1926, and had not since been heard from, nevertheless the evidence did not show the date of the death of said McLaughlin. The defendant does not set forth the evidence. The plaintiff concedes the point of law contended for by the defendant but claims there was substantial evidence from which the jury was justified in inferring death occurred while the policies were in force. In that behalf the plaintiff states: "The time of death can be found to be the date of the disappearance or any time short of the seven year period, and to justify such a finding it is not necessary to produce an eye witness, or otherwise to show, that the absent one encountered within the period some specific peril likely to produce death." Estate of Christin, 128 Cal.App. 625, 17 P.2d 1068. That there was substantial evidence supporting the plaintiff's contention that her husband met death on or about October 13, 1926, she calls our attention to the following facts: The night before Frank McLaughlin disappeared, he had in his pocket a large amount of money in currency. He received a telephone call. The plaintiff answered the telephone. The person calling did not give his name but insisted on speaking to plaintiff's husband. The party was a man who spoke with considerable foreign accent. Plaintiff's husband went to the telephone and was heard to make an appointment with said party for the following morning at which time, according to the drift of the telephone conversation, he was to give said party employment as a solicitor. The next day Frank McLaughlin left his home at Yakima, Washington, driving his own automobile. Later that automobile was found. It was then at Wilmar, California. At that time it had attached to it a stolen license plate. The plaintiff also shows that at the time Frank McLaughlin left home he had in his safe deposit box his adjusted service certificate as a world war veteran. Although he was entitled to draw against said certificate, no claim was ever made thereon. Another fact was introduced in evidence which also had a tendency to support the plaintiff's contention. In an effort to settle her claim for insurance, the plaintiff called on Mr. Moore, the defendant's agent at Portland. As a result of that conversation Mr. Moore stated he was going to the head office at Seattle and when he returned he would again take the matter up with her. When he returned Mr. Moore stated to her if she would deliver the $2,500 policy to him he would disclose absolute confidential news that her husband committed suicide and would tell her how, and when, and where the body was found. Such statement indicated the defendant corporation had information as to what had happened to Frank McLaughlin. There was evidence of irregularities in the accounts of the insured and that such facts were brought to her attention and she admitted them. She denied she had done so. The record does not show the nature nor the amount of such irregularities as of the date of the disappearance of the insured. There was evidence to the effect that the relations existing between the insured and his wife were, at times, not pleasant. There is no evidence that those strained relations existed at the time of his disappearance. The plaintiff testified such relations, at said time, were not strained. There was evidence the plaintiff had declared the insured was a drinking man. The plaintiff testified she never made such declarations. Twelve years have elapsed now since his disappearance. Search by his friends, his fraternal brothers, his relatives, the authorities, and by the insurance company has failed to produce evidence that he is living or was living after the last effective date of the policies. Pointing to these several circumstances the plaintiff contends, and we think correctly, that the record contains evidence supporting the verdict of the jury that Frank McLaughlin died on or about October 13, 1926.

Before discussing other points it is necessary to set forth additional facts: On October 13, 1926, Mrs. McLaughlin held a policy on her own life issued to her by the defendant. She had in her possession a policy, on the life of her husband, issued by the defendant September 14, 1925, which was for $2,500. She also had a policy on the life of her husband issued by the defendant June 18, 1926, which was for the sum of $5,000. The payment of the initial premium on that policy carried it forward one year. On the policy for $2,500 the combined premiums were $11.75 per month. After the disappearance of her husband the plaintiff paid $23.50 in premiums. All payments were, at first, made to Mr. Peterson, manager of the Yakima office. The plaintiff then went to Portland. There she called on Mr. Moore, manager of the office of the defendant. The result of that call was such that Mr. Moore went to her apartment. There she turned over to him for inspection all of her policies. He refused to accept premiums on the policy for $2,500 until he consulted the home office at Seattle. The policy for $5,000 he appropriated and did not return to her. On returning from Seattle Mr. Moore stated to the plaintiff that if she would turn over the $2,500 policy he would repay $23.75, the premiums she had paid, and would communicate to her the facts regarding the suicide of her husband. He would tell her how and when the insured committed suicide and about the finding of his body. The plaintiff testified she turned over the policy and received the check for $23.75, but that Mr. Moore did not tell her any of the facts regarding the suicide of her husband. The plaintiff never saw the $5,000 policy again until she saw it in court. The defendant produced a draft dated June 9, 1927, for $25, and an endorsement which purported to be a release of the obligations of the defendant under that policy. The plaintiff testified the endorsement on the draft was not her signature.

In September, 1930, the plaintiff and Mr. Bamford, the head of the defendant corporation, met at the office of the insurance commissioner in Seattle, Washington. The plaintiff testified that at that time Mr. Bamford told her if she would let the defendant hold the policies until seven years after October 13, 1926, that then if McLaughlin had not been found the defendant would pay both policies. She acted accordingly, but had not been paid.

[1, 2] The defendant asserts the evidence demonstrates plaintiff surrendered the policies of insurance, that she made no attempt to rescind, and that she is barred from questioning such surrender. In reply the plaintiff does not controvert that both policies were at the time of the trial produced from the possession of the defendant, however she earnestly contends the evidence did not show she ever surrendered either policy or consented to the cancellation thereof. On the other hand she at all times contended that by certain fraudulent practices the agents of the defendant wrongfully obtained possession of the policies. On the issues of fact so presented to the jury, the evidence may be said to be conflicting, but the jury found the facts in favor of the plaintiff and such findings may not be disturbed at this time.

[3, 4] Having found there was no agreement of surrender or cancellation, it is clear the jury did not err in finding there was no contract that should be rescinded, nor was there any sum to be tendered back. It is not claimed that both policies were not in force when McLaughlin disappeared (that is, when he died, as found by the jury), hence the plaintiff was not bound to pay premiums. Not being so bound she was entitled to receive back payments inadvertently made by her. That she did, but she received no other sum. However she offered in open court to repay even those sums but the offer was not accepted.

[5, 6] The real claim of the defendant is that the plaintiff is precluded by her laches. It claims, in effect, that the plaintiff should have rescinded the alleged surrender, and, not having done so, she may not attack the evidence offered in support thereof. In other words, it claims she should have maintained an action to rescind, and then, if successful, she could have maintained an action on the policies. We think she was not bound to do so, but was entitled to attack the evidence of a purported surrender when such evidence was offered. Field v. Austin, 131 Cal. 379, 382, 63 P. 692.

The judgment and orders appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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28 Cal.App.2d 446

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. MARXEN et al.

Civ. 6062.

District Court of Appeal, Third District, California.

Sept. 16, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. Mortgages 🔑159

Where owner of wharf leased part of it for construction of dance hall and thereafter executed a trust deed on the wharf with bank as beneficiary, and lessee, as part of same transaction and for a valuable consideration, executed a written agreement specifically covenanting that its title should be subject to the lien created by the trust deed, bank's title acquired on foreclosure of the trust deed was not subject to title of lessee, since lessee was estopped to deny the effect of the subordination agreement.

2. Wharves 🔑9

Where lessee of portion of wharf used for dance hall and its lessor executed a lease to city for a term of more than a year in advance of date of expiration of lessee's lease, and monthly rental was to be paid by city to both original lessee and lessor, and repairs could be made by city only with approval of original lessee and lessor, execution of the lease to city constituted a "release" and "surrender" by original lessee of its lease.

[Ed. Note.—For other definitions of "Release" and "Surrender," see Words & Phrases.]

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Suit by the Security-First National Bank of Los Angeles against Edward H. Marxen, as trustee in bankruptcy of the estate of the Santa Monica Amusement Company, a bankrupt corporation, the La Monica Dance Hall, Inc., and others to quiet title to certain property. From a judgment in favor of the named defendants, the plaintiff appeals.

Judgment reversed, with directions to render judgment for plaintiff.

Thorpe & Bridges, of Los Angeles, for appellant.

Le Roy Brigham, of Los Angeles, Bernard J. Walsh, and Lynden Bowring and H. Elliott Pownall, Jr., both of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered in favor of the defendant, Edward H. Marxen, as Trustee in Bankruptcy of the Estate of Santa Monica Amusement Company, a bankrupt corporation, and the plaintiff has also appealed from that portion of the same judgment which quiets title to a wharf at Santa Monica, subject, however, to the rights acquired by La Monica Dance Hall, Inc., a corporation, under a lease thereof from Santa Monica Amusement Company dated August 24, 1928, which lease expired June 6, 1936.

Since this appeal was perfected, the respective parties filed in this court July 14, 1938, a written stipulation to the effect that the portion of the judgment which quiets title to the real property involved in the defendant Edward H. Marxen, as Trustee in Bankruptcy of the Estate of Santa Monica Amusement Company, a bankrupt corporation, may be reversed, and that the court, in lieu thereof, may render judgment to the effect that the plaintiff, Security-First National Bank of Los Angeles, a national banking association, is sole owner and entitled to the exclusive possession and use of the property as against said Marxen, as trustee.

The stipulation leaves for the disposition of this court only that portion of the appeal which quiets title to the real property in plaintiff, subject to the rights of the respondent, La Monica Dance Hall, Inc., a corporation, under the terms of its lease from Santa Monica Amusement Company, dated August 24, 1928.

The appellant, Security-First National Bank of Los Angeles, contends, with respect to the last-mentioned portion of the appeal, that finding VIII, which was adopted by the trial court, is not supported by the evidence for the reason that appellant acquired title to the property by foreclosure of a trust deed which was executed by the Santa Monica Amusement Company, a corporation, to plaintiff as beneficiary thereof on September 12, 1932, and that the title of the defendant, La Monica Dance Hall, Inc., a corporation, became subject to plaintiff's title by the terms of an express agreement to that effect, also dated September 12, 1932, subordinating its title to the lien of said trust deed, and that respondent's title was also rendered subject to the plaintiff's title by a subsequent written agreement dated May 25, 1935, between plaintiff as party of the first part, Los Angeles Trust & Safe Deposit Company, a corporation, as second party, and the City of Santa Monica, a municipal corporation, as party of the third part.

Finding VIII, which is involved on this appeal, reads as follows:

"That it is true that the right, title and interest of plaintiff in and to said wharf, pier, franchise and other property, hereinabove in Paragraph VII of these findings described, is subject to that certain lease held by the City of Santa Monica, a municipal corporation, as lessee, which said lease is dated October 1, 1934, and is more particularly described in the copy of the subordination agreement attached to plaintiff's complaint herein and marked 'Exhibit C' thereto.

"That it is true that the right, title and interest of plaintiff in and to said wharf, pier, franchise and other property, hereinabove in Paragraph VII of these findings described, is also subject to the interest of the defendant herein, La Monica Dance Hall, Inc., a corporation, as Lessee, under and by virtue of the terms and provisions of that certain lease dated on or about the 24th day of August, 1928, entered into in writing by and between Santa Monica Amusement Company, a corporation, as Lessor, and said defendant, La Monica Dance Hall, Inc., a corporation, as Lessee, for a period ending at the expiration date of the franchise attached to plaintiff's complaint herein and marked 'Exhibit A', or any extension thereof; that it is true that the expiration date of said franchise, attached to plaintiff's complaint herein and marked 'Exhibit A', is midnight on June 6, 1936.

"That it is true that no renewal or extension of said franchise, granted under date of June 7, 1916, by the City of Santa Monica to Charles I. D. Looff, has ever been made."

June 7, 1916, the city of Santa Monica granted Charles I. D. Looff a franchise to build and operate for a term of twenty years a wharf extending into the Pacific ocean at the foot of Colorado avenue, in Santa Monica, to be used for commercial, amusement and recreation purposes. The dock was constructed. By mesne conveyances it was leased to the Santa Monica Amusement Company, a corporation, which was the owner thereof on August 24, 1928. On the last-mentioned date, for a named consideration, the Santa Monica Amusement Company executed a lease to this respondent, La Monica Dance Hall, Inc., a corporation, of a portion of the dock specifically described, and including a space of 180 feet by 250 feet in size, for the purpose of constructing and operating thereon a dance hall. The term of that lease was specified as the duration of the Looff franchise, which expired June 6, 1936. On September 12, 1932, the Santa Monica Amusement Company executed and delivered to the plaintiff its promissory note for $96,000, secured by a trust deed on the wharf property, including that portion thereof which was leased to the La Monica Dance Hall, Inc., as above stated. On the last-mentioned date, and as a part of the same transaction, the Santa Monica Amusement Company and the La Monica Dance Hall, Inc., executed a written agreement specifically covenanting that the respondent's title to the dance hall property should become subject to the lien created by the trust deed of September 12, 1932. October 1, 1934, this respondent, in conjunction with E. Pickering, a sub-lessee of respondent, and the Santa Monica Amusement Company joined in a lease to the City of Santa Monica of the dance hall property which was originally leased to La Monica Dance Hall, Inc., on August 24, 1928. This last executed lease created a term more than a year in advance of the date of the expiration of the former lease held by the respondent. It also provides for a definite sum of rental per month whereas the consideration for the respondent's former lease of the dance hall property depended upon the gross receipts derived from operating the pavilion.

May 25, 1935, this appellant, together with the trustee named in said trust deed of September 12, 1932, and the city of Santa Monica joined in another written instrument, declaring that the trust deed was executed on the date which it bears for the purpose of securing the Santa Monica Amusement Company's note for $96,000, and that, on October 1, 1934, the last-mentioned lease of the dance hall property contained the following provisions: "It is hereby agreed that the lease mentioned above to third party [City of Santa Monica] as lessee, dated October 1, 1934 is hereby made prior and superior to the deed of trust mentioned above." Thereafter, by appropriate valid proceedings, the property described in the trust deed of September 12, 1932, was foreclosed and sold to this appellant June 14, 1935. The regularity of the foreclosure proceedings is not questioned.

This suit was commenced to quiet title to all the property described in the trustee's deed. The complaint alleges the execution of the subordination agreement with the city of Santa Monica dated May 25, 1935, which is referred to as "Exhibit C" thereof, and the complaint concedes that plaintiff's title is subject to the second lease of the wharf property. The complaint also prays that plaintiff's title be quieted subject to the rights of the city of Santa Monica under the "second lease".

This respondent answered the complaint, denying the material allegations thereof, and affirmatively alleging that the plaintiff's title to the wharf property is subject to the title of La Monica Dance Hall, Inc., acquired under its lease dated August 24, 1928, from Santa Monica Amusement Company to respondent by virtue of the subordination agreement pleaded by the plaintiff as "Exhibit C" of its complaint.

Findings were adopted favorable to this respondent on that issue, and the title was quieted in plaintiff subject to respondent's lease thereof which expired June 6, 1936. From that portion of the judgment this appeal was perfected.

The appellant contends, (1) that the respondent, La Monica Dance Hall, Inc., for a valuable consideration, specifically and expressly consented in writing that its lease of the dance hall property should become subject to the lien created by the trust deed, and (2) that the execution of the second lease of the wharf property October 1, 1934, to the city of Santa Monica, in which both this respondent and Santa Monica Amusement Company joined, resulted in a surrender of the respondent's original lease of the property acquired August 24, 1928, by operation of law. In support of this assertion the appellant relies on the following authorities, to-wit: Ferguson v. Commissioner of Internal Revenue, 10 Cir., 59 F.2d 891; Douglas v. Schindler, 209 Cal. 616, 289 P. 625; Jenkins v. Root, 269 Pa. 229, 112 A. 153; Casper National Bank v. Curry, Wyo., 65 P.2d 1116, 110 A.L.R. 360.

In the Ferguson Case, supra, it is said [page 892]: "Where the owner of land gives a lease thereon and during the existence of such lease enters into a new lease thereof inconsistent with the first, and the tenant under the first consents to the second lease and the tenant under the second lease pays rent and goes into possession of the leased premises, a surrender of the first lease is effected by operation of law. The lessor and the lessee under the first lease by their acts are estopped to deny the first lease was not surrendered."

In the Douglas Case, supra, it is likewise said [page 627]: "It is elementary that two valid and enforceable leases cannot be outstanding on the same property for the same term. A surrender of the premises by operation of law took place when appellants entered into a new lease with the farming company with Schindler's consent, thus releasing Schindler of all liability."

And in the Jenkins Case, supra, the court said [page 154]: "The making of a new lease by a lessor during the existence of an outstanding lease and in hostility thereto, the tenant under the original lease giving up possession to a stranger, effects a surrender by operation of law."

The appellant propounds these pertinent questions: (1) Did the respondent consent that its lease of the dance hall should become subject to the lien created by the trust deed at the time the lessor, Santa Monica Amusement Company, joined with it in releasing the property to the City of Santa Monica? (2) Did the execution of the second lease by the respondent result in a surrender of the first lease by operation of law? and (3) Did the second lease constitute a sublease or a mere assignment of the first lease?

[1, 2] We are of the opinion finding VIII is not supported by the evidence; that the plaintiff's title to the wharf property, derived by the valid foreclosure proceedings of the trust deed, is not subject to the title of La Monica Dance Hall, Inc.; that for a valuable consideration the respondent specifically agreed, as a part of the same transaction, in which the trust deed was executed, that respondent's title should become subordinate to the lien created by the trust deed, and that the circumstances surrounding the execution of the second lease constitute a surrender on the part of the respondent of its lease of August 24, 1928.

Clearly it was the intention of the respondent to render its original lease of the wharf property, subject to the lien of the trust deed. On September 12, 1932, the same day upon which the trust deed was executed to secure a refinancing plan of indebtedness due to the plaintiff, the respondent, La Monica Dance Hall, Inc., a corporation, joined its original lessor, Santa Monica Amusement Company, in a written agreement by the express terms of which the respondent specifically consented to make its lease of the wharf property subject to the lien created by the trust deed. That instrument is called an "Agreement of Subordination". It identifies the respondent named as the second party thereof as the "present owner of the hereinafter described lease." The agreement specifically describes the wharf property leased to the respondent, together with other property, stating that it "is subject to the following incumbrances:

"* * *

"(4) An unrecorded Lease dated August 24, 1928, executed by Santa Monica Amusement Company, a corporation, Lessor, and La Monica Dance Hall, Inc., a corporation, as Lessee, which Lease expires June 6, 1936, subject to renewals as provided therein."

It is then stated in the agreement that the deed of trust of even date therewith was executed to refinance three previous trust deeds to secure specifically mentioned loans, and then continues:

"Whereas, it is the intention and understanding of all the parties to this agreement that the lien of said three Trust Deeds last above mentioned shall be and each remain at all times prior and superior to the Leases hereinabove described as Incumbrances Nos. 4, 5 and 6.

"Now, Therefore, to carry out the intention of the parties, and in consideration of the premises and other valuable consideration, receipt of which is hereby acknowledged, it is hereby declared, understood and agreed that said Trust Deed in favor of Security-First National Bank of Los Angeles, and said Trust Deed in favor of Arthur Looff, and said Trust Deed in favor of the Prudential Realty Company, a corporation, shall be and remain at all times a lien or charge on the property hereinabove described prior and superior to the effect of or liens of the Leases as hereinabove described as Incumbrances Nos. 4, 5 and 6."

That agreement was signed by the respondent and was duly acknowledged by the respective parties. It clearly covers the property leased by the respondent. The consideration for that instrument is not questioned. We may assume from the language of the instrument that the trust deed of September 12, 1928, which was executed contemporaneously with the subordination agreement to refinance the three previous trust deeds was given as a substitution for and renewal of said three trust deeds which already constituted liens against the property prior to respondent's lease. At least, for a valuable consideration the respondent consented that the latter trust deed should become a prior lien to its lease, and the respondent is therefore estopped from denying the effect of the subordination agreement.

We are also of the opinion the execution of the lease of the dance pavilion property by the respondent and its original lessor to the City of Santa Monica on October 1, 1934, under the circumstances of this case, constituted a release and surrender of its former lease of August 24, 1928, on the part of La Monica Dance Hall, Inc. The circumstances indicate that lease to the City of Santa Monica was not a mere sublease of the property on the part of the respondent. It was executed by Santa Monica Amusement Company, from which the respondent originally secured its lease to the wharf property, together with one E. Pickering and the respondent, all of whom were named as lessors. The lease to the City of Santa Monica contains no provision that the rental shall be paid to the respondent only. The specified monthly rental for the property was to be paid to the lessors. Repairs could be made on the dance pavilion only "with the approval of the Lessors." The respondent's lease of September 12, 1928, expired June 6, 1936. The respondent had no authority to sublet the property for a term extending beyond that date. Yet the lease to the City of Santa Monica was executed October 1, 1934, "for a period of three (3) years, commencing from the 1st day of October, 1934, and terminating on the 30th day of September, 1937". When the lease was made to the City of Santa Monica the respondent's income from the dance hall failed, thus depriving it of the ability to meet its obligation to pay its lessor, Santa Monica Amusement Company, the rental specified by the terms of the lease of August 24, 1928. The last-mentioned lease provided:

"The Lessee [La Monica Dance Hall, Inc.] hereby agrees to operate on said space, a hall for dancing and other purposes.

"The said Lessee agrees to pay to the said Lessor the following rental for said leased premises:

"Twenty-five (25%) per cent of the gross receipts, after deducting the expense of the orchestra."

There is no evidence that the respondent retained any other source of income from the leased property with which it could pay its stipulated rental, after it executed the lease in conjunction with the Santa Monica Amusement Company and Pickering to the City of Santa Monica. The foregoing circumstances are inconsistent with the theory that the respondent was merely subleasing its dance hall property to the City of Santa Monica. These circumstances indicate an intention on the part of the respondent to abandon its lease. They amount to a surrender of the premises by operation of law, according to the authorities heretofore cited. Finding VIII which was adopted by the court is therefore not supported by the evidence.

The judgment is reversed and the court is directed to render judgment in favor of the plaintiff quieting title to the dance hall property in question as against the respondent, La Monica Dance Hall, Inc., a corporation, free and clear of its lease of August 24, 1928, and of any and all other liens.

Pursuant to the stipulation which was filed in this court July 14, 1938, the judgment is also reversed, and the trial court is directed to render judgment in favor of the plaintiff quieting title to the property in question as against Edward H. Marxen, as Trustee in Bankruptcy of the Estate of Santa Monica Amusement Company, a bankrupt corporation, in the form and manner specified in said written stipulation, which may be annexed to and become a part of the remittitur. With respect to the judgment to be rendered against Marxen, as Trustee, as aforesaid, the remittitur may issue forthwith. With respect to the judgment to be rendered against the respondent, La Monica Dance Hall, Inc., a corporation, the appeal may take its usual course. It is so ordered.

I concur: PULLEN, P. J.

28 Cal.App.2d 474

STATE COMPENSATION INSURANCE FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6105.

District Court of Appeal, Third District, California.

Sept. 19, 1938.

1. Workmen's compensation 🔑1054

A workmen's compensation insurance policy, containing stipulation that the policy did not extend to or cover any employee or employees other than those working directly in connection with certain mine located in certain city, was not so restricted as to location as to exclude mine truck driver, who was injured in automobile accident, while acting as chauffeur for one of the members of mining partnership on trip to another city on business connected with financial operation of the mine.

2. Workmen's compensation 🔑1054

A workmen's compensation insurance policy issued to mining partnership and providing that it applied to employees including drivers, chauffeurs, etc., included work of mine truck driver at time of his injury while acting as a chauffeur for one of the partners on a trip to another city to obtain financial backing for mine.

3. Workmen's compensation 🔑1054

If there was any ambiguity created by rider on workmen's compensation insurance policy and any uncertainty whether work of applicant was included in classification of employees as specified in policy, such ambiguity was required to be construed most strongly against the insurer. Civ.Code, § 1654.

4. Partnership 🔑140

Generally, each partner in the ordinary course of firm business has the power to bind the firm and other partners by the employment of third persons whose services are reasonably necessary for carrying on the business of the firm.

5. Workmen's compensation 🔑239

The fact that injured employee, claiming compensation under workmen's compensation insurance policy issued to partnership, was paid salary by the personal check of one of the partners did not necessarily fix the individual partner as the employer.

Original proceeding on writ of review by the State Compensation Insurance Fund against the Industrial Accident Commission of the State of California and Raymond Smith to review an award of the Commission in favor of Raymond Smith.

Award affirmed.

Carroll S. Bucher and Edmund J. Thomas, Jr., both of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner herein, as insurance carrier under a policy of workmen's compensation insurance issued to William J. Williams and Rollie B. Williams, copartners doing business as Williams & Williams, seeks this writ of review for the purpose of annulling the findings and award of respondent in a proceeding wherein Raymond Smith was applicant and Williams & Williams were employers, and petitioner herein was joined as defendant insurance carrier.

From the evidence it appears that William J. Williams and Rollie B. Williams originally were partners in an oil business. Later they acquired a mine near Folsom known as the Mississippi Bar Mine, and some time thereafter became the owners of a mine near Wheatland known as the Maryland Mine. William J. Williams supervised the operations of the Mississippi Bar Mine near Folsom, and the Maryland Mine was transferred to a family corporation in which the two brothers were stockholders and officers. Some time later it was decided to move the machinery from the Maryland Mine to the Mississippi Bar Mine and to devote their funds and energies to developing that property. It became necessary to obtain more capital to develop this mine, and William J. Williams, learning that a man named Murphy might be interested in investing in this mine, decided to present the matter to him.

Raymond Smith, the injured man, was employed by William J. Williams to drive Williams' car for him while he was recovering from an accident and when such service was no longer necessary Smith was then to take over the driving of a mine truck. Pay checks received by Smith were signed by William J. Williams. Williams instructed Smith, as chauffeur, to meet Murphy, the man whom he hoped to interest in the development of the mine, to drive Murphy and himself to Reno, it being the intention of Williams during this trip to discuss the business affairs of the Mississippi Bar Mine with Murphy and to interest him if possible in putting some funds into its development. The trip was made to Reno, but there Williams left the party, and with Smith as chauffeur, started on the return trip to Sacramento. On their way to Sacramento the car being driven by Smith collided with another car, resulting in injuries to Smith.

The commission found that Smith, while employed as a chauffeur by Williams & Williams, the partnership, received an injury out of his employment and further found that the employers were insured by the State Compensation Insurance Fund. The question here for determination is whether or not the commission exceeded its jurisdiction in so finding.

It is the contention of petitioner that the policy of insurance issued to Williams & Williams, a copartnership, was limited in its terms as to location and type of employment, but that in spite of such limitations the commission held the insurance fund liable for the injury, which occurred a considerable distance from the location specified in the policy, and held petitioners liable for an injury to a person employed in a capacity not covered by the policy.

As to both of these points we believe that the petitioner places a more narrow construction upon the terms of the policy than is warranted by the facts. Attached to the policy issued to Williams & Williams was an endorsement as to the place where such work was to be conducted as follows:

"It is agreed that, anything in this policy to the contrary notwithstanding, this policy Does Not Extend to or Cover any employee or employees other than those employees working directly in connection with The Mississippi Bar Mine, West Bank of American River, 1 Mile from Folsom, California."

Also attached to the policy was an endorsement wherein it was provided that the policy applied to a particular classification of employees and included: "* * * drivers, chauffeurs and their helpers, watchmen and all employees engaged in any work incidental to or in connection with the construction of buildings, the reconditioning, preparation, development, operation and/or maintenance of the project, including the operation of tramways. * * *"

[1] In regard to the endorsement which dealt with the limitation to a specific location we find that the restriction was to employees working directly "in connection with" Mississippi Bar Mine. Inasmuch as the injuries suffered by applicant were not received on the property itself petitioner claims that the policy has no application. We believe, however, the facts bear out the contention of respondent that the trip to Reno was directly connected with the financial operations of the mine, and the restriction had reference to the particular business or enterprise and not to the particular location.

In support of the interpretation sought by the insurance fund it relies, among other cases, on that of Ocean Acc. & Guar. Corp. v. Industrial Acc. Comm., 208 Cal. 157, 280 P. 690. There, however, the policy excluded all other business operations "at this or any other location not herein disclosed" [page 691]. There the employee was working at an entirely different mine than that described in the policy.

In National Auto. Ins. Co. v. Industrial Acc. Comm., 220 Cal. 642, 32 P.2d 356, cited by petitioner, the policy provided [page 357]: "This policy shall only cover such operations of this Employer which are performed upon the following described premises or directly in connection with such operations." In that case the court said: "The contention that it is not liable for the death of the deceased because his injury was sustained at a location other than that specified in the rider is without merit as it is apparent that the location given in the rider attached to the policy was only intended to designate the employer's place of business, and did not limit the liability of the insurer to injuries sustained at that particular location."

A difference is to be noted also in the policy between the instant case and in the cited cases, in that in the case before us, the limitation was to employees working directly in connection with the Mississippi Bar Mine whereas in the cited cases the operations were limited to those "which are performed upon the following described premises". The rider before us is therefore much broader in its scope than that found in the cases cited.

Campbell on Workmen's Compensation, volume 2, page 1204, in discussing endorsements limiting coverage to specific locations, states that such endorsements are not intended literally to restrict coverage to a particular place: "The purpose of the endorsement is to confine the coverage to described business activities which are carried on incidental to that address as headquarters or base of operations. In other words, a trucking policy with this endorsement would still cover work performed over public streets and highways and elsewhere in the state, so long as the activity is incidental to the business operations conducted from the described location. A policy issued to a painting contractor, or trucker, would be worthless if only painting within the shop, or the garage activities alone, were covered."

We believe, therefore, that the policy was not so restricted as to location as to exclude the injured chauffeur.

[2] So, also, as to the contention that that type of work being performed by Smith was not covered by the policy. The inclusion of chauffeur in the classification in the rider attached to the policy included services performed while in the employ of the assured and engaged in duties directly connected with the operations described in the policy. It is the work of a chauffeur to travel from place to place on the business of his employer. In so doing he is occupied in the duties of his employment. Under the language of the classification also the chauffeur was engaged in the development, operation and maintenance of the project. Clearly the efforts of a partner in obtaining financial backing necessary to develop and maintain the operation of a mine is as much a part of the "development, operation and maintenance of the project" as would be the actual construction of mine properties.

In support of this portion of the argument petitioner cites Smith v. Industrial Acc. Comm., 18 I.A.C.Dec. 135. In that case the policy for compensation insurance covered E. L. Smith & Sons, a copartnership, engaged in the electrical business at a designated place in Los Angeles. E. L. Smith as sole owner had a dude ranch in another neighborhood and hired one Blake to work on the ranch. Blake was injured while working on the ranch and the commission held the policy did not cover the injury to Blake inasmuch as there was no remote connection between the operation of the dude ranch by Smith personally and the electrical business of the partnership in Los Angeles.

[3] If, however, there was any ambiguity created by the rider on the policy and there was any uncertainty whether or not the work of applicant Smith was included in the classification of employees as a chauffeur as specified in the policy, such ambiguity must be construed most strongly against the insurer. (Sec. 1654, Civ.Code; 27 Cal.Jur. 561.)

[4, 5] Some claim is made that Smith was an employee of William J. Williams and not of the copartnership. As we have before pointed out, Smith was employed to act as chauffeur for Williams and also later to drive a truck at the mine itself. Furthermore, the trip on which he was injured was one for the purpose of obtaining finances for the Mississippi Mine. The general rule is that each partner in the ordinary course of firm business has the power to bind the firm and other partners by the employment of third persons whose services are reasonably necessary for carrying on the business of the firm. (47 Cal.Jur. 848.) The fact that Smith was paid by personal check of Williams does not necessarily fix the individual as the employer. Claremont Country Club v. Industrial Acc. Comm.,

174 Cal. 395, 163 P. 209, L.R.A.1918F, 177; Department of Nat. Resources v. Industrial Acc. Comm., 216 Cal. 434, 14 P.2d 746.

In our opinion the commission did not err in assessing the liability for the injuries complained of on the insurance carrier for the Mississippi Bar Mine.

The award is affirmed.

I concur: THOMPSON, J.

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28 Cal.App.2d 433

HASTY et al. v. G. T. MARSH & CO. et al.

Civ. 10741.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1938.

Rehearing Denied Oct. 15, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. Trial ⇨296(13)

Where court, after instructing jury relative to basic speed law, began to instruct jury relative to prima facie speed limits, but then stated that latter part of instruction was not to be considered by jury, instruction was not objectionable on ground that it permitted jury to guess what the speed limits were which, if violated, raised presumption of negligence, since instruction showed that court concluded from evidence that prima facie speed limit sections were not applicable. St.1935, p. 176, §§ 510, 511.

2. Damages ⇨132(1)

$5,000 for 8 year old school boy who bled profusely and had teeth protruding through lip when injured, and who had a number of long deep cuts on face, one of which took off right wing of nose, and a number of which would leave scars, was not excessive.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by C. Albert Hasty (a minor), by Cyrus A. Hasty, his guardian ad litem, and another against G. T. Marsh & Co., George R. Marsh and others for injuries sustained in collision between school bus and truck at street intersection. From a judgment for plaintiffs, named defendants appeal.

Affirmed.

Alfred B. Weiler, of San Francisco, for appellants.

George K. Ford and Gus K. Burgren, both of San Francisco, for respondents.

STURTEVANT, Justice.

On December 22, 1936, C. Albert Hasty, a boy eight years of age, was riding in a school bus going from his home to Charing Cross school. The bus was traveling along Hyde street in a southerly direction toward Post street. At about the same time George R. Marsh was driving a light Ford truck which was proceeding easterly on Post street. In the intersection of those two streets a collision occurred and C. Albert Hasty was badly injured. His father, acting as guardian ad litem, commenced this action to recover damages. The jury returned a verdict awarding the minor damages in the sum of $5,000 and awarding his father damages in the sum of $1,019. From the judgment entered on the verdict the defendants G. T. Marsh & Company, a corporation, and George R. Marsh appeal. The defendants claim the trial court erred in instructing the jury and that the award of $5,000 in favor of the minor was excessive. Those two points will be discussed in the order stated.

As to the first point the defendants state that the question involved is as follows: Is it error to instruct the jury that the operation of an automobile at a speed which exceeds the limits specified in the law is prima facie unlawful, and yet to leave the jury to guess what limits of speed are so specified? The plaintiffs contend that the question as stated is not involved in the record. In making that contention we think the plaintiffs' position is fully sustained by the record. The defendants' contention is based on the following facts: They asked an instruction that was worded as follows (Lettering and parentheses ours):

"(a) The Motor Vehicle Code sets forth what is there termed a basic speed law, which reads as follows:

"'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'

"(b) The Code then sets out what are termed prima facie speed limits. That provision reads in part as follows:

" 'The speed of any vehicle upon a highway not in excess of the limits specified in this section is lawful unless clearly proved to be in violation of the basic rule declared in section 510 hereof,' which is the section I have just read to you.

"(c) The Motor Vehicle Code then proceeds as follows:

" 'The speed of any vehicle upon a highway in excess of any of the limits specified in this section is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in section 510 hereof at the time, place and under the conditions then existing.'

"The prima facie limits referred to so far as this case is concerned are as follows:

" 'Fifteen miles per hour when traversing any intersection (of highways if during the last one hundred feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of one hundred feet along all such highways, except upon a through highway or at traffic-controlled intersections, in which event in a business or residence district the district speed shall apply and elsewhere the speed shall be thirty miles per hour.'

"The prima facie limit referred to in a business district is twenty miles an hour. I instruct you that under the evidence in this case the district in which the accident in question occurred is a business district.)

"It is also provided in the Motor Vehicle Code that in any civil action proof of speed at a particular time and place in excess of the prima facie limits that I have just explained to you shall not establish negligence as a matter of law, but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence.

"Therefore, in this case, even though you should find from the evidence that the rate of speed of either of the automobiles involved, at the time and place of the collision exceeded the prima facie limits provided in the Code, that fact does not prove as a matter of law that either driver was negligent. Before you can hold either driver negligent, it must be proved as a fact by the evidence introduced that the operation of such automobile at such excess speed constituted negligence."

[1] Having read down to and including "fifteen miles per hour when traversing any intersection", the trial court paused and stated "Let me see, I will withdraw that, the latter part of the instruction. So that the jury will understand the part I just read is not to be considered by them." The defendants assert that such action was in effect to instruct as follows: "If you find that either defendant exceeded the speed limits provided in the Motor Vehicle Code, there will be a prima facie presumption that that defendant was negligent. What speed limits are so provided in that section, I leave to your imagination. But remember, having decided that either machine exceeded the limit which you have so guessed, you will hold that there is a prima facie presumption that the driver of that machine was driving at an unlawful speed." We find no merit in that contention. The instruction as offered contained several separate propositions, (a), (b) and (c). The first was based upon section 510 and all others on section 511 of the Vehicle Code, St.1935, p. 176. When the judge presiding in the trial court made the remark just quoted above, we think it is clear he was addressing himself to the divisions we have marked (b) and (c), both of which were based upon the provisions of section 511 of the Vehicle Code. In other words, the trial court was instructing the jury solely on the law as stated in section 510 and was acting under the assumption that the provisions of section 511 of the Vehicle Code were not involved in the action. That conclusion is supported by the fact that the trial court's remark is reasonably susceptible of such meaning. Furthermore there was no evidence introduced on which the jury could have made a finding as to the speed of either automobile. Moreover, after the jury was selected each party made an opening statement. Neither party claimed either car was driven at an excessive speed. Finally the trial court very fully and completely instructed the jury, but did not instruct on the prima

facie limits of speed of either car. That is to say, prima facie limits of speed were not involved in the theory of either party during the trial nor do they appear in the instructions given by the trial court.

We said above there was no evidence introduced on which the jury could have made a finding as to the speed of either car. That statement rests on these facts. The two drivers were the only witnesses who gave any testimony on the subject. George R. Marsh was driving the truck. He testified as to the movements of the bus: "I observed its speed but I can't say how fast it was going." Richard Hurst was driving the bus. He testified in effect: "When I saw the Marsh car I did not make any approximation, definite approximation, of the speed at that time while I was in the car." Intimating that he did make an approximation in reasoning back from subsequent events. Conceding there is some evidence from which the jury could have made some calculations and on which it could have based some inference, such inference, if made, would have been against these defendants and therefore we are unable to say any prejudicial error was committed. The defendants make the statement that "the speed of the school bus could have been computed by the jury at any rate from nine to thirty-five miles an hour" and defendants' car "at various exact figures". The record does not sustain either statement.

[2] In contending that the verdict was excessive, defendants state: "These injuries—a scar to be eliminated, if desired, a tooth to be filled, and a pain and suffering involved in the treatment undergone—are the basis of a verdict of $5000. Appellants respectively submit that a verdict of $1000 might be justified but that $5000 is grossly excessive." If said statement were full and complete something might be said in favor of it, but it is quite incomplete. The child's condition at the time Dr. Sooy, the surgeon, commenced his treatments was described by the latter as follows: "The child had bled rather profusely, was very pale, quite badly shocked, probably from pain and loss of blood; he was in the operating room when I got there, and his teeth were protruding through his upper lip; there was a cut on the right side of the face that started at the bridge of his nose, down across the nose and took off the right wing of the nose, ran back into this crease in the right upper lip—down to the bone, and across the cheek at almost to the level of the jawbone. The nose was open so the air was coming in, blowing his blood all over. He had another cut starting from his left nostril, running down across the lip, through which his teeth protruded. There was another cut under his right eye, over his right eye, and one under the left temple. The one on the left temple and the one on the right eyebrow, and the one under the right eye were minor cuts; the other two were very deep, the one through the lip and this one went right to the bone, and it was cut with glass—at least I assumed it was, and it went right straight to the bone as I have described it." The cuts were knitted and healed, but a small piece of the right wing of the nose was lost. One tooth was broken. The scars have received, and are receiving, the best of medical care but Dr. Sooy testified: "Scars can be refined but never be taken away; they can be made less noticeable; the child will always have a scar in that side of his face because the muscles were completely cut through to the bone and the scar is not alone in the child's face but runs through to the bone; because of that there has been a contraction of the muscles through this scar and that is why the scar is so noticeable and that cannot be eliminated." We think it is quite clear that it may not be said the verdict of the jury indicates at first blush or at all that the jury were influenced by passion, prejudice or corruption.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

28 Cal.App.2d 488

LAVORE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11856.

District Court of Appeal, Second District, Division 2, California.
Sept. 20, 1938.

1. **Workmen's compensation** 🔑1864

After an award was made by the Industrial Accident Commission, application for rehearing denied, petition for writ of review filed with District Court of Appeal, and a petition to reopen the matter filed before the Commission and denied, it was not a prerequisite for leave to file a supplemental petition to the writ of review pending before the District Court of Appeal that petitioner file application for rehearing with commission of its order denying petitioner right to reopen the proceedings. St.1937, p. 301, § 5803.

2. **Certiorari** 🔑42(9)

Matters arising subsequent to filing of petition for writ of review in the District Court of Appeal, and which might affect rights of parties thereto, are properly presented by a supplemental pleading filed in the District Court of Appeal.

3. **Workmen's compensation** 🔑1864

After one application for rehearing has been filed with the Industrial Accident Commission pursuant to the Labor Code, any party aggrieved by a subsequent ruling of the commission may apply to the District Court of Appeal or to the Supreme Court for a writ of review without filing a further petition for a rehearing with the Industrial Accident Commission. St.1937, p. 301, § 5803.

◆

Madeleine Holden Lavore filed in the District Court of Appeal a petition for writ of review of the findings and award of the Industrial Accident Commission in favor of the Pacific Western Oil Corporation, and thereafter requested the Commission to reopen the matter in which it had theretofore made findings of fact and an award, but the request was denied. On application for leave to file a supplemental petition to the petition for writ of review of findings and award of the Commission.

Application granted.

Murchison & Clopton and Mort L. Clopton, all of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, Asst. Atty., both of San Francisco, for respondents.

McCOMB, Justice.

This is an application for leave to file a supplemental petition to an application for a writ of review of findings and an award of the Industrial Accident Commission of the State of California.

The material facts are these:

May 13, 1938, petitioner filed in this court a petition for a writ of review of the findings and award of respondent Industrial Accident Commission. June 24, 1938, pursuant to the provisions of section 5803 of the Labor Code, St.1937, p. 301, petitioner asked respondent Industrial Accident Commission to reopen the matter in which it had theretofore made findings of fact and an award. This request was denied July 6, 1938.

This is the question for determination: *After an award has been made by the Industrial Accident Commission, an application for a rehearing denied, a petition for a writ of review of the matter filed with the District Court of Appeal, and thereafter a petition to reopen the matter filed before the Industrial Accident Commission and denied, is it a prerequisite for leave to file a supplemental petition to the writ of review pending before the District Court of Appeal that petitioner file an application for a rehearing with the Industrial Accident Commission of its order denying petitioner the right to reopen the proceedings?*

[1,2] This question must be answered in the negative. Matters arising subsequent to filing of a petition for a writ of review in this court and which may affect the rights of the parties thereto are properly presented by a supplemental pleading filed here. First National Bank v. Henderson, 101 Cal. 307, 309, 35 P. 899.

[3] It is likewise the law that after one application for a rehearing has been filed with the Industrial Accident Commission pursuant to section 5803 of the Labor Code any party aggrieved by a subsequent ruling of the Industrial Accident Commission may apply to this court or to the Supreme Court for a writ of review without filing a further petition for a rehearing with the Industrial Accident Commission. The reasoning in Harlan v. Industrial Accident Commission, 194 Cal. 352, 365, 228 P. 654,

relative to an analogous proposition is applicable to the problem here presented.

For the foregoing reasons, petitioner is granted leave to file a supplemental petition to the application for a writ of review heretofore filed in the above matter.

Respondents are granted ten days from the date of this order within which to file an answer to said supplemental petition, and petitioner is granted five days after the filing of said answer within which to serve and file a reply thereto.

We concur: CRAIL, P. J.; WOOD, J.

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28 Cal.App.2d 460

FILLMORE v. REILLY.

Civ. 11797.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1938.

Hearing Denied by Supreme Court Nov. 17, 1938.

1. Appeal and error 🔑930(1)

It is the duty of the District Court of Appeal on an appeal from a judgment or verdict for the plaintiff to review the evidence in the light most favorable to the plaintiff.

2. Appeal and error 🔑1002

The District Court of Appeal need not weigh evidence nor determine where the truth lies when there is a conflict.

3. Action 🔑25(2)

In action for damages for the removal of sums of money, without plaintiff's consent, from a safety deposit box issued in the names of plaintiff and defendant, where there was nothing in the pleadings concerning a partnership or an accounting and plaintiff's evidence, if believed, would have entitled her to a verdict on the theory of conversion, contention that action was suit in equity for an accounting and that court should have prepared findings, using verdict of jury as merely advisory, was without merit.

4. Jury 🔑12(1)

The right to a jury trial in a civil action is determined by the character of the pleading.

5. Action 🔑25(2)

A plaintiff seeking to recover damages for the removal, without plaintiff's consent, of sums of money from a joint safety deposit box issued in the names of plaintiff and defendant, set up an action at law and not one in equity.

6. Pleading 🔑79

One wishing to avail himself of an equitable defense must set it up in his answer.

7. Appeal and error 🔑1064(1)

In action for conversion of funds held in a safety deposit box issued in the names of plaintiff and defendant, where court instructed jury that burden of proof was upon plaintiff, instruction that in civil cases a preponderance of evidence is all that is required and that by a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probabilities are in favor of the party upon whom the burden rests, did not injure defendant though awkwardly phrased.

8. Trial 🔑260(1)

Refusal of requested instructions covered substantially by instructions given was not error.

◆

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Margaret Fillmore, also known as Alma M. Fillmore, against Pearl Miles Reilly, also known as Charlotte Shelby, to recover damages for the alleged removal by the defendant of large sums of money from a joint safety deposit box issued in the names of plaintiff and defendant. From an adverse judgment, defendant appeals.

Affirmed.

Clyde F. Murphy, of Los Angeles, for appellant.

Richard H. Cantillon and John E. Glover, both of Los Angeles, and Max E. Gilmore, of Hollywood, for respondent.

CRAIL, Presiding Justice.

This is an appeal by the defendant from a judgment in a case based on the allegations that the plaintiff had large sums of money in a joint safety deposit box issued in the name of plaintiff and defendant and to which both had access, and that the defendant withdrew said sums and took the same out of the box and retained the same without plaintiff's consent to her damage in the sum of $48,750. To these allegations the defendant filed a specific and general denial. The defendant is the mother of the plaintiff.

[1] The defendant files a brief containing 531 printed pages, but she does not specifically state the grounds upon which she seeks reversal. We find that at the bottom of page 43 of defendant's brief is the following statement, which we assume is the chief contention of the defendant: "* * * and this appellant feels that if the entire case—in other words, the 'whole evidence' of the case—is analyzed, it will be seen that Mrs. Fillmore's testimony is so contradictory, inconsistent and unsatisfactory, as not to be sufficient in substantiality to warrant a verdict in her favor for $20,000, or any other sum." With this contention in mind the defendant reviews the entire evidence in the case, stating the same in the light most favorable to the defendant. The defendant forgets that it is the duty of this court on appeal to review the evidence in the light most favorable to the plaintiff (respondent) and that in this connection it is our duty merely to search the record to see if there is any substantial evidence to sustain the implied findings of the verdict. We have read and reread the defendant's brief and are impressed with its unusual eloquence.

[2] Plaintiff, on her part, contents herself with setting forth in her brief certain evidence, setting forth the book and page where it may be found in the record, which is substantial evidence to sustain the verdict. It is not for this court to weigh the evidence nor to determine where the truth lies when there is a conflict.

This case, so far as the pleadings were concerned, was presented to the jury as a lawsuit involving the simple issues of a damage case in which the complaint alleged a conversion and the answer denied it without alleging any new matter or defense. But the defendant in her testimony undertook to prove that the parties were joint adventurers or partners, and so for twenty-six days before the trial court and jury there was unfolded a drama involving the lives of the parties since about the year 1900—the exciting career of the celebrated Mary Miles Minter, another daughter; a story of the yet unsolved Taylor murder mystery case; and certain insanity proceedings which had been instituted by the defendant against the plaintiff. This became a lawsuit truly jammed with drama, and it comes before us in 2807 pages which give us a life story of the Shelby family, as well as the facts pertinent to the instant case.

[3] The next contention of the defendant seems to be that this was a suit in equity for an accounting and that the court should have prepared findings, using the verdict of the jury as merely advisory. The answer is that there was nothing in the pleadings about a partnership and about an accounting and that the plaintiff went ahead and produced evidence which, if believed, entitled her to a verdict on the theory of conversion. The defendant admits that "a court cannot, by reason of unavailable evidence and failure of memory of litigants and witnesses, reconstruct, in kind, a long series of separated, successive, loosely-made, insufficiently understood, or misunderstood agreements between members of a joint, common, or collective enterprise, in order to determine what their actual agreement was in the beginning, and the myriad ways in which it was modified and changed and re-made, so as to reach its ultimate state". Exact justice is an ideal which is set up at which to aim, and the machinery of justice is set in motion to accomplish the ideal as nearly as possible within the limits of human capacity. After reading the briefs in this case we are delighted that our trial court, hampered as it was by the pleadings and by the human frailties of the parties, came so close to the ideal.

The defendant not only did not set up an equitable defense of partnership and for an accounting, but during the trial she testified that, "It all belonged to me. She had never earned anything. She had nothing due her." In other words, the defendant not only failed to set up an equitable defense in her pleadings but she failed even to attempt to establish the same by way of her evidence and on the contrary, her testimony is against any theory of partnership or joint enterprise.

[4-6] The right to a jury trial is determined by the character of the pleading. Stern v. Hillman, 115 Cal.App. 156, 300 P. 972; O'Dea v. Hibernia Savings & Loan Society, 119 Cal.App. 622, 7 P.2d 318. The issues in this case set up an action at law and not one in equity. It is elementary that if one wishes to avail himself of an equitable defense he must set it up in his answer. Verbeck v. Clymer, 202 Cal. 557, 261 P. 1017.

[7] The defendant next contends that the court erred in giving several instructions to the jury. The first instruction which the appellant presents and the one upon which she primarily relies in this regard is as follows: "In civil cases a preponderance of the evidence is all that is required. By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probabilities are in favor of the party upon whom the burden rests." At the request of the defendant the court had instructed the jury in the instruction just before this that the burden of proof was upon the plaintiff, and the defendant contends that the instruction of which she complains is, in effect, a statement that a preponderance of the evidence is evidence from which it results that the greater probabilities are in favor of the plaintiff. We do not think so. The instruction was a general instruction with awkward and confusing phrasing, but it did not point out either plaintiff or defendant. At another place in the instructions the court correctly instructed the jury that, "In civil cases a preponderance of evidence is always required, that is, such evidence as when weighed with that opposed to it has more convincing force." We are of the view that the instruction did not injure the defendant.

[8] The defendant also contends that there were other instructions which the court refused to give to her prejudice. In two of these instances the court gave substantially the same instruction in its own instructions. We have examined all of the complaints with regard to the instructions which are presented by the defendant, and it is sufficient for us to say that in none of the instances presented is there reversible error.

It is equally true, from what we have heretofore stated, that the trial court did not err in denying the defendant's motion for a directed verdict, and did not err in denying the motion for judgment notwithstanding the verdict, nor in denying the motion for new trial.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

28 Cal.App.2d 418

DODSON v. GREUNER, and six other cases.

Civ. 10654.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1938.

Rehearing Denied Oct. 15, 1938.

Hearing Denied by Supreme Court Nov. 14, 1938.

1. Executors and administrators 🔑437(3)

A provision in the Code of Civil Procedure, to the effect that if a person against whom an action may be brought dies before expiration of the time limited for commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after expiration of that time and within one year after the issuing of letters testamentary or of administration, must be read in connection with provisions in the Probate Code relating to the powers of a special administrator, in determining whether first provision is to be interpreted as permitting action within one year after "general" letters testamentary or of administration are issued. Code Civ.Proc. § 353; Probate Code, §§ 460, 463, 465.

2. Executors and administrators 🔑122(1)

Ordinarily, a special administrator has no powers except to collect, conserve and protect the estate of his decedent, but, where an order confers general powers on him, the order has the effect of imposing the powers, duties and obligations of a general administrator and obligates him to proceed in due time and as provided by law to receive and act on claims presented against the estate. Probate Code, §§ 460, 463, 465.

3. Executors and administrators 🔑437(3)

A provision in the Code of Civil Procedure, to the effect that if a person against whom an action may be brought dies before expiration of time limited for commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after expiration of that time and within one year after the issuing of letters testamentary or administration, is made applicable to a special administrator on whom general powers have been conferred by provision in the Probate Code imposing the duties and obligations of a general administrator on a special administrator on whom general powers are conferred and he may not waive its provisions. Code Civ. Proc. § 353; Probate Code, §§ 460, 463, 465.

4. Executors and administrators ⚷437(3)

An order conferring general powers on a special administrator had effect, in so far as rights of a claimant were concerned, of constituting the special administrator's letters of administration general, and required claimant to file claim within one year thereafter as permitted by statute providing that if a person against whom an action may be brought dies before expiration of time limited for commencement thereof, and the cause of action survive, an action may be commenced after expiration of that time and within one year after issuing of letters testamentary or of administration, so that action on notes which were not outlawed at time of maker's death commenced 16 months after a special administrator had been appointed for maker's estate and 15 months after order conferring general powers on the special administrator was entered was barred by limitation. Code Civ.Proc. § 353; Probate Code, §§ 460, 463, 465.

5. Licenses ⚷39

A credit man of bank acting as assistant to an assistant vice president of the bank was not precluded by the collection agency law from maintaining action without having procured a license, in his own name, on claims against estate of deceased obligor which were assigned to him by the bank. Gen.Laws Supp.1933, Act 1460, § 2.

6. Trial ⚷39

In action on note against administrator of maker, where parties and trial court treated note as being in evidence, after plaintiff had offered the note and proved the signatures thereon and examination and cross-examination elicited many of the elements contained in the note, and clerk duly stamped it as an exhibit, alleged error in entering judgment on note which was not introduced in evidence was unavailing though the record did not show that the trial court had announced "admitted."

7. Judgment ⚷222

Where seven actions arising out of loans by plaintiff's assignor to defendant's deceased were brought to trial, the amount due on each separate loan was ascertained and determined, and provisions were inserted in judgments that plaintiff might collect the amounts found due not in excess of the amount due on the several loans and thereupon the several judgments would stand satisfied, and where defendant did not point to any error in plaintiff's computation of amount due on each loan and the amount and nature of each judgment, defendant's claim that the trial court had rendered double judgments for the same loan was without foundation.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Actions by A. D. Dodson against Philip Greuner, as special administrator of the estate of W. M. Greuner, deceased, C. L. Jennings and others, A. S. Harvey and others, Jane Thorpe and others, Walter W. Parker and others, A. B. Manning and others, and F. A. J. Howell and others, arising out of loans made by the Bank of America to W. M. Greuner, since deceased, and maintained by plaintiff as assignee of the bank's claims. From a judgment entered on findings of fact in favor of the defendant in the first case, the plaintiff and the first named defendant both appeal. From judgments in favor of plaintiff in the remaining cases, the defendants appeal.

All judgments affirmed.

McKee, Tasheira & Wahrhaftig, of Oakland, and George A. Work, of San Francisco, for appellant A. D. Dodson.

Alfred Nelson, of Oakland, for other appellants.

McKee, Tasheira & Wahrhaftig, of Oakland, and George A. Work, of San Francisco, for respondent A. D. Dodson.

STURTEVANT, Justice.

The record before us presents seven appeals in seven actions arising out of loans made by the Bank of America to W. M. Greuner, since deceased. The bank assigned its claims to this plaintiff and as such assignee he maintained the litigation. The plaintiff appealed in one case and the defendant, Philip Greuner, as special administrator of the estate of W. M. Greuner, deceased, appealed in each of them.

Plaintiff's Appeal.

The plaintiff's appeal was taken in the action entitled A. D. Dodson Plaintiff, v. Philip Greuner, as Special Administrator of the Estate of W. M. Greuner, Deceased, Defendant. Prior to November 1, 1930, W. M. Greuner borrowed from Bank of Italy National Trust and Savings Association, three several sums of money and executed and delivered to said association his promissory notes promising to repay said sums with interest as therein stated. Said association, on November 1, 1930, consolidated with Bank of America National Trust and Savings Association. On December 1, 1930, W. M. Greuner borrowed from the Bank of America a further sum and executed and delivered his promissory note promising to repay such sum with interest. On February 8, 1934, W. M. Greuner died. No general letters testamentary or general letters of administration have ever been issued on his estate. On February 23, 1934, Philip Greuner was appointed special administrator of the estate of W. M. Greuner, deceased. On March 13, 1934, an order was duly made granting said special administrator powers of a general administrator of the estate of W. M. Greuner, deceased. On March 31, 1934, a notice to creditors of the deceased was published. On September 28, 1934, plaintiff caused to be presented, pursuant to said notice to creditors, his claim based on said promissory notes. The four several notes matured respectively on August 29, 1930, August 2, 1930, March 1, 1931, and August 29, 1930. On February 8, 1934, the date of the death of W. M. Greuner, the decedent was in default in his payments on each and all of the said notes. No action was taken on said claim and on June 29, 1935, the plaintiff commenced this action. That is, he commenced his action sixteen months after special letters of administration issued and fifteen months after the order granting general powers issued. The defendant filed an answer setting forth many denials and pleaded as an affirmative defense that the action was barred by section 353 of the Code of Civil of Civil Procedure. The trial court made findings of fact in favor of the defendant and from the judgment entered thereon the plaintiff has appealed.

[1-3] The plaintiff makes only one point and that is that his action was not barred by the provisions of section 353 of the Code of Civil Procedure and therefore judgment on the findings of fact should have been in his favor. The real controversy between the parties brings up the proper construction of said statute. Said section is as follows: "§ 353. * * * If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." The plaintiff contends that said language should be construed as though the word "general" were inserted before the word "letters". He argues that such was the meaning when the section was enacted and such must be its meaning now. The vice in that argument is that the plaintiff overlooks the plain meaning of certain sections of the Probate Code which must be read in connection with section 353 of the Code of Civil Procedure. Ordinarily a special administrator has no powers except to collect, conserve, and protect the estate of his decedent. Probate Code, secs. 460, 463. His obligations are to the estate solely. But where, as here, an order is made conferring on the special administrator general powers, it has the effect of conferring and imposing on him "* * * the powers, duties and *obligations* of a general administrator". Probate Code, sec. 465. Thereafter he has obligations to perform to others than merely to the estate; that is, among other things, he must proceed, in due time and as provided by law, to receive, and act on claims presented against the estate. The language of section 353 of the Code of Civil Procedure is in no manner changed but by virtue of sections 463 and 465 of the Probate Code said section 353 is made applicable to him and he may not waive its provisions. (11 Cal.Jur., sec. 461, p. 776.)

[4] When on March 13, 1934, the order was made "providing that such special administrator shall thereafter have the additional powers, duties and obligations of a general administrator * * *." (Probate Code, sec. 465), such order had the effect, so far as the rights of this plaintiff are concerned, of making and constituting defendant's letters of administration general and the plaintiff was bound to act accordingly. The trial court did not err in holding that

when this action was commenced June 29, 1935, the action was barred by section 353 of the Code of Civil Procedure.

Defendant's Appeal.

[5] The defendant earnestly contends that in maintaining these actions the plaintiff is violating the collection agency law of this state. Deering's 1933 Supp. to Deering's Codes and General Laws, Act 1460, p. 1271. Section 2 consists of four paragraphs. The defendant quotes from and relies on the general language contained in the first paragraph. The plaintiff quotes from and relies on provisions contained in the second paragraph. He quotes and italicizes as follows: "The term 'collection agency' shall not include attorneys at law, individuals regularly employed on a regular wage or salary, *in the capacity of credit men or in other similar capacity upon the staff of employees of any one person, one firm, one corporation or one voluntary association* not engaged in the business of a collection agency, *banks,* abstract companies doing an escrow business, duly licensed real estate brokers or agents doing a real estate business, nor a merchant-owned nonprofit credit association unless they are conducting a collection agency." The trial court found all of the facts involved in the issues in favor of the plaintiff. Except as quoted below, the defendant did not produce the testimony of the plaintiff nor the testimony of any one of his superior officers nor any document showing or tending to show the authority of the plaintiff. Kast v. Miller & Lux, 159 Cal. 723, 727, 115 P. 932. The plaintiff testified that he was a credit man of the Bank of America acting as an assistant to an assistant vice-president of the bank. The defendant elicited statements to the effect that, in transacting the business entrusted to him, the plaintiff did or did not do certain things. The very most that can be said in behalf of such testimony is that it raised a conflict in the evidence. However, we have not discovered even a conflict in the evidence. There was no claim that the plaintiff acted for any person whatever except the Bank of America. That he was not the only credit man and did not do all of the credit business of the Bank of America are facts which are not persuasive. It is not reasonable to assume the legislature intended all of the credit business of a large institution must be done by one man.

[6] In one of the actions, the defendant asserts, the trial court gave judgment in favor of the plaintiff on a note which was never introduced in evidence. The vice in that contention is that it is not supported by the record. True, the record does not show that the trial court announced "admitted". But the record shows many facts to the effect, that both parties and also the trial court proceeded and treated the note as being in evidence. The plaintiff offered the note. He proved the signatures thereon. He stated many of the elements contained in the note. The defendant's cross-examination elicited other elements contained in it. The clerk duly stamped it as an exhibit and as such it is before this court. We may not, under these facts, hold it was not admitted in evidence. 24 Cal.Jur. 759; 64 Cor.Jur. 116; Wright v. Roseberry, 81 Cal. 87, 22 P. 336; Consolidated Lumber Co. v. Frew, 32 Cal.App. 118, 162 P. 430.

[7] The next point made by the defendant is that the trial court rendered double judgments for the same loan. We think it is clear it did not do so. There were seven actions brought to trial. One we have discussed above under the heading "Plaintiff's Appeal". That action was commenced *after* the death of W. M. Greuner. The other six actions were commenced *before* his death. It is not claimed that two separate judgments for the same amount were rendered for any single loan. Nor is it claimed that an allowance in any other specific sum was so doubled. But it is the contention of the defendant that as he construes the judgments there was, in effect, a doubling. The plaintiff in his brief states separately the amount due on each loan, the amount and nature of each judgment, and demonstrates there was no doubling of awards made as to any one loan. In his reply brief the defendant does not point to any error in the computations so set forth by the plaintiff. Where, as here, there are so many different documents evidencing certain obligations arising out of and relating to several different loans, it would be possible for a doubling to occur. But the trials were conducted closely following the procedure delineated in Anglo-California T. Co. v. Oakland Rys., 193 Cal. 451, 225 P. 452. The amount due on each separate loan was ascertained and determined. The amount of the liability on each separate contract was also ascertained and determined. Then, following the case last cited, provisions were inserted in the judgments that the plaintiff might collect the amounts so found due up to, but not in excess of, the amount due on the several

loans and that thereupon the several judgments would stand satisfied.

The defendant contends that the plaintiff could take no affirmative action to enforce his rights after the statute of limitations had run against the plaintiff in the action based on the primary debt. If he means by these contentions that after the statute of limitations had run in the first action the plaintiff had no right to take any step in the other actions, notwithstanding the fact that they were commenced before the statute of limitations had run, such contentions are too broad. Anglo-California Trust Co. v. Holbrook, 218 Cal. 531, 24 P.2d 169; Griggs v. Day, 136 N.Y. 152, 32 N.E. 612, 18 L.R.A. 120, 32 Am.St.Rep. 704, 716; Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385, 95 Am.St.Rep. 647; Hodge v. Truax, 184 Wash. 360, 51 P.2d 357, 103 A.L.R. 420, 432; Russell v. People's Nat. Bank, Tex. Civ.App., 2 S.W.2d 961, 963; 17 R.C.L. 948.

All of the judgments appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

12 Cal.2d 168

COLBURN BIOLOGICAL INSTITUTE et al. v. SHAFFER et al.

L. A. 16550.

Supreme Court of California.

Sept. 21, 1938.

Rehearing Denied Oct. 20, 1938.

Corporations ⟹298(5)

Under corporation's by-laws providing that "any document or resolution" signed by three-fourths of the trustees or by all members of any committee "will be as binding upon the institute as though passed at a regular meeting," three of corporation's four trustees had authority to move for substitution of attorneys and dismissal of appeal in a proceeding against the corporation.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. D. Ballard, Judge.

Action by the Colburn Biological Institute and others against Fannie Shaffer and others, wherein named defendant filed cross-complaint. From the judgment Fannie Shaffer, trustee, appealing for and on behalf of the Colburn Biological Institute, appeals. On motions for substitution of attorneys and to dismiss the appeal.

Motion to substitute granted; appeal dismissed.

Charles M. Easton and Palmyra Pressly, both of Los Angeles, for appellant Fannie Shaffer.

David W. Richards and H. F. Poyet, both of Los Angeles, for respondent Colburn Biological Institute, etc.

John F. Poole, of Los Angeles, for respondent Dr. Nora H. Bates.

PER CURIAM.

We are here confronted with another phase of the protracted litigation that has been waged on several fronts by the members and trustees of The Colburn Biological Institute, a nonprofit corporation, for control of the organization and its properties. Upon a prior appeal, wherein the opposing factions likewise were at loggerheads, we affirmed a judgment of the superior court of Los Angeles county determining that Dr. Nora H. Bates, Dr. Alice M. Farwell, C. Cecelia Oberdorfer and Dr. Fannie Shaffer constituted the board of trustees of the institute. Colburn Biological Institute v. DeBolt, 6 Cal.2d 631, 59 P.2d 108. On the authority of that decision and in reliance on article XIII of the by-laws of the institute, to the effect that "Any document or resolution of the trustees or of any committee, if signed by three-fourths of the trustees or by all of the members of any committee, will be as binding upon the institute as though passed at a regular meeting of the committee or a special, stated or annual meeting or adjourned meeting of the trustees," the three trustees first above named have moved this court to substitute Henry T. Poyet as attorney of record herein for the institute in order that they and the institute, through such substituted attorney, may procure the dismissal, contemporaneously moved, of the present appeal prosecuted by the trustee last above named purportedly for and on behalf of the plaintiff institute from an order granting a new trial to the plaintiffs in the action wherein, as stated, the rival factions are again contending for control of the organization. The new trial was moved for and granted under the provisions of section 953e of the Code of Civil Procedure which provides for such relief, in the discretion of the trial court, when the death of the phonographic reporter precludes the procurement of a record of the trial proceedings.

Inasmuch as three of the four persons heretofore determined by this court to be the trustees of the institute have joined in urging the respective motions we are of the view that under the provisions of article XIII of its by-laws, above quoted, they are in a position to speak for and on behalf of the institute and effect should therefore be given to their desires in the premises. Moreover, a granting of the requested relief will be another step toward the termination of this litigation and will do much to obviate a contrary adjudication as to the personnel of the institute's trustees. Diametrically opposed judgments upon this legal issue would present an anomalous and wholly unsatisfactory situation. Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850; Southern Pac. Co. v. City of Los Angeles, 5 Cal.2d 545, 548, 55 P.2d 847.

The application for leave to take additional evidence is denied.

The motions for substitution of attorneys and to dismiss the appeal are, and each is, granted and the appeal is dismissed.

12 Cal.2d 170

CITY OF LOS ANGELES v. STONE et al.

L. A. 16919.

Supreme Court of California.

Sept. 21, 1938.

Rehearing Denied Oct. 20, 1938.

Corporations ⚷298(5)

Under corporation's by-laws providing that "any document or resolution" signed by three-fourths of the trustees or by all the members of any committee "will be as binding upon the institute as though passed at a regular meeting," three of corporation's four trustees had authority to move for substitution of attorneys and dismissal of appeal in condemnation proceeding against the corporation, irrespective of the nature of disagreement between such trustees and the fourth trustee who resisted their action. St.1903, p. 376.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the City of Los Angeles, a municipal corporation, against Edward Stone and others for opening of street and condemnation of land. From an adverse judgment, the Colburn Biological Institute appealed and moved for substitution of attorneys and dismissal of its appeal.

Motion granted; appeal dismissed.

Prior opinion, 81 P.2d 435.

Palmyra Pressly, of Los Angeles (Charles M. Easton, of Los Angeles, of counsel), for appellant Colburn Biological Institute.

H. F. Poyet, of Los Angeles, for Colburn Biological Institute as to correction of minutes only.

John F. Poole, of Los Angeles, for Dr. Nora H. Bates.

Ray L. Chesebro, City Atty., Arthur W. Nordstrom, Deputy City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this cause after decision by the District Court of Appeal in and for the Second Appellate District, Division One, not because of any dissatisfaction with the opinion of that court but solely because of the pendency here of another appeal wherein three of the four trustees of The Colburn Biological Institute sought, as in the instant case, to procure a substitution of attorneys for the institute and a dismissal of an appeal on its behalf. We have this day granted the requested relief in such other appeal, (The Colburn Biological Institute v. Shaffer, Cal.Sup., 82 P.2d 938), as did the District Court of Appeal herein. Therefore, and upon the authority of the cited case, as well as for the reasons advanced by Mr. Justice White in his opinion prepared herein when the cause was pending before the District Court of Appeal, we hereby adopt said opinion as and for the decision of this court. It reads:

"This is a motion by appellant, acting through three of its four trustees, for a substitution of attorneys and a dismissal of this appeal. For an understanding of the pending proceeding it will be necessary to set out some of the facts in connection with the litigation.

"This action was commenced October 23, 1928, under the Street Opening Act of 1903 (Stats.1903, p. 376), for the opening, widening, extending and laying out of Allesandro street from the Los Angeles river to Glendale boulevard. In November, 1929, to the end that some immediate improvement work might be done in Allesandro street to handle the volume of traffic, the Los Angeles city council ordered the board of public works to prepare plans and advertise for bids for the paving of that portion of Allesandro street then owned by the city. Subsequently, upon the petition of various organizations and citizens that a wider pavement be constructed, and upon certain property owners', including appellant herein, giving a written consent to the city to enter upon a portion of the land then being condemned in this action and construct thereon a concrete sidewalk, the city proceeded to construct the sidewalk in accordance with the terms of said agreement between such property owners and the city. Thereafter, an interlocutory judgment was entered in this cause, determining the amount of awards to be paid to each defendant therein, and assessments were spread under the provisions of the Street Opening Act of 1903 for the purpose of raising funds with which to pay these awards. Following this, the city council determined that the awards made were so excessive and the assessments spread against each property so high in proportion to the actual value of the property, that in the opinion of the city council the property in said assessment district could not bear the burden of such high assessments. As an example of the wisdom of the city council in thus determining, it might be said that the assessment against the property of appellant herein alone was in excess of $39,000, whereas its award in said action for land sought to be taken and severance damage was but $15,005.73. No public funds being available for contribution to the cost of the improvement for the purpose of reducing said assessments, the city council on December 18, 1935, adopted an ordinance abandoning said condemnation and said assessment proceedings. The city did not at any time take immediate possession of any of the land sought to be condemned in said action by virtue of said proceedings, or any possession other than that pursuant to the agreements aforesaid.

"When in May, 1937, the city of Los Angeles made a motion to dismiss the action in the superior court, appellant herein, who was one of the defendants, filed written objections to the dismissal and made a motion for an order requiring the city to pay to said defendant institute the award theretofore rendered in its favor by the interlocutory judgment. When this last named motion was heard jointly with the city's motion for dismissal, the latter motion was granted, while the institute's motion for an order compelling the city to pay the award theretofore rendered in favor of the institute was denied. The defendant institute filed a memorandum of costs, including an item for attorney's fees. A motion to retax costs was made on behalf of plaintiff city, and defendant institute filed a motion for a writ of execution to be levied against the award found in favor of said institute in the interlocutory judgment, which last motion for a writ of execution was denied, and defendant institute's costs were taxed in the sum of $227.50, which amount the city paid into court for the benefit of defendant institute. Thereafter, defendant institute took an appeal from the judgment of dismissal and from the order of the superior court denying to it a writ of execution on the interlocutory judgment. These appeals are now pending before this court and are the appeals which are here sought to be dismissed.

"Subsequent to the taking of said appeals, Colburn Biological Institute filed an action against the city of Los Angeles wherein it sought to recover damages from the city alleged to have arisen out of the abandonment of the condemnation proceedings, but not for the collection of the award made in said proceedings. Thereafter, under date of March 10, 1938, respondent's city attorney wrote a letter to the attorneys representing all four of the trustees of said Colburn Biological Institute, wherein it was stated that the city attorney would recommend to the city council a compromise of said appeals and claims in the sum of $3,500, if acceptable to the institute. Thereafter respondent city received a letter from the attorney representing trustee Dr. Shaffer, rejecting the offer of settlement; and approximately a month later respondent city received a joint letter from attorneys representing the remaining three trustees of the institute, Dr. Bates, Dr. Farwell and Miss Oberdorfer, agreeing to accept the sum of $3,500 in full settlement of said action for damages. The Los Angeles city council thereafter approved such settlement and directed that the sum of $3,500 be paid to Colburn Biological Institute in full settlement of its claim for damages against the city and for a dismissal of all actions and proceedings pending against the city arising out of the abandonment and dismissal of said condemnation proceedings and the taking of possession by the city of the real property belonging to said Colburn Biological Institute by virtue of the aforesaid written permit and agreement.

"Three of the four trustees caused to be executed the necessary deed to the city, and the city is now ready and willing to deliver to Colburn Biological Institute the sum of $3,500 when said institute can give to the city proper dismissals of the appeals and actions for damages aforesaid.

"One of the trustees, Dr. Shaffer, opposes the motion for substitution of attorneys on behalf of appellant institute on the ground that the other trustees are acting without authority and in violation of the by-laws of said corporation and in defiance of the best interests and welfare of the institute.

"With the differences that apparently have arisen between one of the trustees and her three colleagues on the board, and which from the record appear to have been of long years' duration, we have no concern. The only questions before us, are, first, whether the three trustees who seek a substitution of attorneys and dismissal of the appeal are duly qualified and acting trustees of the appellant institute; and secondly, if they are duly qualified trustees, do they possess the power to substitute counsel and thereupon, as appellants, to dismiss their appeal?

"The * * * court has settled the first question * * * in the case of Colburn Biological Institute et al. v. De Bolt, 6 Cal.2d 631 [59 P.2d 108], wherein [we] affirmed a judgment of the superior court of Los Angeles county deciding that Dr. Nora H. Bates, Dr. Alice M. Farwell, C. Cecelia Oberdorfer and Dr. Fannie Shaffer (the latter of whom opposes the motion herein), constituted the board of trustees of Colburn Biological Institute. As to the authority of any three of the four trustees to act for and on behalf of appellant institute, we are directed to article XIII of the by-laws of Colburn Biological Institute a corporation which provides as follows: 'Any document or resolution of the trustees or of any committee, if signed by three fourths of the trustees or by all of the members of any committee, will be as binding upon the institute as though passed at a regular meeting of the committee or a special, stated, or annual meeting or adjourned meeting of the trustees.'

"It follows from the foregoing that the three trustees, constituting a majority and three-fourths of the board of trustees of appellant institute, are authorized by their by-laws to substitute counsel in the corporation's appeal herein."

It is therefore ordered that the motion to substitute attorneys be and the same is hereby granted. It is further ordered that appellant's motion to dismiss the appeal herein be and the same is granted, and the appeal is dismissed.

O WEST KEY NUMBER SYSTEM

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12 Cal.2d 175

KOYER et ux. v. McCOMBER et al.

L. A. 16701.

Supreme Court of California.

Sept. 26, 1938.

1. New trial 🔑76(1)

Where there is a conflict of evidence on issue of damages, trial court may grant a motion for new trial on ground that verdict is excessive, even if it does not appear to the court that the verdict was given under influence of passion or prejudice.

2. Appeal and error 🔑1004(3)

When a trial court has denied a motion for a new trial on ground of excessiveness of verdict, reviewing court, on appeal, may not reverse the order or reduce the verdict except upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion.

3. Appeal and error 🔑1004(3)

In action for fraud in connection with exchange of realty, where evidence conflicted as to damages caused thereby to plaintiffs, Supreme Court was required to affirm order of trial court granting a new trial on ground that damages were excessive.

4. Appeal and error 🔑933(1)

All intendments are to be indulged in by a reviewing court in support of action of trial court in passing on a motion for a new trial, and trial court's action will not be disturbed if the question of its propriety is open to debate.

5. New trial 🔑170

Where order of trial court simply granted a new trial and did not limit the second trial to any particular issue, case was thrown open for new trial upon all issues made by the pleadings.

6. Appeal and error 🔑877(1)

Appellants, who sought reversal of trial court's order granting new trial on ground that verdict was excessive, could not obtain reversal by showing that trial court committed error in adopting improper method for fixing damages. Civ.Code, § 3343, as amended by St.1935, p. 1612.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action for damages for fraud in connection with an exchange of property by A. S. Koyer and wife against C. L. McComber and others, wherein defendants C. L. McComber and wife filed a cross-complaint. Judgment for plaintiffs for $47,-500, and from an order granting a motion for new trial, plaintiffs appeal.

Affirmed.

Prior opinion, 75 P.2d 89.

Laurence B. Martin and Frank S. Hutton, both of Los Angeles, for appellants.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, for respondents.

Jean Wunderlich, of Los Angeles, for respondent Linnie H. McComber.

Mathes & Sheppard and William C. Mathes, all of Los Angeles, for respondent Linnie H. McComber, as administratrix.

Edwin C. Boehler, of Los Angeles, for respondents T. C. Holz and C. J. Jasper.

CURTIS, Justice.

Plaintiff, A. S. Koyer, was the owner of certain unimproved property in the counties of Los Angeles and Imperial. C. L. McComber was the owner of an apartment house in the city of Long Beach known as the Terry apartments. On May 18, 1932, they entered into an agreement whereby the plaintiff, A. S. Koyer, agreed to exchange his unimproved real property for the Terry apartments owned by C. L. McComber. Subsequently thereto the transaction was made a matter of escrow, resulting in a conveyance by A. S. Koyer and Martha M. Koyer, as husband and wife, of their unimproved property to C. L. McComber, and a conveyance by C. L. McComber, and his wife, Linnie H. McComber, of the Terry apartments to plaintiff, A. S. Koyer, and the latter entered into and took possession of said apartments. In these transactions the defendants, Holz and Jasper, acted as real estate brokers, the defendant Jasper representing C. L. McComber. Pending the negotiations which finally led up to this exchange of properties, and on March 9, 1932, the defendant Holz sent a letter to plaintiff, A. S. Koyer, in which it was stated, among other things, that the Terry apartments was a reinforced structure, that the income from the building during 1930 was $34,000 and that the expenses in that year were approximately $1,000 per month, including taxes; that the income during 1931 was between $29,000 and $30,000, with the expenses again running about $1,000 per month. A short time after plaintiff, A. S. Koyer, took possession of the Terry apartments and while arranging to make certain alterations in the basement of the building, he discovered that certain of the structural beams which had been represented to him as reinforced concrete were made of wood, and thereafter made further investigation from which he concluded that the building, instead of being a class A reinforced concrete building, was not only not such a building, but was a class C building, within the meaning of the ordinances of the city of Long Beach. Within a short time thereafter, Mr. Koyer had an audit made of the books of the apartment as kept by McComber previous to the exchange which tended to show that the Terry apartments instead of making the large profit set forth in the letter of March 9, 1932, from defendant Holz to plaintiff, A. S. Koyer, was yielding an income much less than that represented in said letter. Following the above investigation and discovery, the plaintiffs brought this action against Mr. and Mrs. McComber, the realty brokers, Holz and Jasper, and one Mitchell. The latter defendant defaulted, and for that reason it will not be necessary to again refer to the action in so far as it affects him.

The action is one in damages based upon the alleged fraudulent representations of defendants as to the character of the Terry apartments, and as to the income from said building. The facts upon which the plaintiffs base their claim for damages were set forth in considerable detail in their complaint. The defendants in their answer denied all allegations of the complaint which imputed to them fraud or any false representations either as to the character of the building or its income. The defendants, C. L. McComber and wife, filed a cross-complaint to which the plaintiffs filed an answer. The action was tried by the court with a jury, and resulted in a verdict and judgment in favor of the plaintiffs in the sum of $47,500 and that defendants, McComber and wife, take nothing by their cross-complaint. The defendants moved for a new trial on the ground, among others, of "excessive damages, appearing to have been given under the influence of passion or prejudice" and also on the ground of "the insufficiency of the evidence to justify the verdict". The motion was granted on the ground of "the insufficiency of the evidence to justify the verdict of $47,500", and also on the ground of "the insufficiency of the evidence to justify the verdict". From this order the plaintiffs appealed. The case was one within the appellate jurisdiction of the District Court of Appeal. That court held respecting the ground of excessive damages that the evidence was in conflict concerning the amount of damages suffered by the plaintiff but that "there is nothing in the record indicating that the jury here was actuated by elements of passion or prejudice in believing and acting upon testimony which, if believed, justified a finding in favor of plaintiffs for the amount of damages awarded by the verdict". That court, for the reason that it did not appear to it that the verdict was given under the influence of passion or prejudice, accordingly reversed the order of the court granting a new trial upon the ground that the damages were excessive. We granted a petition for hearing after decision by the District Court of Appeal for the purpose of considering further the question of the power of the trial court to grant a new trial on the ground that the verdict was excessive where the evidence as to the amount of damages was conflicting. In submitting the case for argument before us, we requested counsel to give consideration to the two following questions:

(1) Was it within the power of the trial court, in the event evidence was conflicting as to the amount of damages, to grant a new trial for that reason, based upon the insufficiency of the evidence to support the verdict?

(2) Must it appear in order to sustain an order granting a new trial that the award of damages was the result of passion or prejudice?

Appellants in their brief filed in response to the submission of these two questions, did not discuss either of said questions, but attempted to show that there was no conflict in the evidence, thus rendering it unnecessary to make any answer to the questions propounded by us. In endeavoring to show that there was no conflict in the evidence as to the amount of damages which appellants alleged they sustained by reason of the fraudulent representations of respondents, the appellants took the average valuation placed upon their property as given by the witnesses of each party, and the average valuation of the Terry apartments, and from the average value of their property as shown by the testimony, they subtracted the average valuation placed upon the Terry apartments, and the difference in these two valuations they fixed as appellants' damage. In support of this method of ascertaining their damage by establishing the difference in the valuation of the two properties, they cite and rely wholly upon the case of Ham v. County of Los Angeles, 46 Cal.App. 148, 189 P. 462. A mere reading of the decision in that case shows that it has no application to the question now before us, and cannot be considered as an authority in support of the appellants' contention that no conflict exists in the evidence in the instant case as to the amount of appellants' damages.

Referring to the evidence in the case upon the question of damages, the record shows that the main controversy revolved around the value of the Terry apartments, and that this evidence consisted of the testimony of three witnesses, two produced by the plaintiffs and one by the McCombers. The testimony of one of plaintiffs' witnesses showed that the damages sustained by the plaintiffs equalled, if it did not exceed, the amount of the verdict. From the testimony of the other witness of the plaintiffs, it was shown that the amount of plaintiffs' damage was much less than the amount of the verdict, while the testimony of the defendants' witness showed that plaintiffs were not damaged in any amount, but that they actually made a profit by the transaction. It is evident that in this state of the record, the evidence as to the issue of damages showed a most glaring conflict. With the record in the case showing a distinct conflict in the evidence as to the amount of damages, was it within the power of the trial court to grant a new trial on the ground that the verdict of the jury fixing the amount of damages was excessive?

In the case of Baker v. Board of Trustees, etc., 133 Cal.App. 243, 249, 23 P.2d 1071, 1073, the court said: "The amount of damages is committed to the sound discretion of the jury, and, next, to the discretion of the judge of the trial court who, in ruling upon the motion for new trial, may consider the evidence anew and set aside the verdict if it is not just."

In the case of Parker v. Brown, 13 Cal.App.2d 501, 505, 57 P.2d 183, 184, we find the rule stated as follows: "The record also sustains the conclusion that the trial court felt that the implied findings of the jury as to the amount of compensatory damages suffered by plaintiffs and the amount of punitive damages corporation was required to pay were not warranted by the evidence. Since all presumptions are in favor of the regularity of the order (Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739), and since we must presume that the court had the matter of damages in mind when it made its order, it follows that the trial court would have a right to grant a new trial on the question raised with respect to damages alone. Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 284, 297 P. 35."

This court in the case of Doolin v. Omnibus Cable Co., 125 Cal. 141, 144, 145, 57 P. 774, 775, announced the same principle in the following language: "Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that, when there is material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict. The record of the case just cited from 116 Cal. and 47 P. [Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 P. 1019] shows that precisely the same practice was pursued there as in the present case. The court ordered that defendant's motion for new trial be denied, provided the plaintiff would consent to a reduction of his verdict from $8,000 to $4,000. Plaintiff refused, and the rule was made absolute on the sole ground that the verdict was excessive. On appeal the plaintiff urged the same objections that plaintiffs make here—that the record did not indicate passion or prejudice in the verdict of the jury, and that the trial judge had no proper control over it. But this court pointed out that there was evidence regarding the amount of damage, upon which the views of men might differ and said, 'Every intendment is to be indulged here in support of the action of the court below, and it will not be disturbed if the question of its propriety be open to debate.'"

In the case of Swett v. Gray, 141 Cal. 63, 69, 70, 74 P. 439, 441, we find the following apt statement of the law upon this subject: "That the evidence is insufficient to justify the verdict or other decision is a ground distinct from that of damages appearing to have been given under the influence of passion or prejudice, and the court may grant a new trial where in its judgment the evidence is insufficient to justify the verdict, without regard to the question as to whether the verdict was the result of passion or prejudice; and, 'as the granting or denying a motion for a new trial upon the ground that the decision or verdict was contrary to the evidence is largely within the discretion of the trial court, its action will not be reversed unless its discretion in this respect has been abused, whether this be the only ground upon which the motion is made or only one of the several statutory grounds.' People v. Flood, supra [102 Cal. 330, 36 P. 663]."

These authorities unequivocally hold that it is within the sound discretion of the trial court in ruling upon a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage.

In Meinberg v. Jordan, 29 Cal.App. 760, 157 P. 1005, 1007, we find statements of the law upon this question both from the District Court of Appeal and from this court. In that case the District Court of Appeal states the rule as follows (page 762, 157 P. page 1006): "The declaration of the court that such sum was 'excessive' does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case." In denying an application for a hearing to the Supreme Court, this court approved the ruling of the District Court of Appeal in the following language: "The application for hearing in this court after decision of the District Court of Appeal of the First District is denied upon the first ground stated in the opinion of the District Court of Appeal, namely, that it cannot be held that there was error in the action of the trial court in granting defendants' motion for a new trial upon the 'ground that the damages awarded to the plaintiff * * * are excessive.'"

[1, 2] The rule established by the decisions of this court appears to be that a trial court may, when there is a conflict of evidence upon the issue of damages, grant a motion for a new trial on the ground that the verdict is excessive, even if it does not appear to the trial court that the verdict was given under the in-

fluence of passion or prejudice, but, when a trial court has denied a motion for a new trial on the ground of the excessiveness of the verdict, on appeal the reviewing court may not reverse the order or reduce the verdict except upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion. This is the rule announced in the case of Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 284, 297 P. 35, 37, where we find the following statement of the law: "It may be conceded that the rule controlling in cases where the reviewing court is asked to reverse a judgment upon the ground of excessive verdict, after the trial court has refused to set aside the same, is that the verdict must stand unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice, passion, or corruption, rather than sober judgment. Szasz v. Joyland Co., 84 Cal.App. 259, 257 P. 871; Reneau v. Hirsch, 88 Cal.App. 1, 262 P. 1100; Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073. But where, as here, we are asked to review the act of the court, where in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and it will not be disturbed if the question of its propriety be open to debate. Harrison v. Sutter Street R. Co., 116 Cal. 156, 47 P. 1019. Furthermore, where a trial court grants a new trial upon the ground that the verdict is excessive, the declaration of the court that it is excessive does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case. Meinberg v. Jordan, 29 Cal.App. 760, 157 P. 1005, 1007."

[3] The following cases bear upon the same subject and support the language just quoted: Swett v. Gray, 141 Cal. 63, 69, 70, 74 P. 439; Griffey v. Pacific Electric Railway Co., 58 Cal.App. 509, 512, 513, 514, 209 P. 45; Muench v. Gerske, 139 Cal.App. 438, 444, 34 P.2d 198; Turner v. Whittel, 2 Cal.App.2d 585, 589, 38 P.2d 835; Holden v. Patten-Blinn Lumber Co., 7 Cal.App.2d 220, 224, 45 P.2d 1037. These authorities compel the affirmance of the order granting a new trial on the ground that the damages were excessive.

[4, 5] We think it unnecessary to discuss the further ground upon which the motion for a new trial was granted—that is, that the evidence was insufficient to justify the verdict finding the defendants guilty of fraud in said transaction. Conceding that there was sufficient evidence to support the verdict as to all answering defendants, it is apparent that there was a substantial conflict in this evidence in respect to the character of the Terry apartments,—that is, whether it was a class A building or one of lesser grade—also as to the net income derived therefrom, and as to certain representations which the plaintiffs claimed were made by the defendants respecting these matters. This conflict was evidently resolved by the trial court in favor of the defendants and, as shown by the authorities heretofore cited, all intendments are to be indulged in by a reviewing court in support of the action of a trial court in passing upon a motion for a new trial, and it will not be disturbed if the question of its propriety be open to debate. The order of the trial court simply granted a new trial, and did not limit the second trial to any particular issue. The case was therefore thrown open for trial upon all issues made by the pleadings.

[6] Appellants make the further contention that the trial court resorted to an erroneous method of fixing the amount of damages prescribed in section 3343 of the Civil Code as amended in 1935, St. 1935, p. 1612. This section provides that in actions like the instant one the measure of damages is the difference between the actual value of that with which the defrauded party parted and the actual value of that which he received. We are unable to perceive how the appellants can avail themselves of this action of the court, even if the court acted erroneously. Appellants are endeavoring to reverse the order of the trial court in granting a new trial. Can they do so by showing that the trial court committed error during the trial? If the court adopted an erro-

neous method of fixing damages, then this error would be a proper ground for the granting of a new trial, and not a ground for reversing the order granting a new trial. We express no opinion as to the contention that the court applied the wrong rule as to the measure of damages for the reason that the question has not in our opinion been sufficiently argued.

The order granting a new trial is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; HOUSER, J.; SEAWELL, J.

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28 Cal.App.2d 532

NOLTE v. SOUTHERN CALIFORNIA HOME BUILDING CO. et al.

Civ. 2066.

District Court of Appeal, Fourth District, California.

Sept. 26, 1938.

1. Appeal and error 🔑1011(1)

A finding supported by conflicting evidence must be accepted by the District Court of Appeal.

2. Compromise and settlement 🔑5(3)

A payee could not recover on note which was the subject of an oral agreement of settlement, notwithstanding that a subsequent instrument reducing the agreement to writing was not signed by payee, where there was no understanding between the parties that the terms of the oral agreement were to be reduced to writing and signed by the parties before the oral agreement should become effective.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action on a promissory note by Henry Nolte against the Southern California Home Building Company and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Dempster McKee, of San Diego, for appellant.

Wright, Monroe & Harden, of San Diego, for respondents.

LEONARD, Justice pro tem.

This is an appeal from a judgment in favor of the defendants in an action upon a promissory note for $34,500, executed by the defendant, Southern California Home Building Company, a corporation, hereafter called the company, and guaranteed by the defendants, J. B. Coker and Regina W. Coker. They were president and secretary, respectively, of the company and owned practically all of its capital stock.

Appellant had, from time to time, for a number of years, loaned money to respondents. On October 1, 1932, the respondents' joint indebtedness to appellant amounted to the total sum of $34,500. On that date, a note for that amount was given by the company to appellant, and at the same time, or later, the Cokers guaranteed its payment. Certain collateral and other security was given to appellant as security therefor.

Thereafter, and some days prior to February 3, 1937, the company, being in default in the payment of both principal and interest of said note, and being somewhat financially embarrassed (if not in fact insolvent), through its president, J. B. Coker, entered into certain oral negotiations with appellant for a settlement of said note. These negotiations led to an oral agreement of settlement under the terms of which certain real estate and collaterals belonging to the company were to be transferred to appellant, and he was to surrender to the company certain other securities held by him.

After the oral agreement had been made, it was agreed that appellant and J. B. Coker would meet at the law office of E. L. Seavey and have him prepare a written instrument to evidence their oral agreement. On or about February 3, 1937, appellant and Coker met at Seavey's office and Coker, in the presence of appellant and without any objections on his part, outlined to Seavey the oral agreement and requested him to reduce it to writing.

This was done, and on February 3, 1937, Seavey delivered two copies thereof to appellant, who took them to Coker for the company's signature. They were signed by the company, and one of the signed copies delivered to appellant. He did not sign it nor did he object to it. Neither of the parties, apparently, raised any question about his signing it. No new negotiations concerning the settlement were had in Seavey's office.

Shortly thereafter, the company transferred to appellant the real estate and securities he was to receive under the oral settlement agreement, and he delivered to the company the securities it was to receive. The note, which had been left with Seavey by appellant, was later surrendered by Seavey to Coker. After the transfers had been made, appellant dealt with the property as his own. He sold some of it, collected rents from the real estate, made collections on the securities transferred, and accepted renewals upon some of the notes received by him. He never rescinded nor offered to rescind the agreement, nor to restore to the company any of the property deeded or transferred to him, nor did he offer to hold such property as security.

The record, consisting of several hundred pages of testimony, contains a mass of conflicting evidence and it would serve no useful purpose to attempt to review it.

[1, 2] Appellant's first contention is to the effect that the oral agreement was to be reduced to writing before it should become a binding obligation on appellant and that, as he never signed it, it was not binding.

The finding is that the parties "orally agreed" to the settlement, and "that said agreement so entered into was thereafter reduced to writing and delivered to the plaintiff, but was not signed by him".

This finding is supported by conflicting evidence, and must be accepted by this court. There is no evidence in the case to justify the conclusion that there was any understanding between the parties that the terms of their oral agreement were to be reduced to writing and signed by the parties before the oral agreement should become effective.

Appellant cites in support of his contention the case of Spinney v. Downing, 108 Cal. 666, 41 P. 797. In that case the court says [page 798]: "it appears, without conflict, that it was the understanding and agreement between the plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties".

In the instant case, the contract was orally made and later reduced to writing to evidence its terms. In the case of Conner v. Plank, 25 Cal.App. 516, 518, 144 P. 295, 296, the court, referring to the case of Spinney v. Downing, supra, says: "These cases go no further than to establish the rule that, when it is a part of the understanding between the parties in negotiating the terms of their contract that the same be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract." But where "the terms of the contract are in the first instance definitely agreed upon and completed, then the mere fact that immediately thereafter they agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement".

In the case of Fly v. Cline, 49 Cal.App. 414, 425, 193 P. 615, 620, the court, in commenting upon an oral agreement, says: "It may be conceded that, where the minds of the parties have met respecting the terms and conditions of the more formal writing that is to be executed by them, and the agreed terms of the contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance, either orally or by informal writing, there is in such case an obligatory contract dating from the making of the earlier agreement."

We adopt the view of the trial court that there existed an oral agreement of settlement between the parties. The fact that a written instrument was later made to evidence that oral agreement does not change the binding effect of the oral agreement. No contention is made by appellant that the terms of the oral agreement and also those of the writing were not carried out by both parties. If there was no binding oral agreement, then the binding effect of the written instrument unsigned by appellant, when fully performed by both parties, might be considered, but we refrain from that discussion as unnecessary. Heffernan v. Davis, 24 Cal.App. 295, 140 P. 716; Cavanaugh v. Casselman, 88 Cal. 543, 26 P. 515; 6 Cal.Jur. p. 233.

Appellant next contends that under our procedure he could not file a replication to the respondents' plea of settlement, but was entitled to overcome such plea by any evidence he might produce. A careful examination of the record fails to disclose a single instance wherein the trial court either limited or restricted the introduction of any evidence offered on appellant's part along any such line of defense.

The trial court, however, did not agree with appellant that his evidence justified the conclusion that the settlement was made under circumstances entitling the appellant to rescind without notice, without restoration or offer to restore, nor that the consideration for the settlement was inadequate. In these conclusions of the court we agree. It is unnecessary to prolong this decision by a review of the evidence upon the points.

The question of accord and satisfaction is discussed by both parties. In view of our conclusion that the settlement was complete under the oral agreement, it is unnecessary to consider that question or other points raised by appellant.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 501

PEOPLE v. CHICK.

Cr. 516.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

Criminal law 🔑**1182**

Where no briefs were filed within time allowed for filing and no extension of time had been granted, and no appearance was made on behalf of appellant after cause was put on calendar, judgment was affirmed on motion by Attorney General. Pen.Code, § 1253.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceedings by the People of the State of California against Frank Chick. From an adverse judgment, defendant appeals.

Affirmed.

N. Lindsay South, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The clerk's transcript was filed in this court on August 2, 1938, and the reporter's transcript on August 29, 1938. No briefs have been filed and no extension of time has been granted. The cause was on the calendar on September 20, 1938, and no appearance was made on behalf of the appellant. The motion made by the attorney-general for an affirmance of the judgment under section 1253 of the Penal Code will be granted.

The judgment is affirmed.

We concur: MARKS, J.; LEONARD, Justice pro tem.

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28 Cal.App.2d 502

AMES v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 2089.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

1. Prohibition 🔑**13**

A writ of prohibition will not lie to prohibit an act of the superior court already performed even though that act be in excess of the jurisdiction of the court issuing it.

2. Prohibition 🔑**13**

Where order of confinement for contempt had been signed by judge and filed with clerk, a writ of prohibition prohibiting the contempt proceedings was not a proper remedy since there remained no further judicial act to be performed by the court, although ministerial acts by nonjudicial officers were yet to be performed by clerk delivering the order to sheriff and his execution of it.

3. Prohibition 🔑**1**

A writ of prohibition can only prohibit any tribunal, corporation, board, or person exercising judicial functions from acting without or in excess of its jurisdiction. Code Civ.Proc. § 1102.

Petition by Matthew H. Ames against the Superior Court of the State of California in and for San Diego County and Harriet C. Ames asking for a writ of prohibition prohibiting the defendants from proceeding further in contempt proceedings and from imprisoning the petitioner for contempt of court. The respondents demurred to the petition.

Demurrer sustained, alternative writ discharged and proceeding dismissed.

Hunter M. Muir, of San Diego, for petitioner.

Stearns, Luce, Forward & Swing, Jack L. Oatman, and F. T. Scripps, Jr., all of San Diego, for respondents.

PER CURIAM.

This is a petition for a writ of prohibition prohibiting the Superior Court of San Diego County from proceeding further in a contempt proceeding and from imprisoning petitioner for contempt of court. Respondents have demurred to the petition.

On May 3, 1934, petitioner and Harriet C. Ames were husband and wife. On that day they entered into a property settlement agreement which provided, among other things, for payment by petitioner to his wife of a monthly sum for the support of Mrs. Ames and the three minor children of the parties.

On July 7, 1934, in an action for divorce, an interlocutory decree of divorce was granted plaintiff by the district court of the city and county of Denver, Colorado. The property settlement was made a part of the interlocutory decree by reference and was approved by it. A final decree of divorce was rendered on January 8, 1935, which approved and continued the terms of the interlocutory decree as to the support to be paid.

On May 13, 1938, Mrs. Ames instituted an action against petitioner in the Superior Court of San Diego County. Besides the foregoing, and other facts, it was alleged that Mrs. Ames was impecunious; that two of the children had reached their majority; that there was $2,612.50 unpaid on the Colorado judgment. A judgment was entered in plaintiff's favor on May 28, 1938.

On May 13, 1938, an order to show cause was signed requiring petitioner to show cause why he should not pay plaintiff $175 per month for the support of herself and one minor child, $250 attorney's fee and costs. On May 18, 1938, an order was made directing petitioner to pay forthwith to F. T. Scripps, Jr., as trustee, $100 attorney's fees, $11 court costs, and $175 support money. On May 31, 1938, an order was made adjudging petitioner guilty of contempt of court for failing to make the payments just mentioned. Petitioner was given until June 2, 1938, to purge himself of contempt. By an order dated June 3, 1938, petitioner was committed to the county jail of San Diego county, there to remain until he had purged himself of the contempt. On this order was endorsed "Execution stayed until June 6, 10 a. m." Further proceedings were thereafter stayed by this court's issuing its alternative writ of prohibition.

Counsel argue numerous questions of law, none of which need be decided here, in view of the conclusion which we have reached that prohibition is not the proper remedy to be invoked in this case.

[1] It is well settled that a writ of prohibition will not lie to prohibit an act of the superior court already performed even though that act be in excess of the jurisdiction of the court issuing it. Havemeyer v. Superior Court, 84 Cal. 327, 394, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Valentine v. Police Court, 141 Cal. 615, 75 P. 336; County of Sutter v. Superior Court, 188 Cal. 292, 204 P. 849; Davis v. Superior Court, 71 Cal.App. 646, 236 P. 151; Lindsey v. Superior Court, 100 Cal.App. 37, 279 P. 837; Plocher v. Superior Court, 135 Cal.App. 337, 26 P.2d 841; Dunn v. Justice's Court, 136 Cal.App. 269, 28 P.2d 690.

[2, 3] The record before us shows that petitioner had been adjudged guilty of contempt and had been ordered confined in the county jail of San Diego county. There remained no further judicial act to be performed by the respondent court. The last order possesses all of the attributes of finality. Because execution of the order was stayed for three days did not change the situation. It had been signed by the judge and filed by the clerk. It needed only delivery by the clerk to the sheriff and execution by that officer after 10 o'clock a. m. on June 6, 1938. Those were only ministerial acts by nonjudicial officers. A writ of prohibition can only prohibit "any tribunal, corporation, board, or person exercising judicial functions" from acting without or in excess of its jurisdiction. (Sec. 1102, Code Civ.Proc.)

The demurrer is sustained, the alternative writ is discharged and this proceeding is dismissed.

DREESEN v. RICHARDS.*

Civ. 2084.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

Rehearing Granted Sept. 28, 1938.

1. Appeal and error ⚷792

If the District Court of Appeal was without jurisdiction to entertain an appeal, it had duty to raise and pass on the jurisdictional question, notwithstanding that respondent had not moved for dismissal of the appeal.

2. Appeal and error ⚷792

Where no notice of entry of judgment was ever given, and no motion for new trial ever made, and defendant did not file notice of appeal until more than 60 days after entry of judgment, the appeal would be dismissed, notwithstanding that plaintiff did not move for dismissal. Code Civ.Proc. § 939.

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Ella B. Dreesen against Helen Richards to obtain a money judgment based on a judgment obtained against the defendant in the state of Pennsylvania. From a judgment in favor of the plaintiff, the defendant appeals.

Appeal dismissed.

Wayne Compton and William H. Wylie, both of San Diego, for appellant.

Joseph S. Campbell, of San Diego, for respondent.

LEONARD, Justice pro tem.

The respondent brought this action to obtain a money judgment against appellant, based upon a judgment obtained against appellant in the state of Pennsylvania.

Appellant's counsel states that "The material question presented by this appeal is one of fact: Has respondent produced and introduced in evidence, at the trial of case at bar, an authenticated copy of the judgment alleged to have been rendered by the Court" against the appellant?

[1] At the outset we are confronted with a question of the jurisdiction of this court to review the judgment in this case. The judgment was entered February 2, 1938. No notice of the entry of judgment was ever given, nor was a motion for a new trial made. On April 20, 1938, more than sixty days after the entry of the judgment, the appellant filed her notice of appeal. While the respondent has not moved for a dismissal of the appeal, yet if the court is without jurisdiction to entertain the appeal, it is the duty of the court to raise and pass upon the jurisdictional question. It is said in Harpold v. Superior Court, 58 Cal.App. 629, 631, 209 P. 219, 220, that: "It is a rule of general application that, when an appellate court has not obtained jurisdiction of an alleged appeal, such court will dismiss such purported appeals of its own motion. 4 C.J. 589, § 2402. Whether jurisdiction has attached is determined by an inspection of the record."

In Re Dutton, 119 Cal.App. 447, 6 P.2d 558, it is held that "if the record shows that no jurisdiction exists to hear the appeal, it must be dismissed." [Page 559.] In the case of Lawson v. Guild, 215 Cal. 378, 380, 10 P.2d 459, the court, in considering the question, said:

"Plaintiff filed his notice of appeal on December 5, 1931, which was more than sixty days after the entry of judgment. but within thirty days of the denial of the motion for new trial.

"Section 939 of the Code of Civil Procedure provides that an appeal, to be timely, must be taken within sixty days after entry of the judgment or order which it is sought to have reviewed. The statute limiting the time in which an appeal may be taken is jurisdictional and mandatory. If the appeal is not taken within the time allowed by law, an appellate court has no power to entertain it. Bley v. Board of Dental Examiners, 101 Cal.App. 666, 669, 282 P. 19. In the instant case the judgment was entered approximately five and one-half months prior to the filing of the notice of appeal. The appeal was taken too late and must therefore be dismissed."

[2] The same question has been before this court in the following cases, with like results: Fruit Supply Co. v. Title Guarantee & Trust Co., 127 Cal.App. 91, 92, 15 P.2d 194 wherein it is said: "It it thus made to appear that the notice of appeal was not filed until 119 days after entry of the judgment, and that it was not filed within 60 days after entry of the orders from which an appeal is sought to be taken

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*For subsequent opinion see 88 P.2d 216.

The appeal was not, therefore, taken in time." Franceschini v. Solis, 132 Cal.App. 601, 23 P.2d 50; Confar v. Whelan, 8 Cal. App.2d 101, 46 P.2d 991, wherein it is said [page 992]: "The appeal not having been taken within that period [sixty days from the entry of the judgment], the court has no jurisdiction to consider the appeal on the merits."

The appeal from the judgment is hereby dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 504

PEOPLE v. MARTINEZ et al.

Cr. 370.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

Criminal law ⚷1182

Where clerk's and reporter's transcripts were filed July 25, 1938, no briefs were filed and no extension of time was granted, cause was on calendar on September 20, 1938, and no appearance was made on behalf of appellants, judgment was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Proceeding by the People of the State of California against Jose Martinez and others. From an adverse judgment, defendants appeal.

Affirmed.

Raymond E. Hodge, of San Bernardino, for appellants.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The clerk's and reporter's transcripts were filed in this court on July 25, 1938. No briefs have been filed and no extension of time has been granted. The cause was on the calendar on September 20, 1938, and no appearance was made on behalf of the appellants. The motion made by the attorney-general for an affirmance of the judgment under section 1253 of the Penal Code will be granted.

The judgment is affirmed.

We concur: MARKS, J.; LEONARD, Justice pro tem.

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28 Cal.App.2d 505

In re CAZAURANG'S ESTATE.

THOMPSON v. THOMAS.

Civ. 2098.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

Rehearing Denied Oct. 19, 1938.

Hearing Denied by Supreme Court Nov. 17, 1938.

1. Executors and administrators ⚷216(2)

The total fees paid to an attorney for special administrator and the total fees paid to attorney for executor or general administrator must not, together, exceed attorney's fees provided by the Probate Code for the ordinary and extraordinary services for executors or administrators. Probate Code, § 910.

2. Executors and administrators ⚷216(2)

Attorney's fees for extraordinary services rendered for special administratrix could not be allowed prior to appointment of an executor or general administrator. Probate Code, §§ 467, 468, 910.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Jean Cazaurang, etc., deceased, by A. M. Thompson against Marie Lees Thomas for an order allowing petitioner certain attorney's fees for extraordinary services. From an order allowing the fees in the amount of $2,255, the contestant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Marion P. Betty and Porter C. Blackburn, both of Los Angeles, for appellant.

A. M. Thompson, of San Diego, in pro. per.

LEONARD, Justice pro tem.

Jean Cazaurang died in 1929, and sometime thereafter Marie Cazaurang was appointed special administratrix of his estate, and continued to act as such administratrix until her death in 1937. From the time of her appointment until her death, covering a period of several years, the respondent, A. M. Thompson, acted as her attorney for said estate, and as such rendered considerable legal services for said estate. After the death of Marie Cazaurang, the San Diego Trust & Savings Bank was appointed special administrator of said estate.

Respondent filed a petition in the trial court praying that an order be made allowing him certain attorney's fees for extraordinary services, specifying in detail the services rendered. An answer to the petition was filed by appellant, Marie Lees Thomas, an heir and beneficiary, and thereafter, on September 17, 1937, over the objection of appellant, the trial court made an order finding that fees for extraordinary services should be allowed to respondent in the sum of $2,255, and ordered the special administrator to pay the same. The appellant, being an interested party, has appealed from such order.

No executor or general administrator had been appointed, and the estate was still under special administration.

It is appellant's position that the order was improperly made, in that it was made pending special administration, and that any allowance for attorney's fees for any extraordinary services should be made, if at all, only after the appointment of an executor or general administrator. Sections 467 and 468 of the Probate Code and the code provisions referred to therein are the only code sections relating to attorneys' fees for a special administrator. Sections 467 and 468, in so far as they relate to attorneys' fees, read as follows:

"§ 467. * * * His [the special administrator's] commissions and the fees of his attorney shall be fixed by the court * * * and the total fees paid to the attorneys both of the special administrator and executor, or of the special administrator and general administrator, must not, together, exceed the sums provided in this code as compensation for the ordinary and extraordinary services of attorneys for executors or administrators."

"§ 468. * * * When the same attorney does not act for both the special administrator and executor, or for the special administrator and general administrator, such fees shall be divided between the attorneys in such proportion as the court shall deem just."

Neither of these sections makes any express provision for attorney's fees for extraordinary services performed for the special administrator. The court is authorized to fix the fees of the attorney for the special administrator, and, doubtless, in fixing such fees may take into consideration all services rendered—ordinary and extraordinary.

Section 467 provides that the special administrator may receive "extra allowances", but contains no such provision for his attorney.

[1] The total fees paid to the attorney for the special administrator and the total fees paid to the attorney for the executor or general administrator must not, together, exceed the attorney's fees provided by the Probate Code (sec. 910) for the ordinary and extraordinary services for executors or administrators.

Section 910 of the Probate Code provides a definite means of ascertaining the amount of the attorney's fees for his ordinary services, but the allowance to be made for extraordinary services, if any, is left to the court to fix in a sum deemed "just and reasonable". No allowance therefor is to be made, unless such services have been rendered. It cannot be determined, in advance of general administration, whether such fees will be allowed, nor the amount to be allowed, if any.

The information necessary to be before the court to enable it to properly fix the attorney's fees for the special administrator, under the code sections, is not available during special administration. Both sections 467 and 468 of the Probate Code apparently contemplate that the attorney's fees for the special administrator will not be fixed during the special administration. If the attorney representing the special administrator does not also represent the estate in general administration, then the fees shall be divided between the attorneys in such proportion as the court shall deem just.

It is apparent that the court is in no position to make an equitable division of the fees, if such division becomes necessary, while special administration is pending.

The Supreme Court, in an early case, considering the apportionment of fees between successive administrators under the law as it then existed, says: "The administration of an estate is an entirety; there may be different persons in office at different times, or at the same time; but the claim of each to compensation must be considered with reference to the rights of each and all of the others." In re Estate of Barton, 55 Cal. 87, 90.

In the instant case, petitioner has already been paid by court order, without protest or objection, the sum of $2,275. With the additional allowance of $2,255 for extraordinary services, his allowed fees amount to $4,530, approximately $2,000 more than the statutory fees to be allowed the attorney upon general administration of the estate, if the amount accounted for on general administration should equal the present estimated value thereof, and assuming no unusual extraordinary services were rendered. No contention is made that the extraordinary services alleged to have been rendered were not reasonably worth the amount claimed and allowed. The objection is that the order was prematurely made.

In the case of Kohn v. Superior Court, 21 Cal.App.2d 100, 68 P.2d 755, the court had occasion to construe section 467 of the Probate Code in its relation to fees of a special administrator. The court, quoting from the case of In re Estate of Boyer, 94 Cal.App. 206, 270 P. 1005, says [page 756]: "'As a special administrator's fees and those of an executor or general administrator must amount, when added together, to no more than the total allowable under section 1618, it is reasonable to suppose that the Legislature did not intend an allowance to a special administrator until a time when the court, in making the allowance, could determine, with some degree of accuracy, what should be the total apportionment of fees as between a special administrator and the executor or general administrator, as an aid to concluding what partial allowance should be made to the special administrator. It would appear that the Legislature determined that a sufficient time would elapse, for the purpose of making an intelligent solution of such a question after the passage of one year.'"

The court then continues: "Although respondent's arguments are not without force, we are satisfied that it was not the legislative intention to permit the payment of commissions prior to the issuance of general letters; nor is this view affected by the fact that there may be instances where special administrators are granted general powers, or it appears that, acting under such powers, they have, as here, practically completed the administration of a particular estate. Any other rule would be calculated to foster practices detrimental to orderly administration, to correct which there would be no remedy by appeal, and with no corresponding benefits to estates."

[2] While this decision relates only to that part of the section bearing upon special administrator's fees, the principle decided applies with equal force to the part relating to attorneys' fees.

The judgment is reversed, each party to pay his own costs.

We concur: BARNARD, P. J.; MARKS, J.

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28 Cal.App.2d 522

COFFIN v. BLOODWORTH et ux.

Civ. 11566.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1938.

1. Workmen's compensation 🔑2100

Employer who failed to comply with requirements of Workmen's Compensation Act by securing compensation insurance or consent to self-insure was subject to suit for damages for injuries sustained by employee, though employer had paid employee's medical bills and wages during disability. Code Civ.Proc. § 416; St.1917, p. 857, § 29.

2. Workmen's compensation 🔑2100

The phrase, in Workmen's Compensation Act, that if any employer "shall fail to secure the payment of compensation," any injured employee may bring an action against employer for damages, refers to the time before the contingency arises that requires payment of compensation and not the actual payment. St.1917, p. 857, § 29.

3. New trial ⚷151

Whether a motion for new trial based on newly discovered evidence should be granted was within the discretion of the trial court, where the motion was supported solely by affidavits of persons who either acted in some capacity or were present during the trial, and was contradicted by affidavits filed by other party.

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Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Harry Carleton Coffin, Jr., by Harry C. Coffin, his guardian ad litem, against William Bloodworth and Jessie Bloodworth (husband and wife) for injuries sustained when plaintiff fell to ground while undertaking to replace an electric light bulb on the roof of defendants' service station. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellants.

John E. Martin, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendants in an action for damages. The plaintiff and respondent, while in the employ of appellants, undertook to replace an electric light bulb on the roof of appellants' service station, and while doing so fell to the ground, a distance of about sixteen feet. Certain injuries sustained as a result of the fall, together with the alleged negligence of appellants, are the basis of the action herein.

Appellants at the time of the accident had neither compensation insurance nor a "certificate of consent to self-insure" from the industrial accident commission, as provided by the workmen's compensation laws. Plaintiff recovered judgment, from which defendants appeal.

[1] It is contended by appellants that the superior court was without jurisdiction to try the case because compensation had been fully paid at the time of the bringing of the suit. Such contention is based on the fact that appellants fully compensated plaintiff for hospital and doctor bills and for all medical and surgical treatment required as a result of the accident, as well as for wages in full during total disability and for wages in part during partial disability, which it is pointed out by appellants more than meets the requirements of the Workmen's Compensation Act, St.1917, p. 831. It is argued in that connection that:

"Jurisdiction of the superior court to try claims of an employee against his employer for damages *arises only when the compensation is unsecured* and that compensation must be *unsecured* at the time the action is filed, since the jurisdiction of a court is acquired when the complaint is filed. (See Code Civ.Proc., § 416.)

"It is, therefore, respectfully submitted that, although at the time the respondent was injured, his compensation was at that time unsecured, nevertheless it was paid in full before the action in the superior court was filed, and the need for it *being secured* by reason of it having been paid in full, no longer existed. These conditions removed from the superior court all grounds of jurisdiction under the statute."

The foregoing argument is untenable. The test of the jurisdiction of the superior court under such circumstances is to be found in the Workmen's Compensation Act, wherein it is provided, in section 29 thereof:

"(a) Every employer as defined in section seven hereof, except the state and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways: 1. By insuring and keeping insured against liability to pay compensation in one or more insurance carriers duly authorized to write compensation insurance in this state. 2. By securing from the commission a certificate of consent to self-insure, which may be given upon his furnishing proof satisfactory to the commission of ability to carry his own insurance and pay any compensation that may become due to his employees. * * *

"If any employer shall fail so to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition thereto, such employee or his dependents may bring an action at law against such employer for damages, the same as if this act did not apply. * * *"

[2] Thus it will be seen that the defendants, having failed to "secure the payment of compensation" and having failed to secure "from the commission a certificate of consent to self-insure," are therefore subject to the provisions of the act last above mentioned which vests the superior court with jurisdiction. The phrase "secure the

payment of compensation" has reference to the time before a contingency arises that requires the payment of such compensation and not, as contended by appellants, the actual payment thereof.

Appellants' further contentions that the damages awarded are contrary to the law and the evidence and that the presumption of negligence placed upon the defendants by the statute was overcome by the overwhelming weight of evidence, are without merit. The findings of fact are abundantly supported by the evidence.

[3] Finally it is contended that a motion for a new trial based on newly discovered evidence should have been granted. Said motion was supported by six affidavits, four of which were executed by witnesses who had testified at the trial. A fifth was executed by one of appellants' attorneys, and the sixth by an individual who was present in the courtroom during the trial. These affidavits were contradicted by affidavits filed in support of plaintiff. The question raised by the motion was addressed to the sound discretion of the trial court, and there appears to be no reason why its decision should be disturbed.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

WEST KEY NUMBER SYSTEM

GORDON v. BARR.*

Civ. 1872.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

Rehearing Denied Oct. 19, 1938.

Hearing Granted by Supreme Court Nov. 17, 1938.

1. Gifts 🔑4

A gift of property is not valid as such unless there is a present intention on the part of the donor to part with the title of the property accompanied by a present actual or symbolical delivery.

2. Gifts 🔑1

A "gift" is a voluntary transfer of personal property without consideration.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

3. Gifts 🔑47(3)

The burden of proving a valid gift is on the donee.

4. Gifts 🔑49(1)

Where a claim of gift is asserted after the death of a donor, every element necessary to constitute a gift must be sustained by explicit and convincing evidence.

5. Gifts 🔑28(2)

An assignment of a mortgage and the indebtedness secured thereby on condition that assignee should manage and control the funds subject to assignor's direction paying the income to the assignor during her lifetime, and that upon assignor's death the funds, indebtedness and proceeds should be property of assignee, did not constitute a "gift."

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Edith M. Gordon, as executrix of the last will and testament of Julia A. Gordon, deceased, against Mary Robb Barr, to quiet title to real and personal property, for an accounting, and to compel a reconveyance of the property. Judgment for defendant, and plaintiff appeals.

Reversed.

J. E. Hood, of Oakland, and Conley, Conley & Conley, of Fresno, for appellant.

Samuel F. Hollins, of Fresno, for respondent.

MARKS, Justice.

This is an action to quiet title to real and personal property, for an accounting and to compel a reconveyance of the property. Defendant had judgment and plaintiff has appealed.

Transactions between Julia A. Gordon, who died on October 24, 1934, and W. M. Barr, who died on December 17, 1932, covered a period of a number of years. We can save time and space by taking the statement of the facts from the findings of fact. We quote the following:

"That W. M. Barr, the father of the defendant, was a blood relative of Julia A. Gordon, and that said W. M. Barr and Julia A. Gordon were close and intimate friends, and that confidential relations existed between them, and that said Julia

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*For subsequent opinion see 91 P.2d 101.

A. Gordon reposed confidence and trust in said W. M. Barr; that said W. M. Barr was for many years prior to his death a resident of Fresno County, and by occupation a real estate dealer and engaged in the business of loaning money; that said Julia A. Gordon relied upon the advice and counsel of said W. M. Barr, along with her attorney and other advisors, in the handling and management of her business affairs; that Julia A. Gordon had faith in the business integrity and judgment of said W. M. Barr; that prior to 1929 Julia A. Gordon placed $2,000.00 in the hands of W. M. Barr to be loaned out at interest for her account; that Julia A. Gordon had confidence in his business integrity and judgment, and had confidence in said W. M. Barr, and did from time to time execute such assignments, releases or conveyances as said W. M. Barr suggested or requested in the handling of said $2,000.00;

"That on or about the year 1929 said W. M. Barr made a loan of $1,000.00 to M. C. Stewart and Lela Stewart, his wife, for the account of said Julia A. Gordon, and caused to be executed to her a promissory note secured by mortgage upon real property situated in the city of Sanger, County of Fresno, State of California, described as follows: (Description) * *

"That on or about the 19th day of October, 1929, a loan of $1,000.00 was made by said W. M. Barr for the account of Julia A. Gordon to Lila Deaver and Chester C. Deaver, her husband, which loan was evidenced by a promissory note of even date therewith and was secured by a mortgage upon real property situated in the City of Sanger, County of Fresno, State of California, described as follows: (Description)

"That said mortgages, together with policies of title insurance, were thereafter delivered to Julia A. Gordon by said W. M. Barr.

"That on or before the 14th day of January, 1931, the said Julia A. Gordon made, executed and delivered to W. M. Barr, in writing, an assignment conveying and transferring to the said W. M. Barr the said Stewart mortgage and the indebtedness thereby secured; that on or before the 23rd day of April, 1930, the said Julia A. Gordon made, executed and delivered to W. M. Barr, in writing, an assignment conveying and transferring to the said W. M. Barr the said Deaver mortgage and the indebtedness thereby secured; that said assignments were not, nor was either of them, delivered upon any condition whatsoever, except that said assignments were, and each of them was, delivered upon the express understanding and agreement that the said W. M. Barr should manage and control the funds invested in said mortgages, subject to the direction of the said Julia A. Gordon, during her lifetime, paying the income therefrom to the said Julia A. Gordon, for and during the term of her natural life, and that upon the death of the said Julia A. Gordon, the said funds, property and indebtedness, and all the proceeds thereof, should be and remain the property of the said W. M. Barr, his heirs and assigns, free and clear of any trust or obligation whatsoever.

"That on or about the 25th day of September, 1929, the owner of the land covered by the Stewart mortgage conveyed said property to W. M. Barr, subject to said mortgage to Julia A. Gordon.

"That on April 4, 1932, said W. M. Barr released said Deaver mortgage, and a new loan was made to Lydia M. Delano for $1,000.00, payable to the defendant herein; said loan was secured by a mortgage on the same property as was described in the Deaver mortgage.

"That on or about the 18th day of March, 1935, the Delano mortgage was paid off, and the defendant acquired $1,000 face value in bonds of the Federal Farm Mortgage Corporation.

"That prior to the death of W. M. Barr on December 17, 1932, and in consideration of more than $4,000.00, which had been advanced to W. M. Barr by the defendant, W. M. Barr conveyed and transferred the notes, mortgages, and lands derived from the original Deaver and Stewart mortgages to the defendant on the same terms and conditions under which they were previously held by said W. M. Barr.

"That during the lifetime of the said Julia A. Gordon, the defendant and the said W. M. Barr paid all the income from said property, funds and indebtedness to the said Julia A. Gordon."

[1, 2] It is well settled that in order to constitute a valid gift of property there must be a present intention on the part of the donor to part with the title of the property and a present actual or symbolical delivery of it. This rule is thus stated in

Beebe v. Coffin, 153 Cal. 174, 94 P. 766, 767:

"A gift is but the transfer of personal property made voluntarily and without consideration, and a verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery. Civ. Code, secs. 1146, 1147. And the delivery must be absolute; that is, the donor must not only part with the possession of the property, but must relinquish to the donee all dominion and control over it. 14 Am. & Eng. Ency. of Law, p. 1019; 20 Cyc. of Law and Proc., p. 1195. This holds true of all gifts, whether they be gifts inter vivos or gifts causa mortis. As is pointed out in Knight v. Tripp, 121 Cal. 674, 54 P. 267, all gifts are necessarily inter vivos, since a living donor and a living donee are indispensable to a valid gift. * * * 'There can be no gift without an intention to give, and a delivery either actual or constructive of the thing given.' * * * But the essential of delivery of the immediate surrender of all dominion and control over the subject of the gift is as absolutely necessary in the one class of gifts as in the other. Falling short of such unconditional delivery, a gift is incomplete. If the transfer of such dominion and control is postponed to some future date, as until the date of the death of the donor, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift. Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am.Rep. 726; Daniel v. Smith, 64 Cal. 346, 30 P. 575; Zeller v. Jordan, 105 Cal. 143, 38 P. 640; Hart v. Ketchum, 121 Cal. 426, 53 P. 931; Pullen v. Placer County Bank, 138 Cal. 169, 66 P. 740, 71 P. 83, 94 Am.St.Rep. 19. In illustration of the important fact that immediate and complete dominion over the thing given must be surrendered by the donor and accepted by the donee, the cases of Pullen v. Placer County Bank, supra, and Basket v. Hassell, 107 U.S. 602, 2 S.Ct. 415, 27 L.Ed. 500, are instructive. In Pullen v. Placer County Bank [supra] a father had given his son a check for $1,000, upon the understanding that the son should not present the check to the bank for payment until after the death of the father. The son retained possession of the check, and did present it according to instructions after the father's death. This court held the transaction invalid as a gift, citing Knight v. Tripp above referred to, and saying: 'A gift vests the donee with the absolute property in the thing given, and is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or, except in the case of a gift causa mortis, is subject to his revocation, his gift is not complete.'" See Stone v. Daily, 181 Cal. 571, 185 P. 665; Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034; Skellenger v. England, 81 Cal.App. 176, 253 P. 191; Azvedo v. Azvedo, 1 Cal.App.2d 504, 36 P.2d 1078.

[3, 4] It is also the rule that the burden of proving a valid gift is on the donee and that "where a claim of gift is asserted after the death of a donor, every element necessary to constitute a gift must be sustained by explicit and convincing evidence." Bishop's School v. Wells, 19 Cal.App.2d 141, 65 P.2d 105, 108.

[5] When we measure the findings of fact by the foregoing rules it is apparent that they do not support the judgment. Mrs. Gordon did not part with the right of dominion over the property for it was found that the delivery was made on the express condition that Mr. Barr should manage, control and invest the funds subject to the direction of Mrs. Gordon and should pay her its income during her lifetime and that only after her death should Mr. Barr become owner of it. This finding thoroughly negatives any intention to make a present gift and any present delivery of title.

With such findings before us Mr. Barr, were he defendant, could not successfully assert title to the property. Defendant stands in no better position than her grantor because it is expressly found that the property was conveyed to her "on the same terms and conditions under which they were previously held by said W. M. Barr". It is also clear from the record that she cannot claim as an innocent purchaser for value.

The judgment is reversed.

I concur: BARNARD, P. J.

28 Cal.App.2d 525

CITY OF OAKLAND v. AMERICAN DREDGING CO. OF CALIFORNIA.

Civ. 10837.

District Court of Appeal, First District, Division 2, California.

Sept. 26, 1938.

1. Appeal and error ⚷786

In proceedings for condemnation of realty where defendants sought to resist city's entrance and occupancy of property, asserted interest of $100,000 in property, and compelled city to deposit $10,000 with clerk of court as security for damage to property and demanded attorney's fees in sum of $6,000 for protection of interest in litigation, appeal from judgment which sustained defendants' demurrer to complaint, on ground that complaint did not allege nature and legal status of interest in land claimed by defendant, could not be dismissed on ground there was no substantial question of law involved, notwithstanding complaint showed that defendants had no interest in land.

2. Appeal and error ⚷766

Where appeal is taken upon judgment roll, and clerk's transcript, including complaint, is printed, District Court of Appeal is prohibited by rule of court from dismissing appeal on ground that complaint is not printed in appellant's brief. Supreme and District Court of Appeals Rule 8, § 3 and § 4 as amended.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Proceedings by the City of Oakland against the American Dredging Company of California and others for condemnation of real property. From a judgment sustaining defendants' demurrer to the complaint, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Markell C. Baer, Port Atty., W. Reginald Jones, Asst. Port Atty., F. B. Fernhoff, City Atty., and Hilton J. Melby, Asst. City Atty., all of Oakland, for appellant.

Ira Abraham, Brown & Rosson, and Thos. J. Ledwich, all of Oakland, for respondent American Dredging Co. of California.

NOURSE, Presiding Justice.

The respondent moves to dismiss the appeal from a judgment on an order sustaining its demurrer to the second amended complaint. Grounds of the motion are that no substantial question of law is involved, and that the appeal is taken for delay.

[1] The action is one for condemnation of real property of which the city alleges that it is the owner in fee, but that the defendant claims and asserts certain rights and interests therein. The questions arising on the appeal from the judgment are whether a plaintiff in condemnation must allege the nature and legal status of the interest in the land claimed by each defendant. The statement of the question is its own answer to the claim that it is not a debatable one. But the respondent urges in support of its motion that the complaint shows affirmatively that it has no interest in the land. In reply the appellant shows that the respondent erected barriers across the property, posted armed men as guards, and sought to resist the city's entrance and occupancy; that in the trial court it asserted an interest in the property of over one hundred thousand dollars when it successfully demanded of the trial court that the city be compelled to deposit ten thousand dollars with the clerk of the court as security for damage to its property upon the city's entry under these proceedings; and that there is now pending in the trial court respondent's demand for attorney's fees in the sum of six thousand dollars for the protection of its interest in this litigation. There is sufficient stated here to show that there is no merit in the first ground urged for a dismissal.

The second ground is not supported by the record. The transcript was filed on April 30, 1938, and appellant's brief was filed thirty days later. From the nature of the case it is one in which delay would not be beneficial to appellant.

[2] It is further urged in support of the motion that appellant has failed to comply with section 3 of rule VIII governing the appellate courts, in that the complaint is not printed in its brief. Respondent has failed to note the amendment to section 4 of this rule, effective November 24, 1937, under which we are not permitted to dismiss an appeal on that ground. Here the appeal is taken upon the judgment roll, and the entire clerk's

transcript, including the complaint, is printed. There is no reason for reprinting this matter in one of the briefs.

The motion is denied.

We concur: STURTEVANT, J.; SPENCE, J.

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28 Cal.App.2d 494

YOUNG v. GAUTIER et al.

Civ. 11562.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1938.

Hearing Denied by Supreme Court Nov. 17, 1938.

1. Negligence 🔑121(2)

Where accident, resulting from thing shown to be under management of defendant or his servants, is such as in ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence in the absence of explanation by defendant that the accident arose from want of proper care under doctrine of "res ipsa loquitur," which means the thing or affair speaks for itself.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

2. Negligence 🔑134(11)

One, who seeks to recover damages for an injury alleged to have been incurred by reason of another's negligence, must establish by a preponderance of evidence that latter's negligence has occasioned the loss.

3. Negligence 🔑121(2)

Where facts are such as to give rise to an inference of negligence from inherent nature and character of act causing injury giving application to the principle of res ipsa loquitur, burden of proceeding is shifted to defendant, who, to escape an adverse finding, must adduce evidence to meet the plaintiff's prima facie case.

4. Negligence 🔑136(6)

Where proof of happening of accident and circumstances surrounding it give rise to inference of negligence authorizing application of doctrine of res ipsa loquitur, jury or court sitting without a jury must determine whether prima facie case made by plaintiff has been rebutted.

5. Negligence 🔑121(2)

The inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury but must be weighed and considered against evidence adduced by the defendant in rebuttal thereof.

6. Negligence 🔑121(3)

In bather's action against proprietor of bathing resort for injuries sustained as result of broken glass on bottom of portion of lake used for swimming, where evidence failed to show that proprietor used reasonable care to examine bottom of lake to find if it was free from glass, or other injurious substances, doctrine of res ipsa loquitur was applicable, since inference of negligence arose from nature and character of act which caused the injury.

7. Negligence 🔑134(8)

Evidence that proprietor of bathing resort failed to take proper precautions to examine bottom of lake for broken glass and other injurious substances, sustained verdict for bather who sustained lacerations of foot from broken glass on bottom of lake used for swimming purposes.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Claxton M. Young, guardian ad litem of Francis William Lampshire, a minor, against James A. Gautier and others for injuries sustained by the minor in a swimming pool maintained by the defendant. From an adverse judgment, named defendant appeals.

Affirmed.

C. A. Pinkham, of Los Angeles, for appellant.

Frank J. McCarthy, of Los Angeles, for respondent.

YORK, Presiding Justice.

Appellant is the owner and operator of a resort known as "Pop's Willow Lake", located in the foothills near Sunland, Los Angeles county. Among the facilities offered by him for the amusement of patrons are provisions for swimming and boating, for which purpose a lake is maintained which is divided into two sections by means of a rope barrier. On July 30, 1935, Francis William Lampshire, a minor, having paid the price of admission demanded by appellant, was admitted to the swimming pool around the hour of 1 o'clock in the afternoon. He remained in the pool all afternoon swimming and diving, and at 4:30 o'clock he dove from one of the two rafts maintained on the surface of the pool into the water which had a depth of 12 feet, and in attempting to push himself upward, he placed his foot on the bottom of the pool, came into contact with a piece of broken glass, thereby sustaining deep lacerations on the instep and on the ball of his left foot.

Said minor, by his guardian ad litem, brought this action, alleging that appellant wilfully, negligently and carelessly maintained and operated said swimming pool in a dangerous and unsafe condition, in that said appellant allowed and permitted broken glass and other dangerous instruments to be and remain on a certain portion of the bottom of said swimming pool, and that by reason of such negligence and carelessness, and as a direct and proximate result thereof, said minor was injured to his damage in the sum of $10,000.

The cause was heard by the court, and upon conclusion of respondent's evidence, appellant moved for a judgment of nonsuit, which motion was denied. Thereafter, judgment was rendered in respondent's favor for the sum of $1,000 general damages and the sum of $20.80 to cover medical services rendered to said minor on account of said injuries. Appellant made a motion for new trial upon all of the statutory grounds, but on argument urged only the insufficiency of the evidence to warrant or sustain any judgment in respondent's favor and that the findings lacked evidentiary support, which motion was by the court denied.

Appellant here urges that the evidence as a whole is insufficient to support any judgment in respondent's favor and that the findings of the court are not supported by the evidence; that the court erred in overruling his demurrer to the complaint and in denying his motions for judgment of nonsuit and for new trial. In his closing brief appellant avers that unless this court shall find reason to reverse the case for some other cause, but two main questions are presented, to-wit: "1. Is the doctrine of res ipsa loquitur applicable? 2. If the doctrine is not applicable, does the evidence as a whole support a judgment in respondent's favor?"

With respect to the sufficiency of the evidence to support the judgment, appellant maintains that "there is not a scintilla of evidence in the entire record showing or indicating negligence on the part of the defendant Gautier, or on the part of his agents, servants or employees, nor is there any showing in the record from which such negligence can reasonably be inferred. The mere presence of a bottle, piece of glass or other foreign substance upon the bottom of the lake raised no presumption of negligence."

[1-5] "It is elementary that the maxim, 'Res ipsa loquitur,' translated means simply, 'The thing, or affair, speaks for itself.' The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.), p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' [Citing cases.] Of course, to justify the application of this doctrine in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. * * * One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of res ipsa loquitur, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's prima facie case. * * * It is apparent from these latter authorities that it is for the jury, or the court when sitting without a jury, to determine from all the evidence in the case whether the defendant has successfully met and rebutted the prima facie case made out by the plaintiff in an action wherein

the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence. That the inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof, has been announced in numerous cases." Michener v. Hutton, 203 Cal. 604, at pages 607, 609, 610, 265 P. 238, at page 239, 59 A.L.R 480.

The record reveals that beer, wine and soda water were sold on the premises and that soda water bottles were the only bottles permitted to be taken on the beach surrounding the lake. One Marvin E. McCart, who was manager of the resort at the time the accident occurred, in answer to the question "What precautions, if any, were taken by the management to prevent the throwing of any debris or bottles, or foreign matter into the lake?" replied: "We did not permit anyone to leave upon the beach any article or anything—they were not allowed to throw anything they might bring with their lunch, like a can, or a paper plate, or anything of that nature on the beach, and the children were not permitted to throw rocks, and each employee, and any employee, of the lake, regardless of his position was told to interfere with anyone breaking those rules." Other than this testimony no evidence was offered by appellant that the bottom of the lake was ever examined to find out if it were free from glass or other debris which might injure the feet of patrons of the resort who were swimming and diving from the rafts maintained by appellant on the surface of the swimming pool. There was evidence that the average attendance at the resort during the month when the accident occurred was six or seven hundred persons per day; that during the peak of the daily attendance three or four lifeguards were on duty and on Sundays and holidays twice that number, and in addition that appellant employed a plain clothes man, a clean-up crew and a janitor crew; that it was the plain clothes officer's duty to walk around the entire lake and to see that the rules and regulations were carried out.

The case of Boyce v. Union Pacific Ry. Co., 8 Utah 353, 31 P. 450, 18 L.R.A. 509, cited by respondent, presents a situation analogous to that now under consideration: A bather brought action against the proprietor of a lake bathing resort for injuries sustained by him from broken glass on the bottom of the lake. There was evidence that, although the defendant employed men for the purpose of examining the bottom and removing dangerous substances therefrom, there had been no examination made by them on the day of the accident nor on the day before; and that every precaution was taken to prevent people from throwing things into the lake where people bathed that might injure the feet of the bathers. It was held in the cited case: "It was the duty of the defendant to use reasonable care to keep the bottom of the lake where people bathed free from everything that might injure the feet of the bathers, and the want of such reasonable care is negligence. If the defendant had examined the bottom of the lake the morning of the injury, it, in all probability, would not have occurred. The question was fairly submitted to the jury whether the defendant was guilty of negligence, and it found that it was; and we think the evidence justifies the verdict."

[6, 7] The lake here in question was divided by means of ropes on barrels into two parts, one for swimming and the other for boating. It was the duty of appellant to use reasonable care to keep free from injurious substances the bottom of the lake where people were allowed to swim and to dive. The circumstances of the accident which are unexplained by appellant raise the inference that appellant failed to exercise reasonable care to keep the swimming pool safe for those using it. Such inference constitutes sufficient evidence of negligence on the part of appellant to sustain the findings and the judgment. In other words, the swimming pool was under the management of appellant or his servants, and the accident was such that in the ordinary course of events would not have occurred had appellant used the proper care. The doctrine of res ipsa loquitur is applicable for the reason that an inference of negligence arises from the nature and character of the act which caused the injury.

There was no error on the part of the trial court in overruling appellant's demurrer to the complaint, or in denying his motions for nonsuit and for new trial.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

28 Cal.App.2d 499

FRANKISH v. FEDERAL MORTGAGE CO. et al.

Civ. 2168.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

1. Appeal and error ⟹659(3)

A motion for diminution to have excerpts from minute books of a corporation considered a part of the record on appeal was granted where it appeared from record and from certificate of trial judge that they were admitted in evidence pursuant to stipulation, that they were considered as part of the evidence by trial judge, and that he signed certificate to original transcript through inadvertence and in belief that they were included in it.

2. Appeal and error ⟹786, 1126

A motion to dismiss appeal and affirm the judgment on the ground that appeal was taken for delay and that questions presented are so unsubstantial as not to require further argument must be denied where it appears from examination of opening brief that it will be necessary to consider the entire record.

3. Appeal and error ⟹811

A motion to advance the cause on the calendar cannot be granted where time allowed by court for filing closing brief has not expired.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Adele Frankish against the Federal Mortgage Company and another to cancel a trust deed on the ground of fraud. From a judgment in favor of plaintiff, defendants appeal.

Respondent's motion for diminution of the record granted, the motion to dismiss or affirm is denied, and the motion to advance is denied.

Burr & Smith, A. M. Cross, and S. J. Loughlin, all of Los Angeles, for appellants.

Edward E. Gray, of Upland, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to cancel a trust deed on the ground of fraud.

[1] The respondent has asked, through a motion for diminution, to have brought up and used as a part of the record certain excerpts from the minute books of a corporation. It appears from the record before us and from a certificate of the trial judge that these excerpts were admitted in evidence pursuant to a stipulation of the parties, that they were used and considered by the trial judge as a part of the evidence in the case, and that the trial judge signed the certificate to the original transcript through inadvertence and in the belief that these documents were included therein. Under these circumstances, the evidence in question should be a part of the record on appeal and that motion will be granted.

[2] The respondent has further moved to dismiss the appeal or affirm the judgment on the ground that the appeal was taken for delay only and that the questions presented are so unsubstantial as not to require further argument. Ten points are raised in the opening brief, most of which attack the sufficiency of the evidence to support the particular findings. It fully appears from an examination of the opening brief that it will be necessary to consider the entire record and, in accordance with the settled policy of this court, this motion must be denied. Ure v. Maggio Bros Co., Inc., 22 Cal.App.2d 536, 71 P.2d 598.

[3] The respondent also moved to advance the cause on the calendar. Since the time given for filing the closing brief has not expired, this motion cannot now be granted.

The motion for diminution of the record is granted, the motion to dismiss or affirm is denied, and the motion to advance is denied.

I concur: MARKS, J.

28 Cal.App.2d 517

SUPERA v. MORELAND SALES CORPORATION et al.

Civ. 1884.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

1. Costs ⇨264

A judgment for costs of appeal is a complete judgment in itself, independent of the final judgment in the case, finding its origin in the order of an appellate or Supreme Court affirming or reversing a judgment of a lower court. Code Civ.Proc. § 1034, as amended by St.1933, p. 1902; Rules for the Supreme Court and District Courts of Appeal, rule 23.

2. Bankruptcy ⇨498(91)

A judgment against corporation for costs on appeal, which did not come into existence until over a year after proceedings for reorganization of corporation were instituted and for almost eight months after proceedings were terminated, was not a "claim" within meaning of the Bankruptcy Act from which corporation could be relieved on discharge of its debts. Bankr. Act § 77B(b, c, h), 11 U.S.C.A. § 207(b, c, h); Code Civ.Proc. § 1034, as amended by St. 1933, p. 1902.

A "claim" in its primary meaning indicates the assertion of an existing right, while in its secondary meaning it may be used to indicate the right itself.

[Ed. Note.—For other definitions of "Claim," see Words & Phrases.]

Appeal from Superior Court, Kern County; Erwin W. Owen and Robert B. Lambert, Judges.

Action by Pete B. Supera against the Moreland Sales Corporation and others. From an order refusing to tax plaintiff's costs on appeal at nothing or to order the clerk to withhold execution on a judgment for costs on appeal and from judgment taxing costs, defendant Moreland Motor Truck Company appeals.

Affirmed.

Richard J. O. Culver and Felix H. McGinnis, both of Los Angeles, for appellant.

Kelso, Berryman, Grua & Counts, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an order refusing to tax plaintiff's costs on appeal at nothing or to order the clerk to withhold execution on a judgment for costs on appeal, and from the judgment taxing costs.

The costs involved here were those of plaintiff in a former appeal in this case, Supera v. Moreland Sales Corporation et al., 13 Cal.App.2d 186, 56 P.2d 595, in which a judgment in favor of defendants was reversed. The sole question involved is whether or not those costs were discharged under an order of the United States District Court in which the petition of the Moreland Motor Truck Company for reorganization under the provisions of section 77B of the Bankruptcy Act, title 11 U.S.C.A. § 207, p. 1057, was granted and the debts of the corporation were discharged.

The dates of the filings in this court and the United States court are material. Our docket of the first appeal shows the following filings: January 15, 1935, filed clerk's and reporter's transcripts on appeal, $10 filing fee paid. April 15, 1935, filed appellant's (plaintiff's) opening brief. June 28, 1935, filed respondents' brief. August 16, 1935, filed appellant's reply brief. January 14, 1936, ordered submitted. April 9, 1936, judgment reversed. April 28, 1936, filed petition for rehearing. May 7, 1936, rehearing denied. June 9, 1936, remittitur issued.

The cost bill in question showed taxable costs against defendants in the sum of $227.50. The motion before us for review was denied on October 20, 1936.

The record shows the dates of the following proceedings in the federal court: May 2, 1935, filed petition for reorganization under section 77B of the Bankruptcy Act. May 27, 1935, day fixed for presenting claims. (Supera claim not presented.) July 12, 1935, order confirming plan of reorganization and naming those entitled to participate therein. (Supera not named.) October 18, 1935, order discharging Moreland Motor Truck Company of its debts and liabilities.

It should be observed that the question of the discharge of Supera's original claim or cause of action is not involved here and will not be considered, although that question is discussed at considerable length in the briefs. The only question before us is the effect of the order of discharge of the federal court made on October 18, 1935, on the costs on appeal which accrued on June 9, 1936, and were thereafter taxed in the superior court.

Subdivision (b) of section 77B of the Bankruptcy Act, 11 U.S.C.A. § 207(b), p. 1060, contains the following: "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character."

In subdivision (h) of the same act, 11 U.S.C.A. § 207(h), p. 1067, the following appears: "Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid."

The right of the federal court to stay proceedings by or against the corporation in state courts cannot be doubted. Subd. (c), sec. 77B, Bankruptcy Act, 11 U.S.C.A. § 207 (c), p. 1063. Although the appeal in this court was pending before, during and after the pendency of the proceedings in the federal court, it was not stayed. As far as we are now able to determine from an examination of the record on the first appeal, we received no suggestion of the pendency of the proceedings in the United States court.

Section 1034 of the Code of Civil Procedure, as amended by St.1933, p. 1902, provides as follows:

"The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified or proceedings had pursuant to the provisions of sections 956a, or 988i, of this code, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs, and the production of additional evidence; provided, however, that no amount shall be allowed as costs of printing briefs in excess of one hundred dollars to any one party. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record.

"Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, serve upon the adverse party and file with such clerk a memorandum of his costs, verified as prescribed by the preceding section. The party dissatisfied with the costs claimed may move to have the same taxed in the same manner and within a like time after service of a copy of the bill of costs, as prescribed by the preceding section. After such costs have been taxed, or the time for taxing the same has expired, execution may issue therefor as upon a judgment."

Rules XXIII, Rules for the Supreme Court and District Courts of appeal provides as follows: "In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal. In all cases in which the judgment or order appealed from is affirmed, the clerk will enter upon the record, and insert in the remittitur, a judgment that the respondent recover the costs of appeal."

In First National Bank v. Stansbury, 214 Cal. 190, 5 P.2d 11, the question of the right of a successful appellant to have execution to collect his costs of appeal before the case was finally decided by final judgment on the merits was before the Supreme Court. It was there said [page 12]: "We perceive no grounds upon which to deny appellants the right to realize upon their judgment. Oftentimes the trial court refuses to proceed with a second trial until the costs of the appeal from a former judgment have been paid. Weile v. Sturtevant, 176 Cal. 767, 169 P. 685; 15 C.J., p. 308, § 759. There is no interdependence between the judgment for costs of the former appeal and any judgment which may subsequently be entered in the main case."

[1] It would therefore seem that a judgment for costs of appeal is separate from and independent of the final judgment in the case. It is a complete judgment in itself that finds its origin in the order of an appellate or the Supreme Court affirming or reversing a judgment of a lower court. The right to such judgment comes into being

when the order of the reviewing court becomes final. The judgment itself is created when the successful party files his cost bill and his costs are taxed. Prior to the judgment of reversal there is no right to a judgment nor even a claim or demand that might in itself ripen into a judgment. There is merely a hope or expectancy on the part of each party to an appeal that his cause may be found legally sufficient; that judgment on appeal may be rendered in his favor; that, therefore, he may be entitled to judgment for his costs on appeal.

[2] The word "claim" is thus defined in Prigg v. Commonwealth, 16 Pet. 539, at page 615, 10 L.Ed. 1060, at page 1089: "What is a claim? It is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time, an equally expressive, definition was given by Lord Dyer, as cited in Stowel v. Zouch, 1 Plowden, 359; and it is equally applicable to the present case: that 'a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him.'"

It is also defined in Uintah State Bank v. Ajax, 77 Utah 455, 297 P. 434, as follows [page 437]: "'The word is derived from the latin clamor, meaning a call, a demand. In its ordinary sense the term imports the assertion, demand or challenge of something as a right; the assertion of a liability to the party making it to do some service or pay a sum of money. * * *' 11 C.J. 816 (claim)."

In Mellus v. Potter, 91 Cal.App. 700, 267 P. 563, it is said [page 564]: "'Claim,' in its primary meaning, is used to indicate the assertion of an existing right. In its secondary meaning, it may be used to indicate the right itself. Appeal of Beach, 76 Conn. 118, 55 A. 596, 599." See, also, Golden v. Golden, 155 Okl. 10, 8 P.2d 42; Vulcan Iron Works v. Edwards, 27 Or. 563, 36 P. 22, 39 P. 403; Radichel v. Federal Security Co., 170 Minn. 92, 212 N.W. 171.

It is our conclusion that the judgment for costs on appeal does not come within the meaning of the word "claims" as used in the portion of the Bankruptcy Act already quoted. It did not have any existence at all for over a year after the proceedings were instituted and for almost eight months after those proceedings were terminated. Bankruptcy proceedings have never been held to be a discharge of such subsequent debts.

The judgment and order appealed from are affirmed.

I concur: BARNARD, P. J.

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28 Cal.App.2d 510

DRESSER v. SOUTHERN CALIFORNIA EDISON CO., Limited.

Civ. 1874.

District Court of Appeal, Fourth District, California.

Sept. 21, 1938.

1. Appeal and error ⊂⇒659(3)

On appeal from a judgment in favor of defendant rendered after the trial court had granted its motion for nonsuit, where purported judgment could add nothing to the record and was not necessary to a decision of the case, plaintiff was not entitled to a diminution of the record by inclusion of the purported judgment.

2. Appeal and error ⊂⇒428(2)

An appeal from a judgment in favor of defendant rendered after trial court had granted its motion for nonsuit was not subject to dismissal because notice of appeal was filed prior to entry of judgment. Code Civ.Proc. § 581.

3. Appeal and error ⊂⇒105, 110

An order granting a motion for nonsuit and an order denying motion for new trial were not "appealable orders." Code Civ. Proc. § 963.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

4. Negligence ⊂⇒80

One whose own negligence contributes to his injury cannot recover from another for such injury regardless of the other's negligence.

5. Negligence ⊂⇒4, 67

A person must make a reasonable use of his faculties of sight and hearing to avoid injury from the lawful acts of others and to avoid injury to others engaged in acts which they are lawfully entitled to perform.

6. Negligence ⚷4, 67

One who approaches a place which he knows or ought to know to be one of danger is bound to take reasonable precautions to avoid causing injury or being injured.

7. Electricity ⚷18(1)

A laborer who knew of proximity of high-power transmission lines to electrically driven pump but who, without regard to the wires, raised pump rod until it contacted exposed wires overhead, was not entitled to recover from power company for burns received, because of his own contributory negligence, irrespective of whether wires should have been at a greater height above the ground or of whether they should have been insulated.

8. Negligence ⚷97

The doctrine of comparative negligence is not a part of California law.

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Douglas R. Dresser against the Southern California Edison Company to recover for injuries. Judgment for defendant, and plaintiff appeals.

Affirmed.

Shepard & Shepard, of Selma, for appellant.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, and Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of defendant rendered after the trial court had granted its motion for nonsuit.

[1] Plaintiff has moved for a diminution of the record by including in it a purported judgment dated December 7, 1937. This document can add nothing to the record and is not necessary to a decision of the case. Southern Pacific R. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526; McColgan v. Jones, Hubbard & Donnell, Inc., Cal.Sup., 78 P.2d 1010.

[2] Defendant has moved to dismiss the appeal on the ground that the notice of appeal was filed prior to the time of the entry of judgment. The motion will be denied under authority of section 581 of the Code of Civil Procedure and McColgan v. Jones, Hubbard & Donnell, Inc., supra.

[3] Plaintiff has attempted to appeal from the order granting the motion for nonsuit and from the order denying his motion for new trial. These orders are not appealable. (Sec. 963, Code Civ.Proc.)

[4] The only question we need to consider here is the contributory negligence of plaintiff. We will, therefore, assume that defendant was negligent, for if negligence of plaintiff contributed to his injury he cannot recover regardless of negligence on the part of defendant.

On June 24, 1935, plaintiff was twenty-seven years of age. He was employed as a farm laborer by Frank Alves. On that day Alves told plaintiff to get Tony Machado and fix a pump on what is known as the Moore place. They proceeded to the well and found that the rod running into the well and which operated the pump at the bottom of a pit thirty-five or more feet deep had broken below the surface of the ground.

The rod was five-eighths of an inch in diameter and had a length of about twenty feet. Part of the machinery at the surface of the pit, which we will call the pump head, extended between three and four feet above the surface of the ground.

The pump was electrically driven. The well was situated on the west side of a pump house in which was an electric motor and switch. Insulated service wires ran to the switch from a transformer on a pole about fifteen feet east of the pump house. High voltage lines carrying eleven thousand volts of electricity ran to the transformer pole from the west. The northerly wire was slightly over five feet south of the center of the well and between nineteen and twenty-three feet above the surface of the ground at that point. It passed near the pump house.

The two men opened the pump head and pulled the rods from the well by hand. The first rod had an extension on it, making its total length about twenty-two feet. When this rod had been raised clear of the pump head plaintiff attached a wrench to the top of the next rod to keep it from falling back into the well and the two men unscrewed the first rod from the second. It is evident from the measurements already given that the top of the first rod, when raised, was above the level of the high voltage wires, only slightly more than five feet from one of them while it was in a perpendicular position.

When the two men had unscrewed the top rod from the second they lifted it from the coupling and attempted to lower it to the ground. The rod quivered and vibrated and bent to the south. It came into contact with the high voltage wire and plaintiff was terribly burned and permanently injured.

Plaintiff tries to excuse his very evident carelessness in raising a twenty-two foot iron rod five-eighths of an inch in diameter in close proximity to a wire charged with eleven thousand volts of electricity by claiming that he had worked around a number of wells, the pumping plants of which were operated by electricity, and had never known of a naked high voltage electric wire being in close proximity to a pump house; that he did not know that the wire in question was naked and charged with several thousand volts of electricity, nor had he any reason to so believe; that the wires were old and corroded and that it would have been difficult to determine whether or not they were insulated.

Defendant proved that on the morning after the accident there was posted on the wall of the pump house near the switch "Safety Circular No. 2-E" of the state railroad commission. Also, that on a pole near the door through which plaintiff entered the pump house there was posted "Safety Circular No. 1-E" of the railroad commission. Both of these circulars warned of the high voltage wires and of the dangers from them. The appearance of at least one of them indicated that it had been in place some time. Plaintiff denied having seen either placard, although he admitted that a short time previously he had thrown the electric switch several times in starting the motor that operated the pump. These signs were printed in large black-faced type on a white background and were easily visible to anyone entering or passing through the pump house. While plaintiff denied seeing them he testified he did not know whether or not they were posted at the time of the accident. He produced no other evidence on the subject and there is nothing else in the record to contradict the evidence that both, or at least one of the signs were in place when plaintiff went upon the premises.

Plaintiff was a high school graduate. He had worked on a number of farms on which were electrically operated pumping plants. He had frequently observed naked high voltage wires. He testified that a person should and that he thought he could tell the difference between a naked and an insulated wire at a distance of twenty-five feet. At the trial he testified that when he started pulling the rod he had not looked for overhead wires; that when the top of the rod had been raised to a height of about nine feet above the ground he caught a glimpse of the overhead wires; that he had no idea that they were naked high voltage wires; that he assumed they were insulated and continued raising the rod; that he had seen such rods sway and vibrate when raised by others but that none had done so when he raised them; that he had no idea of any danger until the time of the actual contact. His deposition was taken and part of it was read into the record. His evidence there was much more damaging to his cause.

The fact that a five-eighths inch metal rod twenty-two feet long will vibrate, sway and bend when it is raised into the air without support of its upper portion is of such common and general knowledge that plaintiff must be charged with knowing it. He also knew that if such a rod supported by a man on the ground came into contact with a naked high voltage wire serious injury to the man holding it was inevitable. He admitted knowing that there were wires overhead almost in the path of the rod he was lifting.

Plaintiff's reasons for his actions are thus suggested in his testimony:

"Q. Didn't you know at that time it might whip around or would whip around when it got high enough in the air? A. Not necessarily. I said some of them would, but none of them had.

"Q. But some of them that you had worked with had whipped? A. No, sir.

"Q. You never had seen any whip? A. I had seen some whip, but never none that I had worked on myself.

"Q. You had seen them whip yourself? A. I had seen one or two.

"Q. And you watched this rod while you had it up in the air, or while you were putting the pipe in the air, to see whether it would whip or not? A. Part of the time I was.

"Q. And do you now say, Mr. Dresser, that at no time while you were watching that rod, looking up in the air, that at no time you saw those wires? A. I knew the wires came in from the south across the field some place, but exactly where they came by that house I won't say.

"Q. Well, that is not what I asked you. Now, you did look up while you were raising the rod, at least when it was going past the tripod, and your deposition states that you were watching it all the time. Do you now say that you, when you were looking up there and raising the rod and had it in the air, that at no time you saw those wires? A. When I had it clear up.

"Q. You saw them? A. Yes, sir.

"Q. But you did not see them until you got it clear up? Is that what you now testify to? A. As near as I can remember. That is quite a while ago.

"Q. You knew those wires had juice in them, didn't you, electric current? A. Well, I suppose they had.

"Q. Well, didn't you know it at that time? A. No, sir, I had no proof. There might have been a fuse shot some place, there was no proof they had juice in them. * * *

"Q. And when you saw those wires near there, that is, when you looked up in the air and saw the wires, you knew those wires were not insulated, didn't you? A. No. sir.

"Q. Then, you did not know whether they were insulated or not insulated? A. I have never paid any attention to the insulation, because I had never seen any wires close to any building I ever worked on that was not insulated.

"Q. Well, now, do you know whether those wires, when you saw them, were insulated or uninsulated? A. Not those particular wires, as I told you, I did not pay any attention to the wires.

"Q. Well, but you did see them? A. Just a flash, yes.

"Q. You saw them, and whenever it was that you saw them, when you had that rod up in the air, or when you were raising it up, you do not know whether they were insulated or not? A. I did not have time to pay that much attention to them.

"Q. You did not take occasion to pay that much attention to them, did you? A. Well, as I told you, when I was observing the wires, mainly was when that rod was, the rod was whipping, and I did not have time to look at the wires to tell whether they were insulated or not.

"Q. You did observe the wires while the rod was whipping? A. I just made one glance, and that is all.

"Q. Why did you observe the wires while the rod was whipping? A. It just happened to pass in my line of vision.

"Q. Were you afraid that the rod would whip over and touch the wire? A. No, sir.

"Q. You did not fear that at all? A. No, sir.

"Q. Didn't you know if the rod came in contact with that wire you would get an electric shock? A. If I had thought of that at that time I would have sure left it and run. I would not have tried to steady the rod and bring it down to the ground.

"Q. Didn't you know you were likely to get an electric shock if that rod came over and connected with that wire? A. It never entered my head that the rod could contact any wires there that were not insulated."

What was said by the Supreme Court in Shade v. Bay Counties Power Co., 152 Cal. 10, 92 P. 62, is particularly applicable here: "The deceased was not a backwoodsman who had never heard of electrical plants and the danger which lurks in live wires—if, indeed, such a person could be found in California. He had been born and had always lived in the city of Vallejo, where, as in nearly every American city, electricity is used, was a businessman, 28 years old, and of good intelligence. He knew the danger of live wires, but was not an expert electrician. He had not been placed by the negligence of the appellant in a position of peril from which he must by some means extricate himself, so that he might have been excused if he had not used the best judgment in trying to avoid danger." [Page 63.]

Plaintiff was in no danger at all until he raised the rod to the height of the wires. He knew the wires were somewhere above him. He did not ascertain their exact location. He did not know if the wires were insulated. He could have determined this fact by simply looking at them. He did not look at what was in plain sight. This unfortunate young man simply "took a chance" and was terribly injured.

[5, 6] The presence of an electric transmission line near an electrically operated pumping plant fed from that line should have been a warning of probable danger. As said in 19 California Jurisprudence 592:

"It is laid down as a general rule that a person must make a reasonable use of his faculties of sight and hearing to avoid injury from the lawful acts of others, and to avoid injury to others engaged in acts which they are lawfully entitled to perform. Furthermore, one who approaches a place which he knows or ought to know to be one of danger is bound to take reasonable precautions to avoid causing injury or being injured."

[7] We are of the opinion that the trial judge was fully justified in concluding that defendant was guilty of contributory negligence as a matter of law.

Plaintiff argues that it was a requirement of safety rules that under the circumstances here disclosed the wires should have been not less than twenty-five feet above the ground; that common prudence and due care for the safety of others required that the high voltage wires running over or near a building should have been insulated. From this he argues that if the wires had been of a sufficient height from the ground or if they had been insulated the accident would not have happened and that these acts of negligence, therefore, were the sole and proximate cause of plaintiff's injury. It is equally true that if plaintiff had not raised the limber rod into close proximity to the wires the accident would not have happened.

[8] We are not here particularly concerned with the negligence of defendant and have assumed its negligence. It is too well settled to need citation of authority that contributory negligence of a plaintiff bars his recovery even though a defendant is also negligent. This argument by plaintiff invokes the doctrine of comparative negligence which is not a part of California law.

The motion for diminution of the record is denied.

The motion to dismiss the appeal is denied.

The attempted appeal from the orders granting the motion for nonsuit and denying the motion for new trial is dismissed.

The judgment is affirmed.

I concur: BARNARD, P. J.

12 Cal.2d 208

PEOPLE v. MEGUGORAC.

Cr. 3073.

Supreme Court of California.

Sept. 29, 1938.

Criminal law ⟹1069(6)

The failure of a defendant to file with the clerk and present an application to the trial court designating the portions of the phonographic reporter's notes necessary to be transcribed on appeal within the time prescribed by court rule did not deprive the appellate court of jurisdiction to hear the appeal where designation was supplied ten days after expiration of period fixed by rule and reporter's transcript was served on district attorney approximately 14 days after notice of appeal was filed, in absence of showing of prejudice by the brief delay. Rules of the Supreme Court and the District Courts of Appeal, rule 2, § 7.

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Nick Megugorac was convicted of first degree murder, and he appeals. On motion to dismiss appeal.

Motion denied.

Prior opinion, 77 P.2d 251.

Peter T. Rice, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

Motion to dismiss appeal.

The defendant was convicted in the superior court of the county of Los Angeles of murder of the first degree and his punishment was fixed by the jury at life imprisonment at the state prison. His appeal, taken to the Second Appellate District, Division Two, District Court of Appeal, was dismissed by order of said court on the grounds that appellant had failed to file within five days after giving notice of appeal, with the clerk, and present to the trial court an application designating the portions of the phonographic reporter's notes necessary to be transcribed to fairly present the points he desired to urge on appeal, as required by section 7, rule II, Rules for the Supreme Court and the several District Courts of Appeal.

The defendant announced in open court at the time judgment was pronounced (December 20, 1937) that he appealed from the order denying his motion for a new trial and from the judgment pronounced against him. He failed, however, to file within five days thereafter an application designating the portions of the phonographic reporter's notes necessary to be transcribed fairly to present the points he desired to urge on appeal, as in said rule prescribed. The designation was supplied some ten days later and the reporter's transcript was served on the district attorney January 10, 1938, approximately fourteen days after notice of appeal was filed. None of the parties appear to have suffered any prejudice by the brief delay.

The question presented may be thus phrased: "Does a failure to file with the clerk and present an application to the trial court designating the portions of the phonographic reporter's notes necessary to be transcribed on appeal within the time prescribed in section 7 of rule II, supra, deprive the appellate court of jurisdiction to hear the appeal?"

People v. Lewis, 219 Cal. 410, 414, 27 P.2d 73, is cited as authority to sustain respondent's claim that the court was without jurisdiction to entertain the appeal, and it was accordingly dismissed. Appellant, on the other hand, relies on People v. Bryant, 207 Cal. 450, 278 P. 1025, as an authority supporting his contention that the failure to comply with the letter of the requirements of the rule does not deprive the court of jurisdiction.

There is a distinction between the questions presented in the two cases. In the Bryant Case, which in principle is on all fours with the question presented in the instant case, a majority of the members of this court was of the view that the court was not deprived of its power on jurisdictional grounds to apply the provisions of section 7, rule II, supra, by reason of the concluding clause of said rule, which provides, if such application is not filed within the time prescribed, that the appeal shall be dismissed "provided that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent". This court was of the view that no substantial right of respondent would be affected by a denial of the motion to dismiss and allowed the appeal. The appellant in that case had failed to comply with those particular portions of section 1247, Penal Code, which provide that the application filed with the clerk, etc., should contain a statement in general terms as to "the grounds of the appeal and the points upon which the appellant relies". In view of the holding that there was a substantial compliance with section 1247, Penal Code, and in view of the further fact that the conditionally repealed section (1247, Pen.Code) was in a form which might readily mislead appellant, the court was of the opinion that the appeal should be heard on its merits. The decision further emphasized the policy of the court to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technical grounds.

The Lewis Case is factually different from the Bryant Case and is controlled by a different rule of law. In the Lewis Case no appeal was taken orally or by written notice. One Crist and Lewis were jointly tried and convicted. Crist gave notice of appeal within the statutory period. Two days after the time had expired for filing notice of appeal Lewis filed such a notice. A motion to dismiss his appeal was made in the appellate court and was continued from time to time at the request of Lewis until April 22, 1933, at which time a motion was made for diminution of record. The diminution proceeding resulted in the superior court amending or reforming the notice of appeal by a nunc pro tunc order directing insertion of the words "and C. K. Lewis" after Crist's name in the notice of appeal prepared by the latter December 2, 1932, approximately three months after the same had been filed.

The only ground assigned in support of said order reforming the original Crist notice of appeal was "good cause appearing therefor", but no cause was apparently shown to sustain the recital in the order that Lewis' name was "improperly omitted" from the notice of appeal filed by Crist. Suffice it to say this court held that the requirements as to the time for filing notices of appeal are mandatory and jurisdictional in both civil and criminal actions, citing a long list of decisions of this court and our appellate court decisions sustaining our adjudication of the question.

The only question presented in the Lewis Case was whether Lewis had taken an appeal at all and no question was raised as to what subsequent or subsidiary acts or orders were necessary to complete an appeal which had a jurisdictional background as its initial basis. In discussing the only question presented in the Lewis record, we did by quotation, inadvertently, include the entire subject-matter set forth in the rule by the use of general language which well may have given grounds for the learned author of the main opinion filed by the District Court of Appeal to have understood that the precise matter now before us was intentionally included by what was said in that case. Our language should have been confined to the sole question there presented, to-wit: "a tardy notice of appeal", as shown by the facts and circumstances of the case presented. In such circumstances what was said in the Lewis Case cannot be taken as a reversal of the rule announced in the Bryant Case.

The motion to dismiss the appeal is denied.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.

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12 Cal.2d 230

METHEVER v. STATE BAR OF CALIFORNIA.

L. A. 16677.

Supreme Court of California.

Sept. 29, 1938.

Attorney and client 🔑58

Evidence warranted suspension of attorney from practice for period of one year on ground that his conduct in accepting money for purpose of organizing a corporation, which was never organized, involved moral turpitude.

In Bank.

Petition by Ulysses E. Methever to review recommendations of the State Bar of

California suspending the petitioner from practice of law for one year on ground that his conduct involved moral turpitude.

Petitioner suspended from practice for period of one year.

Ulysses E. Methever, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

On June 28, 1937, Gertrude E. Kamla, wife of Peter Kamla, made complaint to local administrative committee number nine of The State Bar of California, charging petitioner, a member of said State Bar, with defrauding complainant and her husband of the sum of three hundred dollars by a scheme devised by him, whereby he was to form a Nevada corporation in which the Kamlas and petitioner and his wife, as majority stockholders, were to engage in the business of raising for market purposes sheep, cattle, hogs and all kinds of poultry on a somewhat extensive scale.

Peter Kamla was an oil worker and spent most of his time in the oil fields of Kern county. His wife resided in Los Angeles, and the husband spent as much time as his employment would permit at their Los Angeles home. They owned three hundred and twenty acres of unimproved land near Barstow, San Bernardino county. On September 22, 1935, they caused an advertisement to be published in a Los Angeles city newspaper, as follows: "Partner. Ideal location for sheep ranch, need partner with capital. 10253 San Miguel, South Gate."

The advertisement came to petitioner's attention and he contacted Mrs. Kamla and she interested her husband in petitioner's proposition to form a corporation and issue capital stock in the sum of $100,000, of which the Kamlas and petitioner and his wife were to own 51,000 shares of stock, and the remaining 49,000 shares were to be sold to the public to raise funds to finance the project. Petitioner was to be the president of the corporation, Kamla, vice-president, and Mrs. Kamla and petitioner's wife, treasurer and secretary, respectively. The proposition was entirely the scheme of petitioner. The Kamlas knew nothing about the organization or functioning of a corporation, and were guided wholly by the advice of petitioner, who represented himself as being well experienced in the organization and promotion of corporations. The capital necessary to operate the corporation was to be raised by the Kamlas deeding to the corporation their 320 acres of land, and by petitioner deeding a like acreage to the corporation, in consideration of which they were to hold 51,000 shares. The proceeds of the remaining 49,000 shares which were to be sold to the public were to be used in purchasing livestock and equipping the lands for production.

Petitioner had several conferences with Mrs. Kamla, who seemed to have been impressed with his proposals by reason of his representation that he was experienced in the law of corporate organization, and his further representation that he had a thorough knowledge of stock and poultry raising, and that he was in close connection with the stock-raising industry. Mrs. Kamla testified that when she first called on petitioner at his request she told him that she and her husband were looking for a partner to help finance the sheep business. Petitioner said he didn't have any money, but he was a "corporation lawyer", and that he had incorporated many companies, and he advised that they incorporate and sell shares and raise money in that way. She further testified that the proposition was all new to her, and she told him she would have to consult her husband about the incorporation proposal. Petitioner asked her to bring her husband to see him when he should next return home. Some two weeks thereafter, on a Sunday morning, she and her husband called on petitioner, as requested by him, and petitioner disclosed to them his proposal and showed them a book containing pictures of cattle and sheep. He told them he was experienced in the stock-raising business and that he would go in with them as a partner in the business; that he would put in an equal amount of money and equal acreage with them; that he had 400 acres of land in the San Joaquin valley. Mr. Kamla told him he would think it over. Petitioner told them that he would come to the Kamla home that evening and explain more fully his proposition to them. He arrived in the evening, taking with him a scrapbook containing pictures of cattle and sheep and hogs, which were pasted in the book.

Mr. Kamla asked him what he expected as a fee for his services as a lawyer, and petitioner said he would make no charge for his services in forming the corporation. Mr. Kamla told him he couldn't pay anything as he didn't have any ready money. He then asked him what would happen if the corporation was not formed, and petitioner assured him that he would get his money back. Petitioner advised that the corporation be formed at Las Vegas, Nevada, and that the incorporation costs would be $600, each party to put up $300. Petitioner was asked if any part of that sum was to be used in promotion, and he replied that it would be necessary to get out some literature which would cost $27, and the balance would be expended solely as costs incurred in obtaining articles of incorporation.

Mr. Kamla went to Bakersfield, and the next morning Mrs. Kamla went to petitioner's home and gave him a check for $150. Petitioner said he would go to Las Vegas as soon as she paid the balance and effect incorporation of the entity to be known as the "Tally-ho Livestock Farms, Inc." The balance of the $300 was paid by Mrs. Kamla within three months thereafter. Petitioner never went to Las Vegas nor formed the corporation, nor paid his share of the costs, nor made any satisfactory explanation as to how he expended the sum of $300 which he took from Mrs. Kamla to be applied as costs in forming the corporation. After it became apparent that he had no serious thought of forming a corporation, and had made no bona fide effort to do so, the Kamlas made a demand upon him for the return of the $300 which petitioner had collected from them. Mr. Kamla obtained a judgment against him in the sum advanced, which he has not been able to satisfy.

The feeble defense which the petitioner made to the accusations proffered by the local committee does not deserve extended review. Petitioner attempted to justify his retention of the $300 as an attorney fee by virtue of the following paragraph of a contract prepared by petitioner and signed solely by Mrs. Kamla and petitioner: "That all parties herein performing service in forming and maintaining said corporation are to receive compensation therefor."

The foregoing paragraph is immediately preceded by the following paragraph: "That the parties hereto are to pay the costs and expenses necessary to form and finance said cattle and poultry company, not to exceed the sum of Six Hundred Dollars."

It is the claim of Mrs. Kamla that at the time petitioner read to her a purported memorandum of the agreement prepared by him the paragraph above quoted providing for the payment of services was not mentioned; that it was inserted afterwards as a part of the contract which she signed with the understanding on her part that it was the same in all material respects as the memorandum which he had read to her. The husband never saw nor signed the contract. In fact, petitioner testified that he did not think anything was said by him about the payment of attorney's fees in his estimate of the costs of organization.

He attempted to account for the expenditure of the $300 received from Mrs. Kamla, but in doing so made no claim or pretense that any portion of said sum was to be used in payment of attorney's fees. His testimony is inconsistent with any claim or suggestion that he regarded any part of the $600 expense fund subject to the payment of attorney's fees. He testified that the $600 was "for the expense to form the corporation". Again:

"Q. What was the conversation relating to that $600? A. Well, we figured out it would cost about $600 expense to form the company and get it on a paying basis to start.

"Q. Filing articles. A. Filing articles and I told them if we had to hire an attorney [petitioner had prior to this testified that he had no recollection of anything being said about the payment of attorney's fees] anybody that was to do the work was to get paid. After the company was formed we all expected to get paid. I was corresponding with a man in Texas who wanted to go into the cattle business with us. He had a large ranch. If I did the work I would draw a plan. When it comes to paying me for services, the same as some other lawyer we would get, they didn't see it that way. I guess they didn't see it. Finally when I found out I couldn't go ahead with it they wanted their money back and I figured I had done some services. I had spent cash and it should be reimbursed."

Petitioner owned no land which he could put into the project. He furnished no part of the $300 which he was to put in the proposed enterprise. He kept no account of moneys claimed to have been expended by him in a futile and purposeless attempt at organizing the corporation.

The services rendered by him were worthless. The whole project was a sham. Petitioner retained for himself practically the entire fund paid to him for organization purposes and paid nothing on his own account.

The evidence amply supports the findings and the recommendation of the board of governors of The State Bar suspending petitioner from the practice of the law in this state for a period of one year on the ground that his conduct as described by the evidence amounted to and involved moral turpitude on his part as defined by the decisions of this state.

The recommendation of said board of governors is hereby approved and adopted by this court and petitioner is accordingly suspended from the practice of the law for a period of one year, effective thirty days from the filing of this order. It is so ordered.

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28 Cal.App.2d 562

O'HARE et al. v. PEACOCK DAIRIES, Inc.

Civ. 1843.

District Court of Appeal, Fourth District, California.

Sept. 28, 1938.

1. Appeal and error ⇨878(6)

In action for breach of contract, where plaintiffs recovered judgment, defendant appealed from entire judgment and presented a complete record, question of amount of damages could be considered on defendant's appeal.

2. Costs ⇨279

A judgment for costs on appeal is a complete judgment in itself that may be enforced by execution prior to the entry of final judgment. Code Civ.Proc. § 1034; Rules for the Supreme Court and District Courts of Appeal, rule 23.

3. Costs ⇨230

Where plaintiffs recovered judgment, defendant appealed from entire judgment and presented a complete record and plaintiffs appealed from the portion of the judgment fixing amount of damages, all questions presented on both appeals were considered in defendant's appeal, and judgment was reversed in both appeals, clerk, in issuing remittiturs, properly awarded costs to the respective appellants in each case, as against contention that plaintiffs were "prevailing parties" in both appeals and that, therefore, costs on appeal should not be taxed against them in either appeal. Code Civ.Proc. § 1034; Rules for the Supreme Court and District Courts of Appeal, rule 23.

[Ed. Note.—For other definitions of "Prevailing Party," see Words & Phrases.]

Action by James M. O'Hare and another, as copartners doing business under the firm name and style of O'Hare Bros., against the Peacock Dairies, Inc., to recover for a breach of contract. Judgment was for plaintiffs for $10,158.24, from which both parties appealed, 79 P.2d 433, and judgment was reversed and remanded. On motion to recall a remittitur issued by the clerk of court and to strike therefrom the words "Appellant to recover costs on appeal."

Motion denied.

Harvey, Johnston & Baker, of Bakersfield, for appellant.

Joseph Scott, of Los Angeles, and Claflin & Dorsey, of Bakersfield, for respondents.

MARKS, Justice.

This is a motion to recall the remittitur issued by the clerk of this court on July 14, 1938, and to strike therefrom the words, "Appellant to recover costs on appeal."

Plaintiffs instituted an action in the superior court of Kern county to recover damages for breach of contract. They were awarded judgment in the sum of $10,158.24. Defendant appealed from the entire judgment and presented a complete record on appeal bearing our Civil Number 1843. We will refer to this case as defendant's appeal. Plaintiffs appealed from the portion of the judgment which fixed their damages at $10,158.24. This appeal was also presented on its complete record bearing our Civil Number 1842. We will refer to this case as plaintiffs' appeal.

[1] As the entire judgment was before us in defendant's appeal, the question of the amount of damages awarded could be considered there. For our own convenience, and to save needless repetition, we

considered all the questions presented on both appeals in defendant's appeal (O'Hare v. Peacock Dairies, Inc., Cal.App., 79 P.2d 433), and filed a memorandum opinion in plaintiffs' appeal (O'Hare v. Peacock Dairies, Inc., Cal.App., 79 P.2d 443). The orders made in the two appeals are identical and are as follows: "The judgment is reversed and the cause is remanded for new trial solely on the issue of the amount of damages, with direction to the trial court to retry the issue of the amount of damages only; to amend its findings of fact and conclusions of law in accordance with the evidence so taken and the views herein expressed, and to render judgment in favor of plaintiffs for the amount of damages so found upon a determination of that issue."

As the judgment had been reversed in both appeals, the clerk in issuing the remittiturs awarded costs to the appellant in the one case, and to the appellants in the other case on the theory that the reversal made them the "prevailing party" under the provisions of section 1034 of the Code of Civil Procedure and rule XXIII, Rules for the Supreme Court and District Courts of Appeal.

Plaintiffs contend that as they were really the victors in both appeals they should be considered the "prevailing party" in both and that the costs on appeal should not be taxed against them in either appeal. This argument overlooks the fact that the appeals were separate and distinct, were on separate records, and that in each appeal the judgment was reversed.

The decision here must turn on the definition of "prevailing party" as used in section 1034 of the Code of Civil Procedure. "Prevailing party" was thus defined in United States v. Minneapolis, St. P. & S. S. M. Ry. Co., D.C., 235 F. 951, 955:

"Section 7976, Gen.St.Minn.1913, contains the following provision: 'In every action in a district court, the prevailing party shall be allowed his disbursements necessarily paid or incurred.' The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered, * * *" See, also, Dunne v. New York Tel. Co., 107 Misc. 439, 176 N.Y.S. 519; Klock Produce Co. v. Diamond Ice & Storage Co., 98 Wash. 676, 168 P. 476; Portland & Oregon City Ry. Co. v. Doyle, 86 Or. 206, 167 P. 270, 168 P. 291.

[2] A judgment for costs on appeal is a complete judgment in itself that may be enforced by execution prior to the entry of final judgment. "There is no interdependence between the judgment for costs of the former appeal and any judgment which may subsequently be entered in the main case." First Nat. Bank v. Stansbury, 214 Cal. 190, 5 P.2d 11, 12.

[3] The question presented here is identical with that before the court in Broy v. Calaveras Central G. M. Co., 22 Cal.App. 2d 232, 70 P.2d 689, where it was said: "In our opinion, respondent's motion must be denied. The appeal resulted in a reversal with directions and appellants were the prevailing parties and were entitled to their costs. Said appeal did not result in a modification of the judgment and no proceedings were had pursuant to the provisions of section 956a of the Code of Civil Procedure as claimed by respondent. Hence the cause did not fall within the exceptions set forth in section 1034 of the Code of Civil Procedure * * * and the matter of costs was not within the discretion of this court." See, also, Baker v. Southern Cal. Ry. Co., 130 Cal. 113, 62 P. 302; Crittenden v. San Francisco Savings Union, 157 Cal. 201, 107 P. 103; Robinett v. Brown, 167 Cal. 735, 141 P. 368; Oakland v. Pacific Coast Lumber, etc., Co., 172 Cal. 332, 156 P. 468, Ann.Cas.1917E, 259; Horan v. Varian, 207 Cal. 7, 276 P. 1002.

Plaintiffs' argument that they were in fact the parties benefited by the reversals is largely based on the following statement in our opinion in defendants' appeal: "Milk prices were greatly depressed after the contract was executed. This would probably entitle plaintiffs to recover a greater sum than that awarded in the court below." To obviate any future misunderstanding of the effect to be given the foregoing quotation it should be observed that it was merely an expression of a surmise on the part of the writer of that opinion and had no proper place in it. The question of the amount of damages to be awarded will be determined upon the evidence produced at the second trial. An appellate court should not, during an appeal from a first judgment, conjecture upon what the evidence at a second future trial might show.

The motion is denied.

I concur: BARNARD, P. J.

28 Cal.App.2d 591

CONNOR et al. v. OWEN et al.

Civ. 11965.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1938.

Hearing Denied by Supreme Court Dec. 1, 1938.

1. Appeal and error ⚷930(1)

Where defendant on appeal raised the question of sufficiency of evidence, appellate court should view evidence in a light most favorable to plaintiff.

2. Appeal and error ⚷996

Where different conclusions may be reasonably drawn from the evidence by different minds, trial court's findings will not be disturbed.

3. Automobiles ⚷244(10, 35)

Where deceased was killed when defendant's automobile struck deceased's hay truck while in the act of meeting on the highway, evidence was sufficient to sustain finding that defendant was negligent either in traveling at such a rate of speed that he could not control his automobile, or that he was not vigilant in observing what he was doing.

4. Death ⚷76

Evidence was sufficient to show that death resulted from the collision of automobiles.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Mardell V. Connor and Alton L. Connor, Jr., infants, by Dorothy H. Connor, as guardian ad litem, and Dorothy H. Connor against John D. Owen and another for damage sustained as a result of death of plaintiffs' decedent in an automobile collision. From judgment in favor of plaintiffs, defendants appeal.

Affirmed.

Nourse, Betts & Jones, and Harry C. Cogen, all of Los Angeles, for appellants.

P. E. Cavaney, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment entered on the verdict of a jury in favor of the plaintiff in an automobile collision case.

The plaintiff's decedent was proceeding on the highway on San Fernando boulevard in a hay truck, and while the hay truck was proceeding southerly on the highway and was on its right side of the way and traveling at a speed of about twenty-five miles per hour, the defendant was traveling in his Buick sedan in a northerly direction at a speed of about forty-five miles per hour. The two cars were approaching each other until suddenly Owen, without any sign or warning, turned his Buick abruptly to the left and across the white center line of said boulevard and into the path of the southbound traffic and thus collided with the decedent's car. The accident occurred at 4:30 in the morning. The defendant was quite a distance over on his left hand side of the highway, which was wide at this point. He observed another car coming towards him and he turned his Buick back toward the right and into the hay truck, and this is when the collision actually occurred between the Buick and the hay truck. The highway was straight and was lighted by electric lights.

[1-3] The first and primary contention of the defendant is that the implied findings of the jury in the verdict are without substantial evidence. When such a question is raised it is the duty of this court to view the evidence in the light most favorable to the plaintiff. Cooper v. Stevens, 17 Cal.App.2d 746, 62 P.2d 763. Where different conclusions may reasonably be drawn from the evidence by different minds the trial court's findings are not to be disturbed on appeal. Savelli v. Simon, Cal.App., 77 P.2d 486. We have read the record and there is substantial evidence to sustain the verdict of the jury. Indeed, we do not see how any reasonable inference could be drawn from the evidence other than that the defendant was traveling at such a rate of speed that he could not control his car or he was not vigilant in observing what he was doing. There is no merit in defendant's contention.

The defendant's point II is devoted to complaints with regard to several instructions which the court gave, but the instructions as a whole were apt and appropriate, and there was no miscarriage of justice in this case. We see no reversible error here.

[4] Finally, the defendant complains that the court erred in submitting the cause to the jury because there is no proof of the cause of death. Viewing the evidence in the light most favorable

to the plaintiff, it showed beyond peradventure that the deceased was killed instantly when the Buick car ran into the southwest side of the hay truck and smashed the sleeping compartment on the semi-trailer.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

28 Cal.App.2d 540

BOND v. RUSSELL.

Civ. 11959.

District Court of Appeal, Second District,
Division 2, California.

Sept. 27, 1938.

Appeal and error ⚷627(2)

Where appellant failed to supply the Court of Appeal with any record whatsoever, and superior court had made an order terminating all proceedings in the superior court, appeal was required to be dismissed.

Appeal from Superior Court, Los Angeles County.

Action by Lewis Dean Bond against Louise Russell. Judgment for defendant, and plaintiff appeals.

Appeal dismissed.

Kellogg & Matlin and David A. Matlin, all of Los Angeles, for appellant.

Albert G. Bergman, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss the appeal in the above-entitled case on the ground that appellant has failed to furnish this court with a proper record.

Appellant has failed to supply this court with any record whatsoever. It also appears that the superior court has made an order terminating all proceedings in that court. Therefore, the motion is granted and the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.

28 Cal.App.2d 561

KLEIN v. LARRONDE et al.

Civ. 11987.

District Court of Appeal, Second District,
Division 2, California.

Sept. 28, 1938.

Appeal and error ⚷619, 773(2)

An appeal was required to be dismissed on motion for failure of appellant to file a transcript or brief.

Appeal from Superior Court, Los Angeles County.

Action by Frederick W. Klein, administrator, etc., against James Pedro Patrick Larronde and others. Judgment for defendants, and plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

Adolph B. Rosenfield, of Long Beach, for appellant.

Joe Crider, Jr., and A. W. Mack, Jr., both of Los Angeles, for respondents.

PER CURIAM.

This case comes on after motion of respondents to dismiss for failure of appellant to file a transcript or brief. We find the motion is good and it is granted.

Appeal dismissed.

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 11919.

District Court of Appeal, Second District,
Division 2, California.

Sept. 26, 1938.

Hearing Granted by Supreme Court
Nov. 23. 1938.

1. **Workmen's compensation** ⚷518

As used in Workmen's Compensation Act, "artificial member" of body, for injury to which compensation may be allowed, must be a substitute for, and not a mere aid to, a natural part, organ, limb, or other separable part of body. St.1937, p. 266, § 3208.

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*For subsequent opinion see 90 P.2d 289.

2. Workmen's compensation 🔑518

An injury to eyeglasses is not compensable under Workmen's Compensation Act, as being an injury to an "artificial member" of the body. St.1937, p. 266, § 3208.

Petition for writ of review by the California Casualty Indemnity Exchange against the Industrial Accident Commission of the State of California and another for annulment of an award made against petitioner.

Award annulled.

Richard L. Oliver, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

WOOD, Justice.

Respondent Crawford filed an application with the Industrial Accident Commission wherein he sought to recover from petitioner, the insurance carrier for his employer, the reasonable value of his eye-glasses which were damaged in an industrial accident. The commission filed its findings in favor of Crawford, awarding him the cost of replacing the lenses of his eye-glasses. The insurance carrier seeks the annulment of this award.

The sole question presented to us for consideration is whether or not eye-glasses are artificial members within the meaning of the Workmen's Compensation Act. Section 3208 of the Labor Code, St.1937, p. 266 (formerly sec. 3(4) of the Workmen's Compensation Act, St.1919, p. 911), provides: " 'Injury' includes any injury or disease arising out of the employment, *including injuries to artificial members.*" (Italics ours.)

[1] It becomes necessary for us to determine what the legislature meant when it used the term "artificial members" in that section. "Member" is defined in Webster's New International Dictionary as being: "A part or organ of the animal body; especially a limb or other separable part." The word "artificial" is defined by Webster's New International Dictionary as being in opposition to the word "natural". An artificial member must be held to be a substitute for a *natural* part, organ, limb or other separable part of the body. We believe this conclusion to be fully in accord with the decision of our Supreme Court in the only case in this jurisdiction which has been brought to our attention, involving an interpretation of this section of the Workmen's Compensation Act. In Pacific Indemnity Co. v. Indus. Acc. Com., 215 Cal. 461, at page 465, 11 P.2d 1, at page 3, 82 A.L.R. 1170, the court, in holding that an award may be made for an artificial leg, states: "Fear is expressed by petitioner that the award is the forerunner of others for injuries to clothes, tools, automobiles, or other personal property. We anticipate no such result. The Constitution, in our opinion, authorizes compensation for injury to the body of the workman, including every part thereof, natural or artificial, which is essential to its proper functioning. Other things, such as clothes and tools, may be necessary if he is to perform his duties, but their destruction does not cause him a physical injury or disability. His body may function without them."

The ultimate test to be applied to any given case in order to determine whether it comes within the provisions of the above section is: Was the thing injured a substitute for, or a mere aid to some *natural* part of the body? Eye-glasses are in no sense a substitute or replacement for a natural part of the body; they are merely aids to the eyesight. The eyes, which are the organs of sight, however defective they may be, are still a natural part of the human body.

[2] For the foregoing reasons, we conclude that an injury to eye-glasses is not compensable under the Workmen's Compensation Act as being an injury to an artificial member of the body. The award of the Industrial Accident Commission is annulled.

We concur: CRAIL, P. J.; McCOMB, J.

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